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THE LAW OF EVIDENCE

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CHAPTER VIII

ESTOPPEL

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1. Meaning and nature of estoppel. Sir Edward Coke defined estoppel in the following words : "An estoppel is where a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth". "There

is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. Estoppel or 'conclusion', as it is frequently called by the older authorities may, therefore, be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability".¹ The word "estoppel" is not infrequently used to cover transactions to which it has no proper application. In its essence, it means that the party estopped has, by conduct or language, prevented himself from asserting the true facts on which he would otherwise have been entitled to rely.² Estoppel is often described as a rule of evidence,³ as indeed it may be so described.

But the whole concept is more correctly viewed as a substantive rule of law,⁴ in so far as it helps to create or defeat rights which would not exist or be taken away but for that doctrine.⁵ The rule of estoppel can also be viewed as a rule of substantive law. It prevails over a simple rule of procedure contained in Section 92.⁶

2. Presumptions and estoppels. The subject of estoppels⁷ differs from that of presumptions, which are partly dealt with in the preceding chapter, in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts; whereas a presumption is a rule that a particular inference shall be drawn from particular facts whoever proves them.⁸ Estoppels have been variously treated as conclusive presumptions of law; as solemn admissions and as conclusive evidence. They are, however, distinguishable from each of these, e. g., from the first named, in that an estoppel may be waived by the party in whose favour it operates; from the second as well as the first, in that it cannot in general be taken advantage of by strangers; and from the third in that the conclusiveness of evidence may result from mere logical cogency in the particular proceedings, while, when conclusiveness results from rule of law, it operates indifferently for or against all persons.⁹

1. Halsbury's Laws of England, (Simond's Edition,) Vol. XV. p. 168.

2. Durga Prasad v. Tata Iron & Steel Co., Ltd., 1918 P.C. 125, 129; 45 I.A. 275; I.L.R. 46 Cal. 552; 52 I.C. 909.

3. You cannot found an action upon estoppel; Low v. Bouverie, (1891) 3 Ch. 82 (CA.) at p. 105, per Bowen, L.J., cited in Lyle Meller v. A. Lewis & Co. (Westminster), Ltd., (1956) 1 All E.R. 247, (C.A.) at pp. 252-253; Harriman v. Harriman, (1909) P. 123 (C.A.) at 144; Brandon v. Dowager Baroness Michelham, (1919) 35 T.L.R. 617 and of Combe v. Combe, (1951) 2 K.B. 215 (C.A.); (1951) 1 All E.R. 767; Union of India v. Ram Nath, A.I.R. 1974 All. 296.

4. Canada and Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamships, Ltd., 1947 P.C. 40, at 43; 1947 A.C. 46 at 56 (P.C.); 228 I.C. 614; Govindsa-

Marotisa v. Ismail, 1950 Nag. 22; I.L.R. 1949 Nag. 933; 1950 N. L.J. 1.

5. Veeraraghava v. Kamalamma, 1951 Mad. 403 at 405; (1950) 2 M.L.J. 575; 63 L.W. 932; M.K. Jujhawan v. Jamshedpur Municipality I.L.R. (1972) Cut. 1364; A.I.R. 1973 Orissa 186.

6. State Bank of India v. J. Baij Nath, 1974 M.P.L.J. 329; 1974 Jab. L. J. 476; A.I.R. 1974 M.P. 193.

7. See as to the Law of Estoppel, Bigelow's Treatise on the Law of Estoppel, 6th Ed. (1913); Everest and Storde's Law of Estoppel, 2nd Ed. (1907); Cababe: Principles of Estoppel (1888); and Estoppel by Representation and *res judicata* in British India, by A. Caspersz, being the Tagore Law Lectures, 1893, 4th Ed. (1915).

8. Steph. Introd., 175.

9. Phipson, Ev., 11th Ed., pp. 923, 924.

An estoppel is only a matter of proof.¹⁰ The onus of proving an estoppel lies of course on him who sets it up.¹¹ The representation, which is the basis for the rule must be clear and unambiguous and not indefinite.¹²

Once in a particular case, the authorised officer of the Railways makes the representation that a consignment has not arrived and on the basis of such representation the consignee acts, the plea of estoppel would be available to the consignee against the Railway Administration.¹³ An estoppel cannot be created either by an ambiguous document or an ambiguous act.¹⁴ It is not necessary that there should be any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel.¹⁵ A man is estopped when he has said, done or permitted something or act, which the law will not allow him to gainsay.

3. No odium attached to doctrine of estoppel. Owing to its use in ancient times, in shutting out the truth against reason and sound policy, the doctrine of estoppel was not favoured and was characterised as "odious". In modern times the doctrine has lost all ground of odium and become one of the most important, useful and just factors of the law. At the present day it is employed not to exclude the truth; its whole force being directed to preclude parties, and those in privity with them, from unsettling what has been fittingly determined—a just principle which can be and is daily administered to the well-being of society.¹⁶ As their Lordships of the Privy Council observed in a case: "There was perhaps a time when estoppels were described as odious and as such were viewed with suspicion and reluctance. But in more modern times, the law of estoppel has developed and has become recognised as a beneficial branch of law. That great lawyer Sir Frederick Pollock has described the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'. A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities."¹⁷ In the case of one estoppel against another, the parties are set free and the Court has to see what their original rights are.¹⁸

4. Elements of estoppel. Generally, the elements of estoppel are :

- (1) A representation in any form, a declaration, act or omission.

10. Bashi Chandra v. Enayat Ali, (1892) 20 C. 236, 239.

11. Birendra Kishore v. Baikunta Chandra, 1919 Cal. 1032 : 46 I.C. 474 and the ordinary rules of proof apply. Therefore if an estoppel arising out of a written statement is produced, it and not the judgment, must be put in evidence. Ananda Prasanna v. Badulla, 1919 Cal. 963 : 47 I.C. 985; an ectoppel can only be raised by pleading. If it is not pleaded the Court will not go into the matter ; Purgan Pande v. Dhanpat Tewari, 1919 Pat. 309 : 52 I.C. 739.

12. Bennett Coleman & Co. (Pvt.), Ltd. v. Punya Priya Das Gupta, (1970)

1 S.C.R. 181 : (1970) 1 S.C.A. 123 : 1970 1 S.C.J. 401 : 37 F.J.R. 498 : 19 Fac. L.R. 32 : (1969) 2 Lab. L.J. 554 : A.I.R. 1970 S.C. 426 (434).

13. Union of India v. Rasul Ahmad, A.I.R. 1970 Orissa 157 (161).

14. Mamsa v. Salliajee, A.I.R. 1918 Lower Burma 53 : 46 I.C. 609.

15. Balbir Prasad v. Jugal Kishore, 1918 Pat. 646 (2) : 46 I.C. 473.

16. Bigelow, op. cit., 6th Ed., 5* 6.

17. Canada and Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamship, Ltd., 1947 P.C. 401 at 43.

18. Jiwan Lal v. Behari Lal, 1918 Lah. 392 : 43 I.C. 68.

(2) The representation must have been of the existence of a fact and not of promises *de futuro* or intention which might or might not be enforceable in contract.

(3) The representation must have been made under circumstances which amounted to an intentional causing or permitting belief in another. The proof of the intent may be direct or circumstantial, e. g., by conduct. It is not necessary that there should be a design to mislead or any fraudulent intention. Representation even when made innocently or mistakenly may operate as an estoppel.¹⁹

(4) Some person must have believed the representation to be true.

(5) That person must have acted on the belief so induced and been thus led to change his former position thereby to his prejudice.²⁰

(6) The misrepresentation, conduct or negligence must have been the proximate and not the remote cause of leading the other party to act to his prejudice.

(7) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel.

Though, formerly, the term estoppel *in pais* had a limited connotation in English law, being applied only to acts of notoriety almost as solemn and formal as the execution of deeds, it is now used as synonymous with estoppel by conduct or representation. Estoppel *in pais* embraces all acts or statements of a party upon the faith of which another party has been led to act and to change his position and which it would be unfair to permit the first party to deny. It may arise from agreement, misrepresentation or negligence. Representation may be by conduct, act, omission or neglect. A man by omitting or neglecting to do a thing which he is under an obligation to do, may bring about a state of things equivalent to declaration. Estoppel may be brought about by acquiescence. Silence also may amount to conduct where it is equivalent to speech.

It is important to bear in mind that estoppel does not depend upon the motive or on the knowledge of the matter on the part of the person making the representation. It is not essential that the intention should have been fraudulent, or that he should have been acting with a full knowledge of circumstances and not under a mistake, or misapprehension. This is one main aspect in which it differs from ratification.²¹ "If a man, whatever his real meaning may be, so conducts himself that a responsible man would take his conduct to mean a certain representation of facts, estoppel may arise".²² It is well established that representation need not be false to the knowledge of the maker.

Constituent elements of estoppel: Thus, estoppel is a complex legal notion involving the statement to be acted upon, action on the faith of it

19. *Sarat v. Gopal*, I.L.R. 20 Cal. 296; *Vagliano v. Bank of England*, 1891 A.C. 107.

20. *Jagannath Prasad Singh v. Abdulla*, 45 C. 909 : 1918 P.C. 35 : 45 I.A.

97 : 45 I.C. 770.

21. *Sarat v. Gopal*, I.L.R. 20 Cal. 296.

22. *Carr. v. London and N.W. Rly. Co.*, (1875) L.R. 10 C.P. 347.

and resulting detriment to the actor.²³ The following elements must concur in order to constitute a valid estoppel by representation²⁴ :

(1) That the party sought to be estopped, or some person for whose representations such party is in law responsible, made a representation.

(2) That the case which the party is sought to be estopped from making, setting up, or attempting to prove, contradicts in substance his original representation.

(3) That such original representation was of a nature to induce, and was made with the intention of inducing, the party raising the estoppel to alter his position to his detriment and was of existing facts, not a promise *de futuro* or intention which might or might not be enforceable in contract.²⁵

(4) That on the part of the person claiming the benefit of estoppel there was mistake or ignorance as to the state of things and he was ignorant of the truth regarding the representation, as, when both parties are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel.¹ So, if both parties acted under a misapprehension as to their respective rights, the Court should scrutinise the connection between representation and alleged course of conduct.²

(5) That the party raising the estoppel actually altered his position to his detriment on the faith of such original representation.

(6) That the original representation was made to the party setting up the estoppel, or to some person in right of whom he claims.³

5. Kinds of Estoppel. At common law there were three kinds of estoppel, namely, (a) by Record, (b) by Deed, and (c) *in pais*.

(a) *Estoppel by record.* Estoppel by record is dealt with by the Code of Civil Procedure, Sections 11–14, and by Sections 40–44 of this Act.⁴ There is a twofold estoppel arising by record, that is, from the proceedings of the Courts; first, in the record, considered as a memorial or entry of the judgment, and secondly, in the record, considered as a judgment. In the first case mentioned, the record has conclusive effect upon all the world. It imports absolute verity, not only against the parties to it and those in privity with them but against strangers also; no one may produce evidence to im-

23. Canada and Dominion Sugar Co. Ltd. v. Canada Steamships Ltd., 1947 P.C. 40; Dhiyan Singh v. Jugal Kishore, 1952 S.C. 115; 1952 S.G.J. 142; 1952 S.C.R. 478.

24. Canada and Dominion Sugar Co. Ltd. v. Canada Steamships Ltd., 1947 P.C. 40; Dawson's Bank Ltd. v. Nippon Menkwa Kobushthi Kaish. I.L.R. 13 Rang. 256; 135 I.C. 1; 62 I.A. 100; 1935 P.C. 79, 32; Solano v. Ram Lal, 7 C.L.R. 481.

25. Maddison v. Alderson, (1883) L.R. 8 App. Cases 467; Dawson's Bank Ltd. v. Nippon, etc., 62 I.A. 100; A.I.R. 1935 P.C. 79; Bibhuti v. Maya, A.I.R. 1938 Cal. 172; 174

I.C. 790.

1. Swaminadha Aiyar v. Swaminatha Aiyar, 99 I.C. 772; A.I.R. 1927 M. 458; Lachman v. Collector, 146 I.C. 873; A.I.R. 1933 All. 641; Lotind v. Punjab National Bank, 191 I.C. 830; A.I.R. 1940 Lab. 254; Kanik v. Medni, A.I.R. 1942 Pat. 317; 201 I.C. 360.
2. Rama Kulnagar v. Pillavil, A.I.R. 1937 Mad. 158; 168 I.C. 842.
3. Dawson's Bank v. Nippon Menkwa Kabushthi Kaish, 62 I.A. 100; 1935 P.C. 79, 32; Solano v. Ram Lal, 7 C.L.R. 481; Spencer Bower on Estoppel, s. 36.
4. v. ante, 897–971.

peach it. Thus no one, whether party, privy or stranger, is permitted to deny the fact that the proceedings narrated in the record took place, or the time when they purport to have taken place, or that the parties, there named as litigants participated in the cause or that judgment was given as therein stated; unless in a direct proceeding instituted for the purpose of correcting or annulling the record.⁵

The estoppel of a record as a judgment⁶ is of greater importance. The force and effect of a judgment depend first upon the nature of the proceedings in which it was rendered, i. e., upon the question whether it was an action *in rem* or *in personam*,⁷ and secondly upon the forum in which it was pronounced, i. e., upon the question whether it was a judgment of a domestic or foreign Court.⁸ The record of a judgment *in rem* is generally conclusive upon all persons. In other cases, so far as the record purports to declare rights and duties, its material recitals import absolute verity between the parties to it and those who claim under them. The estoppel, arising from or fixed by the fact enrolled, constitutes the estoppel of a judgment. And to the question whether the judgment necessarily creates an estoppel, the general answer is, yes, if it results in *res judicata*; no, if it does not.⁹ There can be no estoppel by record where there is no judgment or decree.¹⁰ So also, a judgment can operate as estoppel only as between the parties thereto, unless it be a judgment *in rem*.¹¹ As to when a finding in a judgment does not amount to estoppel, see the undernoted case.¹²

The result of Section 12 (7) of the U. P. Consolidation of Holdings Act, 1954, can be called 'estoppel by record' inasmuch as what has taken place and is recorded and declared final cannot be questioned subsequently by a party which has already had an opportunity to object. The term 'estoppel by record' corresponds broadly to '*res judicata*' but it has also a wider connotation.¹³ The principle of estoppel by record is not applicable to mutation proceedings.¹⁴ Under taxation laws the findings of assessing authorities in respect of a previous year do not amount to estoppel. The assessee can question those findings in subsequent proceedings.¹⁵ Where an order for compulsory retirement of a Government servant was set aside and in the application for certificate for appeal to Supreme Court the Government stated that the employee could remain in service till the completion of 58 years, after dismissal of appeal by Supreme Court, the same employee was held not to be entitled to the plea of estoppel; the Government could terminate his service before the completion of 58 years.¹⁶

5. Bigelow, op. cit., 6th Ed., 8, 36.

6. Ahmad Ali Khan v. Veerayya, A.I.R. 1959 Andh. Pra. 280 : 1958 Andh. L.T. 938.

7. Bigelow, op. cit., 6th Ed., 8, 36, iv, ante Vol. 1 pp. 858-863.

8. v. ante Vol. 1 pp. 858-863.

9. v. ib.

10. Bhuturi v. Mikira, 1950 Assam 162.

11. Ahmad Ali Khan v. Veerayya, A.I.R. 1959 Andh. Pra. 280.

12. Jogindra Singh v. Balbhaddar, A.I.R. 1971 All. 334 : (1971) 1 Cut. W.R. 995.

13. Sita v. State of U.P., 1967 A.W.R.

(H.C.) 731 : 1968 A.L.J. 144 : A.I.R. 1969 All. 342 (351) (F.B.). See American Jurisprudence, 2nd Ed., Vol. 28, p. 60 and Corpus Juris Secundum, Vol. 31, p. 193.

14. Shiv Dutt v. Kedar Nath, (1971) 1 Sim. L.J. (H.P.) 1 : A.I.R. 1972 H.P. 20.

15. V.N.R.M. Ammal v. Agriculture I.T.O. Kumbakonam, 1972 Tax. L.R. 1746 (Mad.).

16. Binapani Dei v. State, (1970) 1 Cut. W.R. 287 : I.L.R. (1971) Cut. 224 : A.I.R. 1971 Orissa 170.

But where the order of removal was withdrawn unconditionally the employer is estopped from starting second disciplinary proceedings on the same charges.¹⁷

Res judicata distinguished from estoppel. Estoppel must be distinguished from *res judicata*. Estoppel is part of the Law of Evidence and proceeds upon the equitable principle of altered situation, while the doctrine of *res judicata* belongs to procedure and is based on the principle that there must be an end to litigation.¹⁸ The plea of *res judicata* prohibits the Court from enquiring into a matter already adjudicated upon while estoppel prohibits a party from proving anything which contradicts his previous declarations or acts, to the prejudice of a party who, relying upon them, altered his position. "Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel is to say that while the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declarations or acts to the prejudice of another party who relying upon those declarations or acts, has altered his position. In other words, *res judicata* prohibits an inquiry *in limine* whilst an estoppel is only a piece of evidence."¹⁹ Estoppel results from the acts and conduct of parties while *res judicata* arises from the decision of a court.²⁰

Res judicata ousts the jurisdiction of the Court, while estoppel only shuts the mouth of a party.²¹ Neither the principle of estoppel nor of *res judicata* is applicable to the question of jurisdiction.²²

The general rule of evidence enacted in Section 115 of this Act is the rule of estoppel by conduct as distinguished from an estoppel by record which constitutes the bar of *res judicata*.²³ Estoppel by record is what is provided for in Section 11 of the Code of Civil Procedure. It is not within the province of a Court to introduce another kind of estoppel by judgment not covered by Section 11 or the general principles of *res judicata*.²⁴

(b) *Estoppel by deed.* The strict technical doctrine of estoppel by deed cannot be said to exist in India.²⁵ Section 115 of this Act is exhaus-

17. Sanjib v. Director (Administrator), Government of India, 1975 Lab. I.C. 1580 (Cal.).

18. See Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ebrahim, I.L.R. 36 Bom. 214 : 12 I.C. 225 : 13 Bom. L.R. 717; Baishanker Nanabhai v. Morarji Keshaji, I.L.R. 36 Bom. 283 : 12 I.C. 535 : 13 Bom. L.R. 950; Kali Dayal v. Umesh Prasad, 1922 Pat. 43 : I.L.R. 1 Pat. 174 : 65 I.C. 266.

19. Sitaram v. Amir Begum, (1886) I. L.R. 8 All. 324 at p. 332, per Mahmud, J.

20. Radharani v. Binodamoyee, 1942 Cal. 92 : I.L.R. (1942), 1 Cal. 169 : 200 I.C. 216; Sarangapani v. Venkata Narasimhacharyulu, 1952 Mad. 384 : (1951) 2 M.L.J. 464 : 64 L.W. 863. See also Jai Narain Har Narain v. Bulagi Das, 1968 A. L.J. 1047 : 1968 A.W.R. (H.C.)

704 : A.I.R. 1969 All. 504 (509) (F.B.).

21. Cassamally Jairajbhai Peerbhai v. Sir Currimbhoy Ebrahim, I.L.R. 36 Bom. 214 : 12 I.C. 225 : 13 Bom. L.R. 717; Allah Baksh v. Nussurwanji & Co., 1936 Sind. 99 : 164 I.C. 43 : 29 S.L.R. 455.

22. Palaniappa Chettiar v. Babu Sahib, (1971) 84 M. L.W. 230.

23. Sunderbai v. Devaji Shanker Deshpande, 1954 S.C. 82 : 1953 S.C.J. 693 : (1953) 2 M.L.J. 782.

24. Sarangapani v. Venkata Narasimhacharyulu, 1952 Mad. 384, 387 : (1951) 2 M.L.J. 464 : 64 L.W. 863; Ahmad Ali Khan v. Veeralala, A.I.R. 1959 A.P. 280.

25. See Gokuldas Gopaldas v. Puranmal Premeukhdas, 11 I.A. 126 : I.L.R. 10 Cal. 1035; Zemindar Serimatu v. Virappa Chetty, (1864) 2 Mad. H. C.R. 174. "The strict technical

tive, and the law of estoppel in this country is contained in it.' However it has been held in several cases that Section 115 is not exhaustive and there may be rules of estoppel which may be applicable in India other than what is contained in that section.²

An estoppel by deed is a preclusion against the competent parties to a valid contract and their privies to deny its force and effect by any evidence of inferior solemnity.³ The rule declares that no man shall be permitted to dispute his own solemn deed. In a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of *non est factum* is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law except in those special cases where there is an equitable ground for setting aside or rectifying the deed.⁴ In India, however, conveyancing is of a simple and informal character⁵ and contracts under seal have no special privilege attached to them, being treated on the same footing as simple contracts.⁶ But while the technical doctrine has no application in this country, statements in documents are, as admissions, always evidence against the parties. And the admissions may be conclusive if they work an estoppel, that is, if the statement has been acted upon by the party to whom it was made.⁷

The Courts in England and America in recent times appear inclined to treat the estoppel by deed as resting on contract, an intelligible basis upon which a large class of estoppel is arising, namely, that the parties have agreed for the purposes of a particular transaction to treat certain facts as true.⁸

doctrine of the English law as to estoppel in the case of solemn deeds under seal rests upon peculiar grounds that have no application to the present bonds or the other written instruments ordinarily in use among natives" Gopal v. Blaquiere (1867) 1 B.L.R. O.C. 37; Param Singh v. Lalji Mal, (1877) 1 A. 103; Donzelle v. Kedarnath Chuckerbutty, (1871) 7 B.L.R. 720; Kedarnath Chuckerbutty v. Donzelle (1873) 20 W.R. 352.

1. Asmatunessa Khatun v. Harendra Lal Biswas, (1908) 35 C. 901; 8 C.L.J. 29; 12 C.W.N. 721.
2. Jaikaran Singh v. Sita Ram, A.I.R. 1974 Pat. 364; for other cases see note 5 (c) (vi) (Estoppel under this Act) infra and note 2 under section 115.
3. Bigelow, op. cit., 6th Ed., 360-362; Bowman v. Taylor, 2 A. & F. 278, 291.
4. Martin Cashin v. Peter J. Cashin, 1938 P.C. 103, 109; 1939 M.W.N. 85.
5. See observations of Paul, J., in Donzelle v. Kedarnath Chuckerbutty, (1871) 7 B.L.R. 728-730; and see

Kedarnath Chuckerbutty v. Donzelle, (1873) 20 W.R. 353; and the deeds and contracts of the people of India are to be liberally construed: Hanooman Persaud v. Mst. Babooce Munraj Kuer, (1856) 6 Moo. I.A. 411; Ram Lal Set v. Kanai Lal, (1886) 12 C. 663; Vasonji Morarji v. Mst. Chanda Bibi 1915 P.C. 18; 1 I.L.R. 37 All. 369; 20 I.C. 781.

6. Raja Sahib v. Budhu Singh, (1869) 12 Moo. I.A. 275; s.c. 2 B.L.R. (P.C.) 111; Ram Gopal v. Blaquiere, (1867) 1 B.L.R.O.C. 37; Tirunala v. Tingala, (1863) 1 Mad. H.C.R. 312, 318; Mrs. N. Johnstone v. Gopal Singh, 1931 Lah. 419; 1 I.L.R. 12 Lah. 546; 133 I.C. 628; 32 P.L.R. 840 (the doctrine of estoppel by deed in its technical sense cannot be said to exist in India).
7. v. 3, 31, ante, and Sadhu Churn v. Basudev Parbeary, (1905) 9 C.W.N. ccviii.
8. Bigelow, op. cit., 6th Ed., 361, note (3); see Carpenter v. Buller, 8 M.W. 200, 212.

In this country the technical doctrine is not recognised at all, and a statement in a deed or other document can only give rise to an estoppel if the case is one which can be brought within the rules as to estoppel by conduct. In some cases, such a statement amounts to a mere admission of more or less evidential value according to the circumstances, but not conclusive. In other cases, namely, those in which the other party has been induced to alter his position upon the faith of the statement contained in the document, such a statement will operate as an estoppel. In this view of the matter, an estoppel arising from a deed or other instrument is only a particular application of that estoppel by conduct or misrepresentation which is the subject-matter of Section 115 of this Act. An estoppel, however, *in pais*, may arise in connection with a deed as in connection with any other instrument. In the case of *Param Singh v. Lalji Mal*,⁹ the rule on this point was laid down as follows:

"If a party to a deed is to be precluded from questioning his solemn act much injustice would be brought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced must be proportioned to the degree of care and intelligence which the natives of the country in practice bring to bear upon their transactions. What is ordinarily known in these provinces as a deed, is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity and good conscience required no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument; but where the question arises between parties, or the representatives-in-interest of parties, who at the time of the execution of the instrument were aware of its intention and object, and who have not been induced to alter their position by its execution, we consider that justice in this country will be more surely obtained by allowing any party, whether he be plaintiff or defendant, to show the truth."

Where the plaintiff's father had settled disputes and got his share of the sale-proceeds of trust property in the form of immovable properties, he (the plaintiff) cannot charge the trustee (defendant) for committing breach of trust nor follow the alleged trust properties.¹⁰ Admission of title of brother in a property and of its sale to a third person may amount to estoppel by deed.¹¹ Where in a deed, the land is described to be of a particular kind and that is acted upon by the parties, a contrary stand as to the kind of land cannot be permitted.¹²

Where a tender is made in response to a notice containing a valid condition, the tenderer is estopped from saying that the condition is not bind

9. (1877) 1 All. 403, 410; but see as to this case, *Chenvirappa v. Puappa*, (1887) 11 B. 708.
10. *Joseph v. Stanislaus*, I.L.R. (1966) 2 Mad. 385; A.I.R. 1968 Mad. 161 (168).

11. *Dattatraya v. Rangnath*, A.I.R. 1971 S.C. 2548.

12. *Narayan v. Kannammal*, A.I.R. 1973 Madras 471; *G.C. Nayak v. Marik Chandra*, A.I.R. 1972 Cal 520.

ing on him.¹³ An employee is estopped from challenging the date of birth, entered in his service book for a long period, after he has been retired on the basis of that entry.¹⁴

The doctrine of election is the principle that the exercise of a choice by a person left to himself of his own freewill to do one thing or another binds him to the choice which he has voluntarily made and is founded on the equitable doctrine that he who accepts benefit under one instrument or a transaction of his choice must adopt the whole of it and renounce everything inconsistent with it. The Court exercising jurisdiction in equity will bind him to his election and preclude him from going behind the same. It may be that there can be no ratification of a void transaction but the principle of election does not require any ratification. It imposes a personal bar on the person benefited by the invalid transaction.¹⁵ However if a party does not rely upon estoppel arising from the recitals in a deed, but raises an issue of fact it is not open to him to plead estoppel to prevent his adversary from proving facts.¹⁶

As to the cases in which, in order to prevent fraud it may be shown that an apparent deed of sale is really a mortgage, see ante, Section 92, *sub voc.* "Evidence of Conduct" and authorities there cited.¹⁷ As to estoppel by pleading *v. ante*, Notes under Section 58.¹⁸

(c) *Estoppel in pais.* (i) *Ancient doctrine.* "Estoppel in pais" under the ancient doctrine of the common law sprang from (i) livery of seisin; (ii) entry; (iii) acceptance of rent; (iv) partition; (v) acceptance of an estate. Apart from the case of partition, only one of the above-mentioned instances, mentioned by Coke—estoppel by acceptance of rent—prevails at the present day, and even the character of this instance is widely different from what it was in his time. Estoppel by the acceptance of rent as known to Coke occurred where the landlord accepted rent from a tenant who held over after the expiration of a lease by deed. Such an estoppel depended upon the prior existence of a deed while at the present day it is immaterial how the tenure arose.¹⁹ The estoppel by partition was a case of implied warranty. In the case of a partition of lands by writ of partition between co-tenants, the law imported a warranty of the common title, and held it to be incompatible with their duty to each other for either to become defendant in a suit to recover any portion of the land by a paramount title and thus to place himself in antagonism to his co-tenants. No tenant after partition could set up an adverse title to the portion of another for the purpose

13. *M/s. Produce Exchange Ltd. v. Commissioner Excise*, (1972) *Assam L.R.* 23.

14. *Makradhwaj Singh v. State*, 1974 *Lab. I.C.* 1493.

15. *K. Shanmugham Pillai v. S. Shanmugham Pillai*, *I.L.R.* (1968) 2 *Mad.* 316 : (1967) 2 *M.L.J.* 581 : 80 *M.L.W.* 458 : *A.I.R.* 1968 *Mad.* 207 (211, 215) (question whether plaintiffs precluded from asserting their rights as reversioners).

16. *Rajendra Ram Das v. Devendra Das*, (1973) 1 *S.C.C.* 14 : 1973 *S.C.D.* 59 : (1973) 5 *Civil App. J.* (S.C.) 1 : (1973) 2 *S.C.R.* 911 : (1974) 2 *S.C.J.* 87 : (1975) 1 *An.*

W.R. (S.C.) 4 : *A.I.R.* 1973 *S.C.* 269.

17. *Bapuji v. Senrajji*, (1877) 2 *B.* 231 : *Mahadaji Gopal v. Bithal Ballal*, (1881) 7 *B.* 78.

18. *Bhugwandeem Doobey v. Myna Bace*, (1867) 11 *Moo.* 1. A. 487, 497 : *Ram Surin v. Mst. Pran*, (1870) 13 *M.T.A.* 551, 559 : *Kristo Prea v. Puddo Lochan* (1866) 6 *W.R.* 288 : *Rangaswami v. Krishna*, (1862) 1 *Mad H.C.R.* 72 : *Dayal Jairaj v. Khatav Latha*, 12 *Bom. H.C.J.* 97.

19. *Bigelow*, op. cit., 6th Ed., 490 : see Act IV of 1882 (*Transfer of Property Act*) S. 116.

of ousting him from the part which had been partitioned off to him.²⁰ In this country the question whether there is an estoppel by reason of partition will depend, in the case of a partition by decree, upon the question whether there is an estoppel by judgment or *res judicata*,²¹ and in the case of partition by act of parties whether there is under the circumstances such an estoppel by agreement or by such conduct as is provided for in Section 115, *post*.²² In the case cited it was held by the Privy Council that a decree for partition in a suit by a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit.²³

(ii) *Modern doctrine.* In addition to the above forms of estoppel *in pais* which are now chiefly of historic interest only, there is the modern doctrine of estoppel *in pais*. Indeed the estoppel *in pais* of the present day has grown up entirely since the time of Coke, and embraces cases never contemplated in that character by him or by the lawyers of even much later times, though the old lines are often visible in the newer pathways.

Estoppel *in pais*, according to the modern sense of that term, has been said to arise firstly (a) from agreement or contract; secondly (b) independently of contract, from act or conduct of misrepresentation which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged.

(iii) *Estoppel by agreement.* Estoppel by agreement embraces (i) all cases in which there is an actual or virtual undertaking to treat a fact as settled, so that it must stand specifically as agreed, and (ii) all cases in which an estoppel grows out of the performance of the contract by operation of law. Estoppel by contract does not include cases of estoppel not arising by or by virtue of the contract itself, though arising in the course of the contract; if the estoppel is not part of the contract itself or of its legal effect it belongs to the next head. While there can be no estoppel by agreement where the justice of the case does not require it, such an estoppel may be found to exist where there is an agreement either express or to be implied

20. Bigelow, *op. cit.*, 6th Ed., 445—447. In the case of partition *in pais* by conveyance between the parties there appears to be no estoppel apart from recitals, unless there is an express warranty. And the rule itself has been subjected to some qualification, 6th Ed., 446.

21. As to the conclusiveness of partition proceedings, see *Mst. Oodia v. Bhopal*, (1868) 3 Agra Rep. 137; *Ghassee Khan v. Kulloo*, (1866) 1 Agra Rep. 152; *Shivram v. Narayan*, (1880) 5 B. 27; *Lakshman Dada Naik v. Ramchandra Dada Naik*, (1880) 5 B. 48; *Konnerav v. Gurrav*, (1881) 5 B. 589; *Nilo Ramchandra v. Govind Balla*, (1885) 10 B. 24; *Sadu v. Baiza*, (1878) 4 B. 37; *Ananta Balacharya v. Damodhar Makund*, (1888) 13 B. 25, 31; *Krishna Behari v. Banwari Lal*, (1875) 1 C. 144; 2 I.A. 283; *Rajah of Pitapur v. Situya*, (1884) 12 I.A. 16; 1 I.L.R. 8 Mad. 219

(P.C.); *Venkatadri v. Peda Venkayamma*, (1886) 10 Mad. 15; *Sheik Hossein v. Sheik Musund*, (1872) 18 W.R. 260; *Hari Narayan v. Ganpatrav Daji*, (1883) 7 B. 272; *Kiriy Chunder v. Anath Nath*, (1883) 10 C. 97; 13 C.L.R. 249; and *Caspersz. op. cit.*, 4th Ed., (1915) ss. 860—866 where these cases are cited and considered; and *Chokhey Singh v. Jote Singh*, 36 I. A. 38; 1 I.L.R. 31 All. 73; 1 I. C. 166 (P.C.).

22. Cf. *Greender Chunder v. Troylokho Nath*, (1892) 21 I.A. 35; 1 I.L.R. 20 Cal. 373 (P.C.); *Ananta Balacharya v. Damodhar Makund*, (1881) 13 B. 25; *Srimati Sukkiman v. Mahendra Nath*, (1869) 4 B.L.R. 16 (P.C.); *Caspersz. op. cit.*, 4th Ed., (1915), s. 321, p. 306.

23. *Nalini Kanta Lahiri v. Sarnomoy Debva*, 1914 P.C. 31; 41 I.A. 247; 24 I.C. 294; 17 Bom. L.R. 1.

from the conduct of the parties to, or the nature of, the transaction itself, which justice requires should be enforced. The question of the existence of such an estoppel must be dealt with on broad grounds of legal principle irrespective of whether there may be a decision in point or not. The question in each case is—is there an agreement on which an estoppel may be justly founded?²⁴ Sections 116 and 117 afford instances of estoppel by agreement but they are not exhaustive of it.²⁵ As has been well said, some transactions there are which are so obviously based on a conventional state of facts that for that very reason the parties never in practice come to any express agreement about them at all and the estoppel is but the carrying out of what the parties as honest men must have intended if they thought about the matter at all the time they made their bargain.¹ The parties are deemed to have dealt with one another on the basis of their rights being regulated by a conventional state of facts. The tenant and licensee and bailee obtaining possession are taken to accept it upon the terms that they will not dispute the title of him who gave it to them and without whose possession they would not have got it. The act of acceptance of a bill of exchange amounts to an undertaking to pay to the order of the drawer. Though all are instances of estoppel by agreement, the precise terms of the agreement and therefore of the estoppel may vary according to the nature of the particular transaction in each case.² Another instance of such an estoppel (which, however, has not been provided for in the Act) is the estoppel of a person taking possession under an instrument, whether a will or deed *inter vivos*. Where such taking is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom possession was derived, there is an estoppel. This occurs where several persons take limited interest, under the same instrument. In that case, a party cannot say that the instrument is valid so as to enable him to take under it, but is invalid as regards the interests of those in remainder who claim under the same instrument.³ And a person holding land under a deed or will which, however, does not operate in law to pass the land in question, cannot by such possession for more than twelve years, acquire an interest in the property different from that which he would have taken, if the deed or will had been valid and operative.⁴ Whether all the cases here referred to under this head ought to be called estoppels is a matter of doubt.

24. *Rup Chand v. Sarveswar Chandra*, I.L.R. 33 Cal. 915 : 3 C.L.J. 629 : 10 C.W.N. 747.

25. *ib.* Mr. Bigelow described the estoppel of tenant and licensee of land as an instance of estoppel growing out of the performance of the contract by operation of law. (Bigelow, *op. cit.*, 6th Ed., 547, 586). The estoppel of a bailee and other licensee is analogous to that of landlord and tenant (*ib.*, 6th Ed., 590, 592, 593, 597). The estoppel in respect of negotiable instruments is also an instance of estoppel by contract, but in this instance it is said to arise "upon some fact, agreed or assumed to be true"

(*ib.*, 6th Ed., 519).

1. *Rup Chand v. Sarveswar Chandra*, I.L.R. 33 Cal. 915 : 3 C.L.J. 629 : 10 C.W.N. 747, citing with approval *Cababe on Estoppel*, 12, 21.

2. *Rup Chand v. Sarveswar Chandra*, I.L.R. 33 Cal. 915 : 3 C.L.J. 629 : 10 C.W.N. 747.

3. *ib.* *Dalton v. Fitzgerald*, (1897) 1 Ch. D. 440 : (1897) 2 Ch. D. 86 ; *Board v. Board*, I.L.R. 9 Q.B. 48 ; *Durga Das Khan v. Ishan Chandra Dey*, 1917 Cal. 70 : I.L.R. 44 Cal. 145 : 39 I.C. 223.

4. *Appa Rao v. Gopala Row*, I.L.R. 31 Mad. 321 : 18 M.L.J. 409 : 4 M.L.T. 5 and *Dalton v. Fitzgerald*, (1897) 2 Ch. D. 86.

(iv) *Estoppel by Conduct or Misrepresentation.* The next head, which constitutes an important addition in recent times to the law of estoppel, embraces the class of cases known and described as estoppel by conduct or misrepresentation; the estoppel arising without regard to contract rather, or the fact to be taken as true not being necessarily or ordinarily the subject or the effect of contract. This estoppel is dealt with in Section 115, *post*.

(v) *Other so-called Estoppels.* Besides these two classes, the name of estoppel has been extended to a variety of cases which are not estoppels at all; in some of these cases, there may perhaps be said to be a *quasi-estoppel*; in others, the word is merely used as equivalent to "bar"; in others, it is an entire misnomer; the free use of the term "estoppel" in such cases giving rise to conclusion and misapprehension of the real legal character of the act or declaration which is to be considered.⁵

The different kinds of estoppel by conduct may be briefly set forth :

(1) *Estoppel by attestation.* The scope of attestation and estoppel have been dealt with by Ramaswami, J., in two judgments.⁶

In *Kandasami Pillai v. Rangasami Nainar*,⁷ it was held that having regard to the ordinary course of conduct of Indians in Madras State, attestation by a person who has or claims any interest in the property covered by the document, must be treated *prima facie* as a representation by him that the title and other facts relating to title, recited in the document, are true and will not be disputed by him as against the obligee under the document. This observation was quoted with approval by Sadasiva Ayyar, J., in *Narayana v. Rama*.⁸ The learned Judge observed that in his pretty long experience as a judicial officer, if the attester of a document has an existing interest in the property dealt with in the document, it has been always the case, that this attestation has been taken in order to bind him as to the correctness of the recitals therein. In *Tadrevu Ranganayakamma v. Tadrevu Bullinamayya*,⁹ it was observed that it frequently occurs in Indian documents that a man signs as a witness to show that he is acknowledging the instrument to be correct. Similar observations are found in *Gopal Chunder Manna v. Gour Monce Dossee*,¹⁰ and *Matadsen Roy v. Mussodun Singh*.¹¹

But estoppel by attestation can arise only in cases where the attester can be fixed with knowledge of what he attests. A plaintiff, who has attested document with full knowledge of its contents, is estopped from contesting

5. See Bigelow, *op.cit.*, 6th Ed., 489, 494.

6. *Thayarammal and another v. I.S. Patel and Company* (S. A. No. 299 of 1957) and *Muthuswami v. Anjall Ammal and others* (S.A. No. 442 of 1957).

7. 23 M.L.J. 301.

8. I.L.R. 38 Mad. 396; 20 I.C. 625; A.I.R. 1915 M. 800.

9. 5 C.L.R. 439.

10. 6 W.R. (C.R.) 52.

11. 10 W.R. (C.R.) 293. See also *Srinivasagharachariar v. Rajagopala*, 1927 M.W.N. 231; *Nainsukhdas*,

v. Gowardhandas, I.L.R. 1947 Nag. 510; A.I.R. 1948 Nag. 110; *Basso v. Mir Muhammad*, 20 I.C. 291; *Sunder Kuer v. Uday Ram*, 212 I.C. 168; A.I.R. 1944 All. 42; *Blagwan Singh v. Ujagar*, 107 I.C. 20; A.I.R. 1928 P.C. 20; *Mazharuddin v. Zahur-ud-din*, 99 I.C. 547; A. I.R. 1926 Oudh 131. See also *Ram Gopal v. Mohan Lal*, A.I.R. 1960 Punj. 226; *Krishnan Govindan v. Chellamma*, A.I.R. 1959 Ker. 237; 1958 Ker. L.T. 1062; *Ramaswamy Gounder v. Ananthapadmanabha Iyer*, (1970) 84 M.L.W. 176.

the validity of the gift made under that document to the defendant and cannot dispute the nature of possession of the defendant.¹²

(2) *Estoppel by contract.* (See Sections 116 and 117).

(3) *Constructive estoppel.* This phrase is a wrong usage, because the adjective 'constructive' is used in cases where the true state of affairs is different from what it is construed, e. g., constructive notice by registration of document under the Transfer of Property Act. Thus, a man may really know nothing of a document or its contents but because it is registered on grounds of publicity it is construed that everyone has such knowledge, because if one wants to have such a knowledge he could obtain it. It will be seen how inappropriate this phrase can be with reference to estoppel, because either the conditions of estoppel are present and in such cases the principle operates; or they are not present and the principle will not operate.¹³

(4) *Estoppel by election.* (See below. See also comment under Section 115 under this head).

(5) *Equitable estoppels.* This phrase also is a misnomer, for estoppel was originally an equitable doctrine but since *Pickard v. Sears*¹⁴ is treated in England as belonging to common law. This principle is stated as a rule of law in Section 115 of the Evidence Act.¹⁵

(vi) *Estoppel under this Act.* The law of estoppel is not exhausted by Sections 115 to 117 of the Act and even outside the area covered by these provisions, there is scope for invoking equity or estoppel.¹⁶ This Act deals with the subject of estoppel *in pais* in Sections 115–117, but does not in terms preserve the above-mentioned distinction between estoppel by contract and estoppel by conduct. The rules contained in Sections 116 and 117 have been described as instances of the estoppel by contract. Other cases which have been included under that designation may be found to fall within the purview of Section 115, which, however, primarily appears to refer to what has been described above as estoppel by misrepresentation. The whole law of estoppel *in pais* is not laid down in that section. A familiar rule is that there cannot be estoppel against statute, but that rule is not to be found in the four corners of the section.¹⁷ Hard and fast distinctions are not easily or profitably drawn in this branch of the law. In *Canada & Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamships, Ltd.*¹⁸ Lord Wright remarked: "A question now of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities." Estoppels, in the sense in which that term is

12. A. Gangadhara Rao v. G. Ganga Rao, A.I.R. 1968 A.P. 291 (297); D. Damodaran v. Leelavati, 88 Mad. L.W. 54 : A.I.R. 1975 Mad. 278; Jagannathan v. Kunji Thapatham, A.I.R. 1972 Mad. 390 : 85 Mad. L.W. 112.
13. Parsottam v. Narbada, 21 All. 505 (P.C.) : 26 I.A. 175.
14. (1887) 6 A. & E. 469.
15. Kumari Akhtar v. Admission Committee, A.I.R. 1959 A.P. 493 :

(1959) 1 Andh. W.R. 116.
16. R. Gopala Menon v. Rugmomi, 1969 Ker. L.R. 1 (28) relying on Union of India v. Anglo-Afghan Agencies, (1968) 2 S.C.R. 366 : (1968) 2 S.C.A. 31 : (1968) 2 S.C.J. 889 : (1968) 1 S.C. W.R. 553 : A.I.R. 1968 S.C. 718 (727).
17. Satibhushan v. Corporation of Calcutta, 1949 Cal. 20, 23.
18. 1947 P.C. 40 at 43 : 228 I.C. 614 : 13 B.R. 299.

used in English legal phraseology, are matters of infinite variety, and are by no means confined to the subjects dealt with in this Chapter of the Act.¹⁹

In the case of *Ganges Manufacturing Co. v. Sourajmull*,²⁰ Garth, C. J., said: "It has been further contended by the appellants, that Sections 115 to 117 contained in Chapter VIII of the Evidence Act lay down the only rule of estoppel which are now intended to be in force in British India; that those rules are treated by the Act as rules of evidence; and that, by the second section of the Act, all rules of evidence are repealed, except those which the Act contains. But if this argument were well founded, the consequences would indeed be serious. The Court here would then, be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of Sections 115 to 117, however important those questions might be to the due administration of the law. The fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. The enactment in Section 115 is, no doubt, in one sense a rule of evidence. It is founded upon the well-known doctrine laid down in *Pickard v. Sears*,²¹ and other cases that where a man has made a representation to another of a particular fact or state of circumstances, and has, thereby, wilfully induced that other to act upon that representation and to alter his own previous position, he is estopped as against that person from proving that the fact or state of circumstances was not true. In such a case, the rule of estoppel becomes so far rule of evidence, that evidence is not admissible to disprove the fact or state of circumstances which was represented to exist. But "estoppels" in the sense in which the term is used in English legal phraseology are matters of infinite variety, and are by no means confined to subjects which are dealt with in Chapter VIII of the Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular argument or contention, which the rules of equity and good conscience prevent his using as against his opponent. A large number of cases of this kind will be found collected in the note to *Doe v. Oliver*²² and whatever the true meaning of the second section of the Evidence Act may be as regards estoppels which prevent persons from giving evidence, we are clearly of opinion that it does not debar the plaintiffs in this case from availing themselves of their present contention as against the defendants."

(vii) *Estoppels not covered by the Act.* So parties will not be allowed to vary their cases on appeal by receding from admissions made in the Court of first instance²³ and may be estopped from appealing by reason of an under-

19. *The Ganges Manufacturing Co. v. Sourajmull*, (1880) 5 C. 669, 678, 679; 5 C.L.R. 533; *Fattu Bhila v. Bhawaniram*, A.I.R., 1961 M.P. 27; 1961 M.P.L.J. 58.
20. (1980) 5 C. 669 and see *Janaki Ammal v. Kamalathammal*, (1873) 7 Mad. H.C.R. 263.
21. (1837) 6 A. & E. 469.
22. 2 Smith, I.C. 8th Ed., p. 775, et. seq. See Caspersz, op. cit., 4th Ed., (1915) s. 69, pp. 78-79.
23. *Mohima v. Ram*, 15 B.L.R. 142; (1875) 23 W.R. 174; *Devaji v. Gangadhar*, (1865), 2 Bom. H.C.R. 28; *Stracy v. Blake*, 1 M. & W. 168; *Nidha v. Bunda*, (1886) 6 W.

R. 289; *Doe d. Child v. Roe*, 1 E. & B. 279; *Mouchand v. Dada-bhai*, (1874) 11 Bom. H.C.R. 186; *Hurcehur v. Rajkishen*, (1875) 23 W.R. 251; *Kanailal v. Shoshi*, (1881) 8 C.L.R. 117; see *Gopal v. Joyram*, (1851) 9 C.L.R. 402. See also *Durpa Charan v. Kallash Chandra*, 1920 Cal. 107 (2); 54 I.C. 645; *Basant Ram v. Muhammad Ali*, 1921 Lah. 326; 4 I.L.J. 296; *Mohammad Kutti v. K.P.K. Rammunni Nair*, 1928 Mad. 952; 109 I.C. 245; *K. Co. Ltd. v. State of West Bengal*, A.I.R. 1973 Cal. 325.

taking that they would not do so.²⁴ It is not open to a defendant to change the whole nature of his defence at the last moment, and to set up in a Court of Appeal a plea which he has directly and fraudulently repudiated in the Court below.²⁵ Issues deliberately abandoned in the Trial Court cannot be gone into in appeal.¹ An appellant who has not set up a defence in the Trial Court is estopped from raising it in appeal.² But an omission on the part of the plaintiff to contend in the Lower Appellate Court, that the appellant was not competent to file an appeal from a decree which did not adversely affect him does not estop him from taking it in second appeal as the objection goes to the very root of the appeal.³ Where a document is admitted without objection in the Trial Court, it cannot be objected to afterwards.⁴ A party who has himself relied on certain evidence in the Trial Court cannot be allowed to contend in appeal that the evidence is not admissible.⁵ Where a judgment-debtor asked for time and bound himself not to contest the validity of a sale provided he got time, it was held that as he had obtained time and the advantage of a postponement he was estopped from saying that he was not bound by his agreement.⁶ And in another case, though it was held that there was strictly no estoppel where in an application to execute a decree which provided for no interest the decree-holders put in a prayer as to the award of interest, and the judgment-debtor, accepting his liability to pay the decretal debt as well as interest, obtained from time to time adjournments from the Courts to enable him to pay the amount, it was held that the judgment debtor could not at a later stage of the proceeding dispute the item of interest and was bound to pay interest from the date on which he admitted his liability to pay interest.⁷ An auction purchaser on whose default the property was re-auctioned is not estopped from contending that he is not liable for the deficiency as the deficit was due to circumstances extraneous to his default.⁸ A compromise decree passed on the tenant agreeing to vacate the accommodation by a certain date, operates as estoppel and the tenant is estopped from showing that the need of landlord was not *bona fide* or that the Court has not determined that point.⁹

24. *Moonshee v. Inderjeet*, 14 Moo. I. A. 203 : (1877) 9 B.L.R. 460 ; *Anand v. Ashburner & Co.*, (1876) 1 A. 267 ; *Protap v. Arathoon*, 8 C. 455 : (1822) 10 G.L.R. 443 ; *Bahir v. Nobin*, (1901) 29 C. 306 ; 6 C.W.N. 121 ; see also *Pisani v. Attorney-General*, I.L.R. 5 P.C. 516 ; and *Rajmohan v. Gour*, 8 Moo. I. A. 91 : (1859) 4 W.R. 47 (P.C.), where it was said that a decree of an Appellate Court obtained after a compromise and an agreement not to prosecute an appeal was an adjudication obtained with fraud.

25. *Satyabhama Dasee v. Krishna Chunder*, I.L.R. 6 Cal. 55 : 6 C.L.R. 375 .

1. *Anando Mohan v. Gaur Mohan* 1923 P.C. 189 : 50 I.A. 220 : 1 I.L.R. 50 Cal. 929 : 71 I.C. 499.

2. *Devji v. Bhoja*, 1935 Bom. 219 : 37 Bom. L.R. 220.

3. *Govind Chand v. Gajadhar*, 1934 All. 677 : 131 I.C. 25.

4. *Behari Lal v. Amin Chand*, 1924

All 918 : 79 I.C. 1029 ; *Shahjadi Begam v. Secretary of State*, I.L.R. 34 Cal. 1059 : 9 Bom. L.R. 1192 : 34 I.A. 194.

5. *U Tun Aung v. Ma Thai Nu*, 1935 Rang 44 : 156 I.C. 323.

6. *Utam Chand v. Khetra*, (1901) 29 C. 577 ; see also *Subramania v. Corera* 1925 Mad. 457 : 86 I.C. 723 : 48 M.L.J. 121 ; *Baidvanath v. Satyanarain*, A.I.R. 1960 Pat. 36 : 1959 B.L.J.R. 594 ; *Kedarnath v. Sitaram*, I.L.R. 1969 Bom. 324 : 70 Bom. L.R. 788 : 1968 Mah. L.J. 762 : A.I.R. 1969 Bom. 221 (224).

7. *Narayan v. Raoji*, I.L.R. 28 Bom. 393 : 6 Bom. L.R. 417.

8. *G. K. Das v. S. N. Biswas*, A.I.R. 1975 S.C. 1290 : (1975) 1 S.C.W.R. 426 : (1975) 1 S.C.G. 915 : 1975 U.J. (S.C.) 260.

9. *Munshi Ram v. Dhanraj*, 1974 M. P.L.J. 418 : 1974 Jab. L.J. 360.

Estoppels may also arise out of the compromise of legal claims *pendente lite*.¹⁰ A compromise decree is not a nullity merely because it contains a term opposed to law or public policy.¹¹ Once the stage of examining the lawfulness and validity of the terms of a decree has been passed and the Court has put its seal on approval to the compromise and made it a decree of Court, then that decree is binding between the parties and must be enforced unless it is set aside in a proper proceeding.¹²

A judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case.¹³ This principle has been followed in India.¹⁴ A consent decree raises an estoppel by judgment as much as a decree passed *in invitum*.¹⁵

10. Civ. P.C., Order XXIII, rule 3, *Ruttansey Lalji v. Pooribai* (1883) 7 B. 304; *Karuppan v. Ramasami*, (1885) 8 M. 482; *Appasami v. Manikam*, 9 M. 103; *Hara Sundari v. Kumar Dukkinessur*, (1885) 11 C. 250; *Goculdas Bulabdas Co. v. Scott*, (1891) 16 B. 202; *Kally Nauth v. Rajeeblochun Mozoomdar*, (1867) 2 Ind. Jur. N.S. 122, on appeal 343; *Juggobundhoo Chatterjee v. Watson & Co.* (1865) 2 Bourke 162; *Scully v. Lord Dundonald*, L.R. 8 Ch. D. 658; *Pryer v. Gribble*, L.R. 10 Ch. D. 177; *Rajunder Narain v. Bijal Gobind*, (1839) 2 M.L.A. 181; *Sri Gajapathi v. Sri Gajapathi*, (1870) 13 Moo. I.A. 497; *Golaub Khoonwuree v. Eshur Chundey*, 8 Moo. I.A. 447; (1861) 2 W.R. (P.C.) 47; *Cherukunneth v. Vengunat*, (1894) 18 M. 1. 7; as to waiver, see *Dwarkanath Sarma v. Unnoda Soonduree*, (1866) 5 W.R. Misc. 30; *Shivalingaya v. Nagalingaya*, (1878) 4 B. 247; *Janki Anmal v. Kamalathammal*, (1873) 7 Mad. H.C.R. 203, abandonment; *Man Govind v. Jankce Ram*, (1864) W.R. 211; as to agreements contra *cursum curiae*, see *Sadasiva Pillai v. Ramalinga Pillai*, 15 B.L.R. 383; *Pisani v. Attorney-General*, L.R. 4 P.C. 516; *Sheo Golam v. Beni Prosad*, (1879) 5 C. 27; *Dinnonath Sen v. Guruchurn Pal*, (1874) 14 B.L.R. 287; 21 W.R. 310; *Stowell v. Billings*, (1877) 1 A. 350; *Debi Rai v. Gokul Prasad*, (1881) 3 A. 585; *Ramalakhan Rai v. Bakhtaur Rai*, (1884) 6 A. 623; it has been held that a compromise which does not supersede the decree is no bar to the enforcement of the original decree; *Darbhā Venkamma v. Ram Subbarayudu*, (1878) 1 M. 387; *Ganga v. Murli Dhur*, (1882) 4 A. 240; *Latafat Hussain v. Badshah Hussain*, P.C. 8 O.C. 143; *Malla Reddi v. Aswa Natha Reddi*, 15 M.L.J. 494. See *Caspersz*, op. cit., 4th Ed., (1915) ss. 454-459, pp. 402-407, where these cases are discussed.
11. *Govind Waman v. Murlidhar*, A.I.R. 1953 Bom. 412 at pp. 416-417; *Kamlesh Mitra v. Narendra Nath*, (1976) 1 C.W.R. 243.
12. *Bhima Rama Jadhav v. Abdul Rashid*, 12 Law Rep. 542; (1967) 2 Mys. L.J. 509; A.I.R. 1968 Mys. 184 (188).
13. *In re South American and Mexican Co., Ex parte Bank of England*, (1895) 1 Ch. 37, cited in *Sallendra Narayan v. State of Orissa*, 1956 S.C.R. 72; 1956 S.C.A. 870; 1956 S.C.J. 449; 22 Cut. L.T. 251; A.I.R. 1956 S.C. 346 (plea of estoppel founded on compromise decree); *Kinch v. Walcott*, 1929 A.C. 482.
14. *Secretary of State v. Atendranath Das*, I.L.R. (1936) 63 Cal. 550 at p. 558; *Baishankar v. Morarji*, I.L.R. (1912) 36 Bom. 283; *Kumara Venkata Perumal v. T. Ramaswamy Chetty*, I.L.R. (1912) 35 Mad. 75; *Bhanwarlal v. Raja Babu*, I.L.R. (1969) 19 Raj. L.W. 51; A.I.R. 1970 Raj. 104 (106); *Mathankutty v. Lakshmikutty Amma*, 1970 K.L.T. 498; *Krishnar Nampoothiri v. Velayadiah*, 1971 E.L.T. 307 (309); *I. B. Patel v. B. A. Patel*, A.I.R. 1974 A.P. 303; *Siraj Uddin v. Abdul Haq Pracha*, (1974) 76 Punj. L.R. 200 (Delhi); *Jagannath v. Abdul Aziz*, A.I.R. 1973 Delhi 9; *Kesavan v. Padmanabham*, A.I.R. 1971 Ker. 234; *Gajraj Narain Singh v. Babulal*, A.I.R. 1973 Pat. 58.
15. *Mathankutty v. Lakshmikutty Amma*, 1970 K.L.T. 498; 1970 K.I.R. 710.

Where a Court has, in fact, no jurisdiction to entertain a suit or application, the consent of the parties thereto cannot give it jurisdiction. Where a person filed a claim in execution proceedings in the Small Cause Court and thereafter when such claim was disallowed brought a regular suit in which it was held that that Court had no jurisdiction to entertain the claim, it was also held that the plaintiff was not estopped from saying that the Small Cause Court had no jurisdiction to deal with the matter because under wrong advice he originally filed a claim in that Court.¹⁶ A compromise decree passed without jurisdiction, is not effective as estoppel.¹⁷ But an objection as to jurisdiction which does not go to the root, such as for example, where the lack of it is only local, will not furnish a ground for estoppel; and the validity of the decree cannot be challenged on that ground.¹⁸ In an earlier case, however, where a plaintiff put the Subordinate Judge's Court in motion to execute a decree and thus submitted himself to the jurisdiction of that Court, it was held that the plaintiff was by his own act estopped from saying that the same Court had no jurisdiction to retrace its steps by directing a refund of the sum realised under the order for execution, and to replace the parties in the position which they occupied before the irregular execution was had;¹⁹ and where in the case cited the cause had been made over to the joint Subordinate Judge without objection by either party, it was held that they had waived enquiry as to jurisdiction and were bound by this tacit admission of it.²⁰ The mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is, as a trespasser.²¹ In the case cited, pending a suit by the mother of the last Hindu male owner for a declaration of the invalidity or an alleged adoption made to him, the mother died, and on her death an application was made by the present plaintiffs who were remote reversioners to be brought on record as her legal representatives and to continue the suit, which application was dismissed on the objection raised by the present defendant in that suit and that suit was also eventually dismissed by the High Court in Second Appeal under Order 22, Rule 3 of the Civil Procedure Code. The present plaintiffs thereupon brought a fresh suit. It was held that the defendant was estopped from contending, in the second suit, that the decision in the previous suit was erroneous, that the plaintiff's proper remedy was to continue the first suit, and that the second suit was barred under the Order mentioned, inasmuch as the first suit had abated.²²

16. *Deno Nath v. Adhor Chunder*, (1900) 4 C.W.N. 470 : 3 C.W.N. 591.

17. *Bhurey v. Pir Box*, 1973 A.L.J. 312.

18. *Hiralal v. Kalinath*, I.L.R. (1961) 2 All. 481 : (1962) 2 S.C.R. 747 : A.I.R. 1962 S.C. 199, 200. See also *Jai Singh v. Mangtoo*, A.I.R. 1962 Him. Pra. 10 (application made to wrong Court).

19. *Govind Vaman v. Sakharam Ramchandra*, (1878) 3 B. 42, dissenting from *Gonesh Daji v. Sakharam Ramchandra*, 1877 P.J. 227. See also *Gyan Chunder v. Durga Churan*, (1881) 7 C. 318, in which it was objected that partition proceedings could not be taken in execution of a decree and that the Court was

in error in appointing the Amin Commissioner to effect partition. S. 396 of the Code referring to "Commissioners" in the plural. *Pontifex, J.*, however, held that the order of the Judge was within the meaning of S. 396 of the Code. It may also well be that apart from questions of jurisdiction a person who has acquiesced in proceedings may be estopped from calling them in question.

20. *Baretto v. Rodrigues*, I.L.R. 35 Bom. 24 : 7 I.C. 950 : 12 Bom. L.R. 712.

21. *Zubeda Bibee v. Sheo Charan*, (1899) 22 A. 83.

22. *Arunachalam v. Vellaya*, 1919 Mad. 572 : 52 I.C. 465 : 9 L.W. 345.

Similarly, where the guardian of a minor sues on his behalf and gets back his property, he cannot be permitted to plead subsequently that the decree in favour of the minor was illegal and that he was entitled to it as reversioner, unless he discharges himself from the guardianship.²³ Where a requisition under Section 6 (4) of the Bombay Land Requisition Act, 1948, had been made notifying the vacancy, it is not open to landlord subsequently to contend that the intimation of vacancy given by him was not in proper form.²⁴ Where a sale of occupancy rights was recognised by a compromise followed by a decree and mutation, and a party to the compromise decree filed a suit to pre-empt the sale, it was held that whether the case be viewed under the heading of *res judicata* or estoppel, or of no title and interest to sue, the plaintiff's claim to pre-empt cannot be entertained.²⁵ Where a dispute was settled without a legally binding document the parties acting on it mutually, and nothing remained to be done on either side, the Court held the parties and their representatives estopped from challenging the settlement.¹ In a case the defendant agreed while the plaintiff was a minor, to manage the plaintiff's properties and to pay the interest due on his debts. He also undertook to indemnify the plaintiff if, in consequence of the breach of the covenant on his part to pay the interest on the debts, the plaintiff was put to any loss. In a subsequent suit by the creditors, to which both the plaintiff and defendant were parties, the defendant contended that he had paid up the interest but failed to adduce evidence to prove his contention and the suit was decreed. The plaintiff subsequently paid the amount to the creditor and sued the defendant to recover the damages sustained by him in consequence of the defendant's failure to pay the interest. The defendant pleaded that he had paid the interest prior to the creditor's suit. It was held that whether the technical doctrine of *res judicata* was applicable or not, the defendant must be held to be estopped from contending that the interest was paid.² In another case, a candidate who sat for the S.S.L.C. Examination held by the Board of Secondary Education was in due course given the S.S.L.C. Book with a certificate of eligibility for admission to the University course of studies, endorsed by the Secretary to the Board. On the strength of this certificate the candidate sought and obtained admission to the Intermediate class of a College. After he passed first year examination and while he was studying in the senior Intermediate class his name was removed from the rolls of the College on the ground that his name was not found in the list of S.S.L.C. holders declared eligible for University course of studies published in the Government Gazette and he was not therefore eligible for the University course of studies. It was held that the University having held out that the eligibility endorsement on the certificate was *prima facie* proof of the declaration of the eligibility of the candidate and the candidate having been admitted to the College and allowed to proceed with his studies in the Intermediate class for over a year on the strength of the endorsement, the University was estopped from saying subsequently that the candidate could not continue to study and that he

23. *Fattu Bhaia v. Bhawaniram*, A.I.R. 1961 Madh. Pra. 27; 1961 M.P. L.J. 58.

24. *Shrinibai v. State of Bombay*, A.I.R. 1960 Bom. 396; 61 Bom. L.R. 1191.

25. *Rikhi Ram v. Dhanpat Rai*, 1928

P.G. 190; 55 I.A. 266; 110 I.C.J. 1. *Kunti v. Gajraj*, 1924 All. 826; I.L.R. 46 A. 847; 83 I.C. 297.

2. *Nallappa v. Vridhachala*, 1915 Mad. 36; I.L.R. 37 Mad. 270; 25 I.C. 888.

should leave the College.³ Similarly also, it has been held that where an applicant had fulfilled the standards set up for admission into an academic course, the authorities could not abrogate them and introduce a new disability.

Even though a case does not fall within the terms of Section 115 of the Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, despite the promise not being recorded in the form of a formal contract as required by Article 299 of the Constitution.⁵

6. Inconsistent position: Approbation and Reprobation. Persons will not be permitted to take up inconsistent positions.⁶ "If parties in Court were permitted to assume inconsistent position in the trial of their causes, the usefulness of Courts of Justice would in most cases be paralysed, and the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the Courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose."⁷ It is well settled that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent; and that this wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit other than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.⁸ Where a party invites the Court to adopt a procedure which is not contemplated by the Code of Civil Pro-

3. Registrar, University of Madras v. Sundara Shetti, 1956 Mad. 309: (1956) 1 M.L.J. 25, it was held to be a case of legal or equitable estoppel which satisfied practically all the conditions embodied in S. 115 of the Evidence Act.

4. Kumari Akhtar v. Admission Committee, A.I.R. 1959 Andh. Pra. 493.

5. Union of India v. Anglo-Afghan Agencies, (1968) 2 S.C.R. 366; (1968) 2 S.C.A. 31; (1968) 2 S.C.J. 889; (1968) 1 S.C.W.R. 553; A.I.R. 1968 S.C. 718 (727).

6. Mst. Efatoonissa v. Khondkar Khoda, (1874) 21 W.R. 374; Brij Bhokun v. Mahadeo Dubey, (1872) 17 W.R. 422; Dabee Misar v. Mungin Meeh, (1878) 2, C.L.R. 208; Sonacolah v. Imamooddeen, (1875) 24 W.R. 273; Sutyabhama Dasee v. Krishna Chunder, (1880) 6 C. 55. Where a defendant allowed without objection a purchaser of a plaintiff's interest in the suit to substitute his name on the record,

he was estopped from contending that the suit had abated: Bir Chandra v. Bansī Dhar, (1869) 3 B.I.R. (A. C.) 214; Manpal v. Sahib Ram, 1905 A.W.N. 94: 27 All. 544 (F.B.): 2 A.L.J. 428; Barada Porsad v. Krishna Chandra, 1934 Cal. 414: 151 I.C. 268: 38 C.W.N. 33; Muhammad Wali Khan v. Muhammad Mohiuddin, 1919 P.C. 47: 58 I.C. 843: 24 C.W.N. 321 (P.C.).

7. Bigelow, 6th Ed., p. 783. See The Union of India v. Bharat Fire Insurance, I.L.R. (1961) 1 Punj. 271; A.I.R. 1961 Punj. 157.

8. Hemanta Kumari Devi v. Prasanna Kumar Datta, 1930 Cal. 32; I.L.R. 56 Cal. 584: 120 I.C. 249; see also Dwijendra Narain v. Joges Chandra De, 1924 Cal. 600: 79 I.C. 520: 39 C.L.J. 40; Becharam Chaudhuri v. Purna Chandra, 1925 Cal. 845: I.L.R. 52 Cal. 894: 88 I.C. 637: 41 C.L.J. 456: 29 C.W.N. 755 (F.B.).

cedure and is in fact a procedure *extra cursum curiae*, he cannot turn round and say that the Court is to blame for adopting the very same procedure which he invited the Court to follow. The doctrine of estoppel would apply to a party who attempts to blow hot and cold.⁹ But where on an application to set aside an execution sale under Order 21, Rule 90, C. P. C., the petitioner offered to furnish personal security and the Court issuing notice on the application ordered the petitioner to furnish cash security or security of immovable property, it was held that the petitioner was not estopped from pleading at the hearing of the application that after admitting the application the Court had no jurisdiction to insist on security in the form it did.¹⁰ Where, at one stage, the party contended that he was not the judgment-debtor and that in consequence the executing Court could not proceed against him under Order 21, Rule 58, C. P. C., he could not later on contend that he was a representative of the judgment-debtor for purposes of the applicability of Section 47, C.P.C.¹¹

Where an order absorbing a person in the civil service was subject to certain terms, and the person accepted the order and continued in service, it was held that he could not subsequently repudiate the terms.¹² An employee is estopped from claiming continuance of his service after termination according to terms of service.¹³ Where a Government servant was given the option to retire voluntarily on proportionate pension as an alternative to dismissal and he chose voluntary retirement and the Government passed an order accordingly, it was held that the Government servant was estopped from subsequently impugning the order of the Government.¹⁴ Where a public servant condones all defects in the notice terminating his service and agrees to receive his arrears of pay and three months' pay in lieu of discharge notice, he cannot be allowed subsequently to challenge the legality of the notice of discharge.¹⁵ But where a Government servant even after being exonerated by the criminal Court, was not given his substantive post and had to work on a new post temporarily, it was held that this was not sufficient to create an estoppel against him.¹⁶

When a suit was brought for damages arising from accident to a scooter from a truck, both the defendants (the owner of the truck and the Insurance Co.) in agreement stated unequivocally that the Insurance Co. was not liable towards the plaintiff at all and one of the defendants was found liable for a particular sum, he cannot change his stand and contend that if the claim of the plaintiff is to be decreed, it ought to be decreed against the Insurance Co. also.¹⁷

9. *Makudam Mohammad v. Md. Sheikh Abdul Kadir*, 1936 Mad. 856; 164 I. C. 611; 71 M.L.J. 281; *Mula v. Baburam*, A.I.R. 1930 All. 573.

10. *Vaidyanatha Ayyar v. Indian Bank, Ltd.*, 1955 Mad. 486; (1955) 2 M. L.J. 99; 68 L.W. 330; 1955 M. W.N. 289; *Mula v. Babu Ram*, A.I.R. 1960 All. 573; *Puluwa v. Laxmichand*, A.I.R., 1960 M.P. 438.

11. *Madan Mohan v. Hari*, I.L.R. 1959 Bom. 256; A.I.R. 1959 B. 269.

12. *Diwan Chand v. State of Madhya*

Bharat, 1957 M.B. 100.

13. *Albert Francois Lobo v. Chief Engineer, Flood Control & Irrigation Department, Assam*, 1977 Lab. I.C. 1179; (1977) 2 Serv. L.R. 575.

14. *The State of Assam v. Harnath Barua*, 1957 Assam 77.

15. *Nikunia Behari v. State of Tripura*, 1956 Tripura 33.

16. *Sarangthem v. State of Manipur*, 1956 Manipur 34.

17. *Roshan Lal Bhalla v. Sudesh Kumar*, 1967 Kash. L.J. 392; A.I.R. 1968 J. & K. 2 (5).

Where the landlord expressly and specifically claims a certain amount of interest at the time of the first hearing to exonerate the tenant from eviction and the tenant deposits that amount, the landlord cannot approbate and reprobate even if on the basis of some calculation the said sum was deficient.¹⁸ Where in appeal it was conceded on behalf of the tenant that the question of title was rightly not adjudicated upon by trial Court, it is not open to the tenant later on in appeal from the decree after remand, to say that question of title should have been decided by the trial Court.¹⁹

A person, who in a writ petition before the Supreme Court, claimed that he was the proprietor of the whole village 'R', cannot turn round in a later writ proceeding between the same parties in the Judicial Commissioner's Court and say that he is *not* the proprietor of the whole village 'R': the doctrine of 'approbate' and 'reprobate' applies to the conduct of the person.²⁰

Where there is no evidence of positive consent to, or acknowledgment of, a particular transaction, namely, a gift, on the part of the State which at the earliest opportunity objected to the gift on the basis that it was made to defeat and delay the plaintiff-State's claim to the arrears of licence fee from the defendant-donor and there was no representation by the plaintiff on the basis of which the defendants were made to change or alter their position, there is no estoppel arising from approbation and reprobation.²¹ A party pleading a document to be a will cannot be allowed to take up the stand that it is a family arrangement.²²

A lessee cannot blow hot and cold. If he relies on the lease-deed, he is not entitled to compensation in respect of improvements effected on the property demised. If the lease-deed becomes inadmissible for want of registration under Section 51, Transfer of Property Act, 1882, he would not be entitled to such compensation.²³

Having successfully pleaded want of jurisdiction in Revenue Court it is not open to plead in a subsequent suit brought in Civil Court that the suit should have been filed in Revenue Court.²⁴

Where the management successfully objected before the Industrial Tribunal to the claim of workmen that they were protected workmen; in appeal before the Commissioner for workmen's compensation the Management cannot plead that since employees had claimed to be protected workmen,

18. Prem Chand Hari Prashad v. Mangal Nanak Saini, 1969 Cur. L.J. 415 : 71 P.L.R. 571 : 1969 Ren. C.R. 290 : A.I.R. 1969 Punj. 367 (372).
19. R. L. Sharma v. Sardar Amrik Singh, A.I.R. 1974 Pat. 195 : 1974 Ren. C.R. 269.
20. Gulabbhai Vallabbhai v. H. A. Khan, Collector of Daman, A.I.R. 1970 Goa 59 (64).
21. State of Punjab v. Giani Bir Singh, I.L.R. (1968) 1 Punj. 10 : A.I.R. 1968 Punj. 479 (485).

22. Kasturchand v. Kapurchand, A.I.R. 1975 M.P. 136 : 1975 M.P. L.J. 156.
23. Periaswami Pillai v. Sri Annajadeswara Swami Temple, (1967) 1 M.L.J. 93 : (1966) 19 M.L.W. 637 : A.I.R. 1967 Mad. 257 (259).
24. Unrao Singh v. Man Singh, A.I.R. 1972, Delhi 1 ; Inder v. Gurdit Singh, (1971) 73 Punj. L.R. 909 : 1973 Punj. L.J. 577 : I.L.R. (1973) 2 Punj. 43.

their remedy was an application under Section 33-A of Industrial Disputes Act.²⁵

A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted, when he fails upon this branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage.¹ Where under an arbitration award one of two Mohammedan brothers received his full half of the whole property belonging to his father upon the footing of the exclusion of his mother, and entered into possession of his share, he cannot subsequently, on the death of the mother, be allowed to say that he will take as heir to his mother what was by his own act not allotted to her but was divided between himself and his brother.² Where under an arbitration clause a reference to a third party in London was contemplated and both agreed to a reference to that party, and where furthermore both invited the arbitrator to decide on a matter extraneous to the arbitration, the unsuccessful party could not assail the award on the ground of want of jurisdiction or of the arbitration having been on an extraneous matter.³ Where a person takes advantage of the provisions of a beneficial enactment of Agricultural Land Alienation Act, he cannot subsequently urge that it violates Article 15 of the Indian Constitution.⁴ After accepting full pay and allowances for the period of notice under a Rule of Liberalised Pension Rules, the pensioner is estopped from saying that the rule itself is arbitrary and violative of Act 14.⁵

Party accepting benefit under transaction cannot challenge it. A party who accepts benefit under a transaction cannot subsequently challenge the transaction.⁶ Contractors, who secured a benefit to themselves, by issuing a false certificate to a company, are estopped from urging that the certificate was not genuine and that it did not put an end to their contract with the company.⁷ A person, who, on the basis of an order of compulsory retirement, takes advantage of the leave preparatory to retirement and avails himself of it and also claims the pension due to him, cannot challenge the order which is binding on him.⁸ After having applied under a Rent Control legislation for determination of rent, the tenant cannot turn round and contend that he was not a tenant and that the Act did not cover his case.⁹

25. *Remington Rand of India Ltd. v. Thiru R. Jambulingam*, 1974 Lab. I.C. 1283; 46 J.R. 149; (1974) 2 Lab. L.N. 337; 1974 S.C.C. (Lab.) 337; 30 Fac. I.L.R. 31; (1975) 3 S.C.C. 254; (1975) 1 Lab. L.J. 450; (1975) 2 S.C.R. 17; A.I.R. 1974 S.C. 1915.
1. *Alakh Narayan Gajpatil v. Secretary of State*, 1926 P.C. 18; 53 I.A. 64; I.L.R. 49 Mad. 249; 94 I.C. 501.
2. *Mohammad Wali Khan v. Mohiuddin Khan*, 1919 P.C. 47; 58 I.C. 843; 24 C.W.N. 321 (P.C.).
3. *Pratabmull Ramaswar v. K.C. Sethia*, A.I.R. 1960 Cal. 702; 64 C.W.N. 616.
4. *Puluri Narasimha v. Shaik Hazarat*, A.I.R. 1960 Mys. 59.

5. *Bhola Ram v. Lt. Governor*, 1973 Serv. L.J. 193 (Delhi); *Laiq Ram v. State of Haryana*, 1972 Serv. L. R. 819.
6. *Somnath Singh v. Ambika Prasad*, Dube, 1950 All. 121; *Anantam v. Valluri*, A.I.R. 1960 Andh. Pra. 222; I.L.R. (1959) A.P. 951; *Baidyanath v. Sat Narain*, A.I.R. 1960 Pat. 36.
7. *Hindustan Steel Ltd. v. Ramdayal*, 1972 J.L.J. 520 (524); 1972 M. P.L.J. 46; 1972 M.P.W.R. 181.
8. *State of M.P. v. Gokul Prasad*, 1971 J.L.J. 410 (427); 1971 M.P.L.J. 009; 1971 M.P.W.R. 537.
9. *Sarda Sangha v. Asoka Sen Gupta*, 1972 Ren. C.R. 903; (1972) 76 Cal. W.N. 862; 1973 R.C.J. 30.

A liquor licensee from Government after having done business under the licence for full period cannot afterwards attack the validity of licence under Article 47 of the Constitution.¹⁰ A highest bidder who promised to pay the balance amount of bid took possession, raised and harvested crop in the land, is estopped from saying that he was not liable as the crop was looted.¹¹ One who has claimed the benefit of a statute cannot afterwards assail its validity,¹² or say that it does not apply to him.¹³ A party who has accepted the costs awarded to him as a condition precedent to the restoration of an application dismissed for default is estopped from subsequently challenging the legality or the propriety of the order of restoration.¹⁴ The same rule applies to acceptance of costs awarded on setting aside an *ex parte* decree,¹⁵ or as a condition precedent for allowing amendment in written statement.¹⁶ But this rule does not apply to a case where the various directions in an order or judgment are intended to be distinct and independent of each other. Thus, if a suit is dismissed, but the plaintiff is awarded costs, he is not precluded from impeaching the judgment by receiving the costs. Nor, if the suit is for the recovery of, say, Rs. 200 and a decree is passed for Rs. 50, is the plaintiff disentitled to object, by reason of his having received the amount for which judgment was given.¹⁷ It is of course obvious that acquiescence in an order passed by a Court will not render the order valid, if it is an order passed without jurisdiction.¹⁸ Where the Court, having decided the State was a necessary party, directed the plaintiff to file an amended plaint, the plaintiff applied for extension of time to do so, it was held that he was not thereby estopped from filing a revision against the order directing an amended plaint to be filed.¹⁹ In the case of an instalment decree "if each of the parties has, by his acts, intentionally caused the other to believe that a payment was a regular satisfaction of the obligation, and the parties have acted on that belief, neither can afterwards deny the regularity. Though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regu-

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10. *State of Rajasthan v. Bahmukund* 1974 W.I.N. 367 (Raj.).
 11. *Jitan Tewary v. M. Singh*, 1975 Pat. L.J.R. 200.
 12. *Shridhar Atmaram v. Collector of Nagpur*, 1951 Nag. 90 : I.L.R. 1951 Nag. 818, relying on *Great Falls Manufacturing Co. v. Garland*, (1888) 124 U.S. 581; *Wall v. Parrot Silver & Copper Co.*, (1917) 244 U.S. 407.
 13. *D. R. Gellatly v. J. R. W. Cannon*, 1953 Cal. 109 : 91 C.L.J. 128; 57 C.W.N. 294.
 14. *Mst. Kapura Kuer v. Narain Singh*, 1949 Pat. 491 : I.L.R. 27 Pat. 187. See also *Banku Chandra Bose v. Mariam Begam*, 1917 Cal. 516 : 37 I.C. 804 : 21 C.W.N. 232 (S. B.) ; *Ramasani v. Chidambaram*, 1927 Mad. 1009 (2) : 105 I.C. 620 : 26 L.W. 527 ; *SOHAN Lal v. Dhimi Mal*, 1928 Lah. 813 (2) : 10 I.L.J. 398 ; *Bahadur v. Moham-*
 - mad Din*, 1934 Lah. 979 : 151 I.C. 172 ; *Kiran Lal Behari Lal v. Ram Narain*, 1954 M.B. 12 ; *Mewa Singh v. Brahmanand*, 74 P.L.R. 832.
 15. *Satyanarayanamurthy v. Sundara Rao*, 1938 Mad. 603 : 1938 M.W.N. 385 ; *Firma Rup Chand v. Hardayal*, 1927 Lah. 55 : 96 I.C. 420 : 8 I.L.J. 273 ; *S. Burden & Co. v. Army Cantonnment Board*, 1926 Lah. 637 : 96 I.C. 782 ; but see *Puttu Singh v. Vidya Ram*, 1934 All. 10 : 153 I.C. 999.
 16. *Sewak Prasad v. Gram Panchayat*, A.I.R. 1972 Punj. 272.
 17. *Venkatarayudu v. Rama Krishnayya*, 1930 Mad. 268 : 123 I.C. 337 : 58 M.L.J. 137 ; *Jogendra v. Khoda Buksha*, 1924 Cal. : 380 : 72 I.C. 554.
 18. *Sreeramulu v. Venkatanarasimham*, 1938 Mad. 1004 : 179 I.C. 466 : (1938) 2 M.L.J. 835.
 19. *Sabhu v. Ramsa*, 1953 H.P. 123.

larly and in satisfaction of the obligation under the decree.²⁰ But where in a compromise decree for Rs. 1,285 it was provided that if Rs. 600 and costs were paid by a certain date, the decree would be deemed to be fully satisfied, and the judgment-debtor deposited Rs. 600 and costs after the specified date, stating that he was making the deposit in full satisfaction of the decree, it was held that the withdrawal of the amount by the decree-holder, who had taken out execution, would not mean that he accepted the amount in full satisfaction of the decree.²¹ Where trustees in bankruptcy purport to pay a sum of money to a creditor as a dividend upon a debt, and the creditor accepts the dividend, he cannot subsequently maintain that he intended to repudiate as fraudulent the contract creating the debt.²² The doctrine will not apply when no benefit had been taken under the prior transaction. Thus, a vendee, by withdrawing the pre-emption price deposited in Court, does not disentitle himself from appearing against the decree for pre-emption passed against him, because he had not taken a benefit *de hors* the claim on merits.²³

A person cannot say at one time that a transaction is invalid and thereby obtain some advantage to which he could only be entitled on the footing that it is invalid, and at another time say it is valid for the purpose of defeating another who is entitled to obtain an equal advantage with him on the footing that it is invalid.²⁴ Where in a previous suit the plaintiff allowed the defendant to proceed with the suit on the footing that he was suing him in a representative capacity, it would be wholly inequitable to permit him to refile, in a subsequent suit, from the position he took in the earlier suit and contend that the defendant was not then sued in a representative capacity.²⁵ Where in an execution proceeding the judgment-debtors pleaded that the property sought to be sold was ancestral property and it was sold as such, it was held that the judgment-debtors were estopped from contending in a subsequent suit for possession that the property was not ancestral.¹ There would be monstrous injustice if a party, having suggested one construction of a deed in a previous suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed; it would be playing fast and loose with justice if the Court allowed that.² Where parties have moved the Court under Section 47 of the Civil Procedure Code and invited a decision on their application, they cannot be allowed to turn round and say in a subsequent proceed-

20. Kashiram v. Pandu, I.L.R. 27 Bom. 1 : 4 Bom. L.R. 688 (F.B.); see also Kuniammalu v. Raman Menon, 1951 T.C. 127 : 1950 K.L.T. 679 ; Rahmath Unnissa Begum v. Shimoga Co-operative Bank Ltd., 1951 Mys. 59 : I.L.R. 1951 Mys. 196 : 30 Mys. L.J. 55.

21. Maruti Laxman v. Namdeo Shorramji, A.I.R. 1949 Nag. 385 : I.L.R. 1949 Nag. 295 : 1949 N.L.J. 515.

22. The Kin Tye Loong v. Seth, 1920 P.C. 240.

23. Bhau Ram v. Baij Nath Singh, A.I.R. 1961 S.C. 1527 : (1961) 2 S.C.J. 601 : (1961) 2 Am. W.R. L.E.—364

(S.C.) 165 : (1961) 2 M.L.J. (S.C.) 165.

24. Swaminatha v. Saivu Rowthan, A.I.R. 1936 Mad. 123 at 125 : 160 I.C. 559 : 43 L.W. 624.

25. Gurushiddanna v. Gurushiddappa, A.I.R. 1937 Bom. 238 : I.L.R. 1937 Bom. 326 : 169 I.C. 984.

1. Mahabir Prasad v. Raghunath Saran, 1934 All. 430 : 150 I.C. 141.

2. Candy v. Candy, (1885) 30 Ch. Div. 57 : 54 L.J. Ch. 1154 : 53 L.T. 306 : 33 W.R. 803, cited with approval in Mohammad Khalik Khan v. Mahboob Ali, 1942 All. 122 : I.L.R. 1942 All. 103 : 199 I.C. 190.

ing, because the decision went against them, that neither were they competent so to have moved the Court, nor was it competent for the Court to have dealt with the matter on being so moved.³ If there is a representation by one of the parties to execution proceedings, of certain facts which would necessitate some other proceedings, as a result of those facts being accepted, the Court passes a certain order, then the party who makes the representation would be estopped in separate proceedings from stating that those facts were not true. Where the stand taken by a respondent to the proceedings under Order XXI, Rule 97, C. P. C., was that he was not the judgment-debtor or representative of the original judgment-debtor and therefore the executing court could not proceed against him under Rule 98, it was not open to him to contend later that he was in fact a representative of the judgment-debtor and as such the only remedy open to the appellant lay in execution.⁴ No party can however be estopped because of a legal argument put forward by his pleader.⁵ A plaintiff who has voluntarily submitted to the jurisdiction of a Court cannot subsequently object to the validity of the judgment of that Court on the ground that it had no jurisdiction over him.⁶ A person who has already accepted a benefit by submitting to the jurisdiction of an authority cannot be heard to say that the authority had no jurisdiction.⁷ As a matter of principle a party denying the jurisdiction of a particular tribunal and succeeding in that plea cannot deny the truth of that plea in subsequent proceedings before another tribunal.⁸ A defendant who obtains judgment upon an allegation that particular obstacle exists cannot in subsequent suit based upon such allegation deny its truth.⁹ When a party objects to the jurisdiction of one Court and procures an adjudication in his favour on that point and the plaint is thereupon filed in another Court, he is estopped from putting forward a contrary view of the question of jurisdiction to the one already taken.¹⁰ Where a suit in the Revenue Court having been dismissed on the defendant's plea that the Revenue Court has no jurisdiction the plaintiff brings a suit in the Civil Court for the same relief, the defendant is estopped from pleading that the Civil Court has no jurisdiction and that the remedy lies by a suit in the Revenue Court.¹¹ In

3. *Girish Chandra v. Purna Chandra*, A.I.R. 1944 Cal. 53 : 211 I.C. 515 : 77 C.L.J. 224; see also *Uttam Chand v. Saligram*, 1929 Nag. 79 : 117 I.C. 285.
4. *Madan Mohan v. Hari*, A.I.R. 1959 Bom. 269 : I.L.R. 1959 B. 256.
5. *Bala Lingayya v. Nalayya*, 1944 Mad. 62 : 215 I.C. 130 : (1945) 2 M. L.J. 506.
6. *K. B. Walker v. G. Walker*, 1935 Rang. 284 : 158 I.C. 547.
7. *Samarammal v. Jugakdas*, A.I.R. 1974 Raj. 104.
8. *Khurshed Ali v. Commissioner of Tirhut Division*, 1955 Pat. 198 : 3 B.L.J. 47.
9. *Bigelow*, cited in *Mahadeo Singh v. Puda Singh*, 1931 Oudh 123 : I.L.R. 5 Luck. 645 : 124 I.C. 671.
10. *Hemanta Kumari Debi v. Prasanna Kumar*, 1930 Cal 32, supra; *Ram Khelawan Singh v. Maharaja of Benares*, 1930 All. 15 : 120 I.C. 125;

- 1930 A.L.J. 224; *Uderaj Singh v. Ram Bahal Singh*, 1946 All. 436 : I.L.R. 1946 All. 549 : 224 I.C. 278; *Subbayya v. Biswanath*, A.I.R. 1962 Andh. Pra. 338.
11. *Mahadeo Singh v. Puda Singh*, 1931 Oudh 123 : I.L.R. 5 Luck. 645 : 124 I.C. 671; see also *Saira Bibi v. Ghandrapal Singh*, 1928 Oudh 503 : 5 O.W.N. 897; *Bhagirathi Dass v. Baleswar*, I.L.R. (1914) 41 Cal. 69 : 19 I.C. 686 : A.I.R. 1914 C. 143; *Umeshanand v. Mahendra Prasad*, (1911) 11 I.C. 280; *Abdul Qayum v. Fida Hussain*, (1915) 30 I.C. 551 : A.I.R. 1915 A. 463; but see *Sumitramma v. Subbadu*, 1943 Mad. 22 : 207 I.C. 115 : (1942) 2 M.L.J. 97; *Phuluwa v. Laxmichand*, A.I.R. 1960 Madh. Pra. 138; *Umrao Singh v. Man Singh*, A.I.R. 1972 Delhi 1; *Inder v. Gurdit Singh*, (1971) 73 Punj. L. R. 909 : 1973 Punj. L.J. 577 : I.L.R. (1973) 2 Punj. 43.

a suit filed in the Court of a second class Subordinate Judge the defendant contended that the value of the suit property was over Rs. 10,000 and that the second class Subordinate Judge had no jurisdiction to hear the suit and plaintiff also having admitted the valuation, the plaint was sent to the Court of first class Subordinate Judge and was heard by him without objection on the part of any of the parties. The suit having been eventually decreed, the defendant appealed to the High Court. On a preliminary objection by the plaintiff-respondents that the appeal lay to the District Judge and not to the High Court on the ground that the suit could be tried only by a second class Subordinate Judge as the valuation of the suit for court fees determined the jurisdiction of the Trial Court, it was held that the plaintiff-respondents were by their own conduct estopped from questioning the jurisdiction of the High Court to hear the appeal and that the suit was properly tried by the first class Subordinate Judge.¹² In a suit upon a mortgage the defendant contended that the suit was premature and the Court accepted that view. The plaintiff again sued and the defendant pleaded limitation, but it was held that it was not open to him to raise the defence.¹³ Where a plaintiff, having obtained a decree against one of the two defendants, acquiesced in that decree but the defendant judgment-debtor appealed, making the other defendant also a party to his appeal, with the result that the plaintiff's suit was dismissed, it was held that it was not open to the plaintiff in second appeal to contend that the Court below should have made a decree against that defendant with regard to whom he had acquiesced in the dismissal of his suit.¹⁴

The mere fact, however, of a man with two alternative remedies having, in ignorance of his rights, pursued one and received a payment thereby, will not prevent him from afterwards pursuing the other, if he is able and willing to restore what he has received so as to prevent any wrong being done to any person by his change of remedy.¹⁵ He cannot, however, of his own motion, or even, possibly, with the consent of his opponent, when the interests of third parties are involved, change his election, but the Court has power, in a proper case and in its discretion, to relieve a party from the effects of an election.¹⁶

A party will not be permitted to approbate and reprobate¹⁷ in respect of the same matter.¹⁸ "It is a sound principle of law as between the same

12. *Gajrajji Jastanji v. Somnath Bhudar Das*, 1940 Bom. 242: 189 I.C. 636: 42 Bom. L.R. 445; see also *Balkrishna v. Jankibai*, 1920 Bom. 105: 1 L.R. 44 Bom. 331: 56 I.C. 340: 22 Bom. L.R. 289; *Indermul v. Sub-Judge, Secunderabad*, (1957) 1 Andh. W.R. 196: 1957 Andh. L.T. 445.
13. *Mst. Efatounissa v. Khondkar Knoda*, 21 W.R. 374.
14. *Lohre v. Deo Hana*, 1 L.R. (1907) 30 A. 48: 4 A.L.J. 722: 1908 A.W.N. 4: 3 M.T. 176; *Fazand Ali Khan v. Bismillah Begam*, (1904) 27 A. 23: 1 A.L.J. 358: 1904 A.W.N. 155.
15. *Re Collie Ex parte Adamson*, (1878) 8 Ch. Div. 807 (C) at p. 818; cf. *Young v. Bristol Aeroplane*

- Co. Ltd.*, 1946 A.C. 163 (H.L.): (1946) 1 All E.R. 98.
16. *Morel Brothers & Co. v. Westmorland (Earl)*, 1904 A.C. 11 (H.L.); *S. Kaprow & Co. Ltd. v. Maclelland & Co. Ltd.*, (1948) 1 K.B. 618, (C.A.): (1948) 1 All E.R. 264.
17. The origin of this maxim is discussed in *Lusenden v. Bosch (C.A.V.) Ltd.*, 1940 A.C. 412 (H.L.) at 417, 418: (1940) 1 All E.R. 425 at p. 429; but in England the maxim appears not to express any formal legal concept, see *ib.*, at p. 433 per Lord Atkin.
18. See *Kristo Indro v. Huromonce Dasse*, (1875) L.R. 1 I.A. 84, 88; *Rup Chand v. Sarbeswar Chandra*, 1 L.R. 33 Cal. 915: 3 C.L.J. 629: 10 C.W.N. 747.

litigants a defendant cannot defeat the claim of the plaintiff by a plea negating a contention successfully advanced by him in a former suit, if he thereby approbates and reprobates."¹⁹ The estoppel which arises on this principle "seems to be intermediate between estoppel by record and estoppel *in pais*. The principle that a person may not approbate and reprobate expresses two propositions, first, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and secondly, that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent."²⁰ The principle 'of approbate and reprobate' cannot be made applicable to the rights of a litigant to an appeal either from a judgment or from an award.²¹ A party who has claimed to have the benefit of a course of business on the basis of investments in commercial speculations cannot, on finding that the claim to the benefit of that course of business is not sustainable, claim on another basis.²² It has been held by the Privy Council, that a party cannot both approbate and reprobate, and that he cannot say, at one time, that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid; and, at another, say it is void for the purpose of securing from further advantage.²³ On the same principle, a party cannot be allowed to say, at one time, that the question between him and the opposite party as to adverse possession is not necessary to be decided in the suit and thereby induce the Court to refrain from deciding it, and, at another time, say that because that question was not decided between him and the other party, the latter's claim is barred by adverse possession which is the very issue which he objected to being decided.²⁴ It is not open to a party to say that, although he is not at all bound by a contract, the other party is bound by a certain clause in it and insist upon compliance with it.²⁵ A person, who adopts a sale with full knowledge that nothing was purchased by him at the sale by reason of the judgment-debtor having ceased to have any interest therein and derives some benefit thereby, is precluded from subsequently contending that the sale was void and that he should get a refund of the purchase-money.

19. Virajlal Salot v. Bhaiji Nagardas, (1904) 6 Bom. L.R. 1103; see Coventry v. Tulshi Pershad, I.L.R. (1904) 31 Cal. 822; 8 C.W.N. 672; Balbir Prasad v. Jugal Kishore, 1918 Pat., 646 (2); 46 I.C. 473; 3 Pat. L.J. 454; Lala Kanhai Lal v. Lala Brij Lal, 1918 P.C. 70; 45 I.A. 118; I.L.R. 40 All. 487; 47 I.C. 207; Shih Chandra Kar v. Duleken, 1918 Cal. 13; 48 I.C. 78; 28 C.L.J. 123 (S.B.); Jogendra Nath Bhuraya v. Mohindra Ghora, 1919 Cal. 964; 47 I.C. 978; Basti Begam v. Sajjad Mirza, 1918 Oudh 442; 47 I.C. 558; Gauri Shanker v. Ganga Ram, 1919 Lah. 381; 52 I.C. 859, cited sub. joc. "Representation", post.
20. Halsbury's Laws of England, 4th Ed., vol. 16 Para 1507 citing Banque des Marchands de Moscou (Koupetschesky) v. Kindersley, (1951) Ch. 112 (C.A.) at pp.

- 119-120: (1950) 2 All E.R. 549 at 552; Evans v. Bartlam, (1937) A.C. 473 (H.L.) at 479, 483; (1937) 2 All. E.R. 646 at 649.
21. Krishnaswamy Ayyar v. Mohan Lal Binjini, 1949 Mad. 535; I.L.R. 1949 Mad. 657; (1948) 2 M.L.J. 559; 1949 M.W.N. 329.
22. Hariram v. Madan Gopal, 1929 P.C. 77; 114 I.C. 565; 1929 A.L.J. 406.
23. Ambu Nair v. Kelu Nair, 1933 P.C. 167; 60 I.A. 266; I.L.R. 56 Mad. 737; 143 I.C. 443; see also Sreeramulu v. Venkatanarasimham, 1938 Mad. 1004; 179 I.C. 466; (1938) 2 M.L.J. 835.
24. Chidambar Gauda v. Channappa, 1934 Bom. 329; 153 I.C. 637; 36 Bom. L.R. 694.
25. Chiranjil Lal Ramchandra v. Jata Shankar, 1942 Bom. 207; I.L.R. 1942 Bom. 744; 203 I.C. 322.

To such a person, the doctrine that a person cannot approbate and reprobate is applicable.¹ In a case of a usufructuary mortgage and lease back by the mortgagee which were parts of the same transaction, before a suit by the mortgagee for recovering the amount due on the mortgage was filed, there was an antecedent proceeding under the Rent Control Act in which the mortgagee asserted that what was payable under the lease was really rent, and the mortgagor, repudiated the assertion. The decision in the Rent Control proceeding was that there was no lease and what was payable was only interest. In the suit by the mortgagee's legal representative for recovery of the mortgage amount the mortgagor cannot contend that the mortgagee should file a suit for recovery of rent and that they could not claim interest on the principal sum due under the mortgage.²

A party cannot take the benefit of a transaction and at the same time repudiate a part of it, when the transaction is one indivisible. Where the property of a judgment-debtor is sold in execution of decree and the proceeds go in satisfaction of the decree and the decree-holder accepts the payment of the decree, he cannot impeach a part of the sale.³ Where a person, against whom execution is taken out, admits his liability, he cannot subsequently repudiate it.⁴ If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under sale *in invitum* and undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchases.⁵ Nor can a mortgagor obtaining possession by denying execution, plead the very mortgage in answer to a suit for money filed by the mortgagor.⁶ Likewise, where the property of a minor has been sold by his mother subject to a clause for repurchase, the alienee accepting the transaction cannot refuse to effect the reconveyance on the ground that this vendor, the mother, had no authority to bind the minor by the transaction.⁷ Where an order directing the payment of a decree by instalments was passed at the request of the judgment-debtor, who subsequently acted upon it, it was held that the judgment-debtor was estopped from subsequently contending that the order was not binding on him.⁸ So also, a decree-holder withdrawing moneys deposited by the judgment-debtor, under an order of Court, cannot impugn the order, by applying again for arrest and detention.⁹ Where a person allowed execution to proceed for nearly a year without objection, having twice obtained a stay of sale on the plea that he would satisfy the decree if time were allowed, and having approbated the execution-proceedings by payment of part of the debt, induced the creditor to grant time for payment of the balance, he was held estopped from saying that the decree was incapable of execution against him.¹⁰ But, in all cases, it must be shown that there really exist

1. Kumarsami Chetti v. Subramania Iyer, 1953 Mad. 671 : (1952) 2 M. L.J. 827 : 65 L.W. 1130.
2. Puttananjamma v. P. M. Channabasavanna, 5 Law Rep. 496 : (1965) 2 Mys. L.J. 792 : A.I.R. 1967 Mys. 41 (43).
3. Annapurna Bai v. Rama Chandra, 1918 Nag. 240 : 43 I.C. 178.
4. Balbir Prosad v. Jugal Kishore, 1918 Pat. 646 (2) : 46 I.C. 473 : 3 Pat. L.J. 454.
5. Kalidas Chaudhury v. Prasanna Kumar Das, 1920 Cal. 354 : I.L.R. 47 Cal. 446 : 30 C.L.J. 496 : 24

- C.W.N. 269.
6. Bachan Singh v. Waryam Singh, A.I.R. 1961 Punj. 477.
7. Rajbala Dasi v. Nadharam, 63 C.W.N. 636.
8. Fielding v. Janki Das & Sons, 1926 Lah. 465 : 95 I.C. 243.
9. Khemchandra v. Budha Singh, I.L.R. (1960) 10 Raj. 355.
10. Coventry v. Tulshi Pershad, I.L.R. (1904) 31 C. 822 : 8 C.W.N. 672; see also Subbarama Ayyar v. Chinna-swami, 1935 Mad. 295 : 156 I.C. 492 : 41 L.W. 192.

those conditions which are the essentials of an estoppel. So to petition for the postponement of a sale in execution of a decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed.¹¹ And where a son against whom a suit ought to have been instituted, conducted on behalf of his mother a suit wrongly brought against her, knowing all the time that he and not the mother should have been sued, but there was nothing to show that it was by reason of representation or any conduct of the son, that the plaintiff was led to think that the mother was the right person to be sued, it was held that the decree in that suit was not binding on the son, and did not estop him in subsequent suit against him, from contesting the validity of the decree.¹² It has always been law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that when parties have once litigated a matter it is in the interest of the State that litigation should come to an end; and if they agree upon a result or upon a verdict, or upon a judgment, as the case may be, an estoppel is raised as to all matters in respect of which an estoppel would have been raised by judgment, if the case had been fought out to the bitter end.¹³ Where a party chooses to accept and act on an award, he cannot subsequently be allowed to say that he is not bound by it.¹⁴ Similarly, also, where a party has consented to an arbitration by a person and participated in the proceedings before him subsequently, cannot afterwards challenge the jurisdiction of the arbitrator.¹⁵ Even if it were not an award but merely a compromise acted under the doctrine of estoppel will still apply.¹⁶ It has been held that the test for determining whether there is an estoppel from a decree based on a compromise is whether the particular matter in doubt was decided by the parties in such compromise and embodied in the decree.¹⁷ If a landlord withdraws the amount deposited by the transferee of a non-transferable holding to set aside a sale under Section 310-A of the Civil Procedure Code of 1882¹⁸ without raising any objection he is not thereafter permitted to plead that the transferee did not, by his purchase, acquire a valid title to the holding.¹⁹ There is nothing to prevent the parties to a suit from agreeing

11. *Mina Konwari v. Juggut Setani*, (1883) 10 C. 196 : L.R. 10 I.A. 119; 13 C.L.R. 385; see *Mst. Codey v. Mst. Ladoo*, (1870) 13 Moo. I.A. 585; *Newton v. Liddiard*, (1848) 12 Q.B. 925; see also as to petition for postponement; *Girdhari Singh v. Hurdoo Narain*, (1876) 3 I.A. 230, distinguished in *Thakoor Mahtab v. Leelanund Singh*, 7 C. 613 : (1881) 9 C.L.R. 398.
12. *Mohun Das v. Nilkomul*, (1899) 4 C.W.N. 283.
13. *Per Vaughan Williams, J.* in *Re South American and Mexican Co.*, (1895) 1 Ch. 37 at p. 45; see also *Allah Bux Pendok v. Nusserwanji & Co.*, 1936 Sind 99 : 164 I.C. 43 : 29 S.L.R. 455; *Deo Lal Jha v. Bindeshwari Narayan Singh*, 1929 Pat. 440 : 120 I.C. 776; *Bhai Shanker Nanabhai v. Morarji Keshavji*, I.L.R. (1911) 36 Bom. 283 : 12 I.C. 535; *Rameshwar Singh v. Hitendra Singh*, 1921 Pat. 131 : 62

- I.C. 469.
14. *Brij Mohanlal v. Shiam Singh*, I. L.R. 24 All. 164, 168.
15. *Union of India v. Radanath*, I.L.R. 1960 Cuttack 276.
16. *Kannai Lal v. Brij Lal*, 1918 P.C. 70, *supra*; *Dulan Bai v. Sundarsao*, 1938 Nag. 132 : I.L.R. 1937 Nag. 449.
17. *Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty*, (1912) 35 M. 75 : 9 I.C. 875 : 21 M.L.J. 709 : (1911) 1 M. W.N. 290 : 9 M.L.T. 487.
18. This corresponds to Order 21, R. 89 of the Civil Procedure Code of 1908.
19. *Gadadhar Ghose v. Midnapur Zamindari Co.*, 1918 Cal. 397 : 43 I.C. 742 : 27 C.L.J. 385; see also *Thomas Barclay v. Syed Husain Ali Khan*, (1907) 6 C.L.J. 601; *Ahmed Ali v. Roshan Ali*, (1911) 9 I.C. 619.

apart altogether from the Oaths Act, 1873, now the Oaths Act, 1969, to abide by the statement of a third person. Such an agreement is in substance a compromise or adjustment of the suit. After the agreement has been acted upon, the parties thereto are estopped from impugning it and challenging the statement of the referee.²⁰

The rule that a party cannot both approbate and reprobate has been the subject-matter of a Full Bench decision of the Madras High Court in *Kuppanna v. Peruma*,²¹ the question involved there was whether a party giving or adopting a particular value at an earlier stage of suit or appeal could be said to be estopped from showing its real value when his right to obtain a certificate under Article 133 of the Constitution had to be determined.

The rule that a party cannot both approbate and reprobate, though a species of the law of estoppel, is different from it. In the case of an estoppel, the representee should have altered his position to his detriment; for the rule of approbate and reprobate to apply, the representor must have obtained an advantage by the representation made or the stand taken by him. The rule in its origin was confined to cases of legatees and donees under wills and gifts who were precluded from accepting a benefit under the document and repudiating the same so far as it was disadvantageous to them. In *Verchures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*,²² Scrutton, L. J., observed at page 611:

'A plaintiff is not permitted to approbate and reprobate. The phrase is apparently borrowed from the Scotch Law where it is used to express the principle embodied in our doctrine of election, namely, that no party can accept and reject the same instrument.²³ The doctrine of election is not, however, confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.'

This rule was subjected to a more detailed examination in *Lissenden v. Bosch (C. A. V.) Ltd.*,²⁴ where the House of Lords referred to and defined the origin, scope and operation of it. In the course of his speech, Viscount Maugham observed that the phrase was of Scottish origin and was no more than a picturesque synonym for the ancient equitable English doctrine of election which was distinct from the common law principle of election of remedies and one confined its application to wills, deeds and other instruments *inter vivos*.

The principle was stated to be one of the presumed intention of the testator or the author of the instrument, namely, that a legatee or beneficiary should not claim under the will or instrument and also adversely to it. It

20. *Suraj Narain v. Beni Madho*, 1937 All. 701 : 171 I.C. 697 : 1937 A. L.J. 1066 ; see also the remarks of Sulaiman, C.J., in *Mst. Akbari Begam v. Rahmat Hussain*, 1933 All. 861 : 146 I.C. 84 : 1933 A.L.J. 1127 (S.B.).

21. A.I.R. 1961 Mad. 511.

22. (1921) 2 K.B. 608.

23. *Ker. v. Wauchope*, (1819) 1 Bl. 1 (21) ; *Douglas Menzies v. Umphelby*, 1908 A.C. 224 (232).

24. 1940 A.C. 412.

is essential, therefore, for the application of the rule that no person should be taken as having made an election until he had an opportunity of ascertaining his rights and was aware of the nature and extent, election being based on knowledge. Lord Atkin referring to the subject of approbate and reprobate, observed at page 429 :

'In this country I do not think it expresses any formal legal concepts. I regard it as a descriptive phrase, equivalent to "blowing hot and cold". I find great difficulty in placing such phrases in any legal category, though they may be applied correctly in defining what is meant by election whether at common law or in equity. In cases where the doctrine does apply the person conceded had the choice of two rights, either of which he is at liberty to adopt but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot afterwards assert the other.'

In Broom's Legal Maxims, 10th Ed., while discussing the maxim *allegans contraria non est audiendus* (he is not to be heard who alleges things contradictory to each other), it is stated at page 103 :

'We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction or insist at different times on the truth of each of two conflicting allegations according to the promptings of his private interest.'

The principle variously known as approbate and reprobate blowing hot and cold or as the equitable principle of election, was referred to by the Supreme Court in *Nagubai v. Shamarao*,²⁵ where it was observed that the maxim that a person cannot approbate and reprobate was only one application of the doctrine of election and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.

The rule in its operation might enable a party to shut out truth from a court of justice. It is, therefore, necessary to define its limits with precision. A mere erroneous statement at one stage of a litigation cannot without more be held to prejudice a statutory or other right of a party. While therefore it is necessary that there should be some rule to prevent a party from playing fast and loose with a court, there should be limitations placed on it conformably to the origin and principle of the rule. The rule as to election as stated in Halsbury's Laws of England, Vol. XV, Simond's Ed., in para 340 at page 171 is :

'On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*. The principle that a person may not approbate and reprobate expresses two propositions, first that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, in general at any rate, as having so elected unless

25. A.I.R. 1956 S.C. 593 : 1956 S.C. J. 655 : 1956 S.C.A. 959.

he has taken a benefit under or arising out of conduct which he has pursued and with which his subsequent conduct is inconsistent.'

The two essential elements of an election thus are: (1) that the person who is electing should have a choice between two alternative courses, and (2) he should derive an advantage by such choice. A plaintiff who makes an erroneous statement of value of the subject-matter, has certainly the choice between telling the truth and untruth; but where an erroneous statement is not made with the object of securing an advantage, e. g., having a *forum* of his choice, the principle cannot apply. A defendant adopting the valuation made by the plaintiff for the purpose of filing an appeal (without more) could not be said to have a choice in the matter as he is generally bound to adopt the valuation made by the opposite party.

It is difficult to accept the contention of the learned counsel for the respondent that a defendant should anticipate his losing the case in the Trial Court and obtain from the Court an adjudication as to the proper valuation to enable him to file an appeal to a court of his own choice. Secondly, the rule will not apply where there would be no change in the forum of appeal whether the original valuation was adopted or a higher valuation is put, for *ex concessis* there would be neither an advantage gained nor a detriment suffered by any party.

In *Banque des Marchands de Moscou v. Kindersley*,¹ Evershed, Master of Rolls, observed at page 119:

'The phrases "approbating and reproduce" or "blowing hot" and "blowing cold" are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined. Otherwise the claim or allegation would be liable to be rejected on the mere ground that the conduct of the party making it was regarded by the court as unmeritorious. From the authorities cited to us it seems to me to be clear that these phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, secondly that he will not be regarded at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent.'

It is evident that where no advantage accrues to a party by making or adopting a wrong statement, no question of approbate and reprobate blowing hot and cold can arise. In the instant case, no advantage accrued to the defendant by the lower valuation, because the appeal against the judgment of the Trial Court would lie to the High Court whether on the original valuation or the revised one. When, therefore, he attempted to show the subject-matter of the suit was of a higher value than what was stated in the memorandum of appeal to this Court, his attempt, to quote the words of Greer, L. J. in *Mills v. Duckworth*,² was 'not to blow hot and cold but to blow honest'. Where time was granted to a tenant to vacate the premises on his request in an ejectment proceeding, he is not estopped in a subsequent

1. 1951 Ch. 112: (1950) 2 All E.R. 549 (552).

2. (1938) 1 All E.R. 818.

proceeding under Section 19 of Slum Areas (Improvement and Clearance) Act from showing that it will not be possible for him to get an alternative accommodation.³

It will be seen that in several of the cases referred to in the order of reference the two conditions, namely, (1) a party having a choice of making one of two statements as to value and making one, and (2) his deriving an advantage thereby, have been present and it was held that the party making the statement was held to preclude from departing from it at a later stage.

In *Kristo Indro Saha v. Huromonee Dassee*,⁴ the defendant, by accepting the revised valuation of the plaintiffs, derived an advantage by having his appeal before the High Court which he would not have had, had he not accepted it. In *Rattaya v. Brahmayya*,⁵ the plaintiff who originally valued his suit at Rs. 10,000 and filed an appeal to the Court was precluded from saying that the valuation was incorrect when the defendant sought to file an appeal to the Privy Council on the basis of such valuation.

In *Vasi Reddi v. Secretary of State*,⁶ the plaintiff originally valued the suit at an amount higher than Rs. 10,000. This was not objected to but adopted by the defendant who took advantage of it by filing an appeal in the High Court. But the latter contested the right of the plaintiff to appeal to the Privy Council when the High Court decided against him. Ramesam and Venkatasubba Rao, JJ., held that the value given for the purpose of court-fee on the plaint should be taken to represent at least the minimum value.

In *Alagappa Chetty v. Nachiappan*,⁷ the plaintiff who valued the suit claim at less than Rs. 10,000 sought unsuccessfully to contend that the value was higher when he filed an application for leave to appeal to the Privy Council. Although there are certain passages in the judgment showing that the plaintiff had no right to repudiate the valuation once given, it cannot be held that the learned Judge intended to lay down any different rule as the case appears to have been decided on a question of fact. This is plain from the following observations of Oldfield, J. (at p. 734 of M. L. J.) (at p. 128 of A.I.R.) :

‘There is nothing, it is to be noticed, to explain how the petitioner came to adopt the market-value of the property on which his valuation had to be made at a figure in the aggregate of Rs. 2,800. There is nothing as to the details by which he now proposes to arrive at the higher figure he contends for. There should, in my opinion, be much stronger reason before a fresh enquiry into a matter on which the petitioner has already put forward his estimate can be allowed at this stage.’

In *Mallapudi Venkataravudu v. Mallina Venkanna*,⁸ the plaintiff who wanted to file an appeal to the Privy Council attempted to show that the value of the subject-matter in appeal was beyond Rs. 10,000. The valuation

3. *Smt. Raj Rani v. Dwarka Das*, A. I.R. 1972 Delhi 208.

4. 1 Ind. App. 84.

5. 49 M.L.J. 309 : 91 I.C. 572 : A. I.R. 1925 Mad. 1223.

6. I.L.R. 55 M. 106 : 135 I.C. 442 :

A.I.R. 1932 Mad. 125.

7. 43 M.L.J. 728 : A.I.R. 1923 Mad. 125 : 69 I.C. 385.

8. 104 I.C. 577 : A.I.R. 1927 Mad. 862.

given in the plaint in regard to the items which formed the subject-matter of the appeal was less than Rs. 10,000. The learned Judges held that the plaintiff was not absolutely precluded from saying that the valuation in the plaint was wrong. They observed :

“The question arises, is the plaintiff bound by this valuation? Two views are possible. The first view is that the plaintiff is absolutely precluded from contending that his valuation in the plaint is wrong; secondly, that the Court will merely treat his admission as a strong piece of evidence against him. We think that the second is the correct view.”

In making those observations, the learned Judges held that the decision in *Kristo Indro Saha v. Heeromonee Dasee*⁹ was a case where the defendant had taken advantage and benefited by the plaintiff's valuation but when it suited him contended that the original valuation was incorrect. The case where a defendant could be said to derive an advantage by reason of an incorrect valuation by the plaintiff, is illustrated by the two decisions of the Calcutta High Court, in *Rameshwar v. Siddeshwar*,¹⁰ and in *Mahendra Narayan v. Janakinath*.¹¹

In both the cases the plaintiff valued the suit so as to come within the jurisdiction of a District Munsif's Court. The defendant accepted the valuation and filed an appeal against the decision in the District Court and a second appeal was thereafter taken by the plaintiff who succeeded in the High Court. With a view to appeal to the Privy Council the defendant attempted to prove at a later stage that the real value of the property was different from the one made by the plaintiff. It was held that he could not do so, as he obtained an advantage by adopting the lower valuation in that he was entitled to appeal to the District Court.

The true principle, if we may say so with respect, was laid down in *Radhika Nath v. Midnapore Zemindari Co.*,¹² where the plaintiff valued the suit at less than Rs. 10,000 and filed it in the Court of first instance. The suit was decreed and the defendant in filing the appeal to the High Court adopted the plaint valuation. He succeeded in the High Court. The plaintiff applied for leave to appeal to the Privy Council stating that the real value of the property was more than Rs. 10,000. That was a case where no change of forum of the appeal was involved, even if the real value had been adopted by the plaintiff in the first instance. The learned Judges observed at page 296 :

“On the other hand, the trend of authorities is to the effect that whether by way of estoppel or *res judicata* the Courts have considered whether the question of valuation has been raised and decided at an earlier stage and also whether the opposite party has been led to act upon such valuation, as for instance by way of second appeal, or to put it in another way, whether the party seeking to vary the valuation for the purpose of appeal to England is in the position of approbating and reprobating. Where this is the case, variation of value should not be allowed. But where this is not the case,

⁹ (1878) 1 I.A. 84.

¹⁰ A.I.R. 1927 Cal. 418 : 101 I.C. 901.

¹¹ I.L.R. 58 C. 66 : 132 I.C. 910 :

A.I.R. 1931 Cal. 417.

¹² 171 I.C. 163 : A.I.R. 1937 Cal. 292.

a party should not be shut out from his right to appeal to England merely because of an erroneous valuation in the plaint.'

This view was affirmed in *Annapurna Cotton Mills, Ltd. v. S. Bhaduri*,¹³ where the learned Judges held that except in cases where some advantage had been obtained by the person who had made or adopted a lower valuation on the basis of such lower valuation as against the opposite party, the doctrine that a person cannot approbate and reprobate had no application, and that even the person who had made the lower valuation would not be precluded from showing the real value. In their Lordships' opinion, principle and authority alike support the view taken by Ramesam and Venkatasubba Rao, JJ.¹⁴

It would follow that the observations of Basheer Ahmed Sayeed and Subrahmanyam, JJ., in S.C.P. Nos. 7 and 8 of 1958, cannot be accepted as a correct statement of the law. In that case a specific issue as to the correctness of the valuation was raised and given up. The judgment of the learned Judges can perhaps be supported on the principle of *res judicata*; but it is difficult to agree with the view that independent of any rule analogous to *res judicata* an erroneous valuation by a plaintiff if acquiesced in by the defendant, would preclude the latter from showing the real value of the subject-matter at a later stage.

Nor can it be said that the rule of approbate and reprobate will in no circumstances apply to such cases. That rule would apply to cases where the two conditions as to its applicability are satisfied; where they are not satisfied a mere erroneous valuation of the subject-matter of the suit by a party at one stage of the suit or appeal will not preclude him when the question arises for the issue of a certificate under Article 133 of the Constitution.

It would be open to any party, be he the plaintiff or defendant, to go behind the valuation adopted in the plaint or in the memorandum of appeal, as the case may be, and show the real value of the subject-matter in dispute, except where (1) there has been a judicial adjudication of the correctness of the original valuation in such a way as to attract the principle of the rule of *res judicata*, or (2) where the party making the original valuation or the one adopting it had an option to give that value or the correct value and while exercising the option by giving one of such values he gained for himself an advantage or made the opposite party suffer a detriment.

In *Budhi Panigrahi v. Bhagirathi*,¹⁵ it has been held:

In determining the value of the subject-matter in dispute for the purpose of an application by plaintiff under Article 133 (1) (a) of the Constitution, the High Court will treat the plaintiff's admission in plaint regarding the valuation as a strong piece of evidence against him. Where the plaintiff has put not merely notional or artificial value of the subject-matter in the plaint but has given the actual value which was not erroneous, he would be precluded from contending that the valuation given by him in the plaint was erroneous.

To conclude: Attractive as they are, the maxims 'blowing hot and cold', 'playing fast and loose', sometimes tend to induce somewhat loose con-

13. A.I.R. 1958 Cal. 187.

14. 104 I.C. 577: A.I.R. 1927 Mad.

862.

15. A.I.R. 1962 Orissa 159.

ceptions which may affect even judicial decisions. That mischief has to be carefully guarded against. Strictly speaking, no formal legal concept is inherent or necessarily implied or involved in the maxims quoted or in the familiar cognate phrases 'to approbate and reprobate', 'to affirm and disaffirm'. At the most they may broadly be described in legal parlance as picturesque and synonymous of certain aspects of the law of waiver, estoppel or acquiescence or of the allied legal doctrines of *res judicata* and election. That, however, is the limit and their application should not be extended beyond it.

To preclude a party from 'blowing hot and cold' or 'playing fast and loose', or, to use a more common expression, from 'approbating and reprobatng', one must establish a case of estoppel, waiver or acquiescence or invoke the well-known principles, underlying *res judicata* or election. In the application of these maxims, it is unsafe to go beyond the limits, set by the above principles of law. It is not in every case that a man is precluded by law from 'blowing hot and cold' or 'playing fast and loose'; to prevent him from so doing the bar of the legal principles; referred to above, must be established. Generally speaking also, in the true application of those maxims in the field of law, some change of position is contemplated and some sort of estoppel in the broader sense of that term eventually interferes.¹⁶

7. Promissory Estoppel. (a) *What is the doctrine of.* When one party has by his words or conduct made to the other a clear and unequivocal promise or assurance which is intended to affect legal relations between them and to be acted on accordingly then once the other party has taken him at his word and acted on it the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him; he must accept their legal relations subject to the qualification which he himself has so introduced.¹⁷

A representation made by one party for the purpose of influencing the conduct of the other party and to be acted upon by him will in general be sufficient to entitle him to assistance of the Court of equity for the purpose of making good such representation.¹⁸ But where there is no such representation and the agreement to supply electricity at cheap rates was the result of negotiation the consumer could not plead promissory estoppel.¹⁹

Such equity differs essentially from the doctrine embodied in Section 115 of the Evidence Act, which is not a rule of equity, but of evidence formulated and applied in the Court of Law.²⁰ It also differs from estoppel properly

16. Subodh Chandra Mazumdar v. Manorama Ghose, I.L.R. (1956) 1 Cal. 150.

17. Halsbury's Laws of England, 4th Edition (1976) page 1017; Combe v. Combe (1951) 2 K.B. 215 (220); (1951) 1 All E.R. 767 (770); State Bank of India v. Jagroop Baijnath, 1974 M.P.L.J. 329; 1974 Lab. L.J. 476; A.I.R. 1974 M.P. 193.

18. Kamalendu Parsad Padhi v. Sambalpur University, A.I.R. 1976

Orissa 134; Triloki Nath v. Deputy Director of Consolidation, 1979 A.W.C. 357.

19. Indian Aluminium Co. v. C.E.S. Board, A.I.R. 1975 Orissa 100.

20. Municipal Corporation of Bombay v. Secretary of State, I.L.R. (1905) 29 Bom. 580; Jasjeet Films (P) Ltd. v. Delhi Development Authority, A.I.R. 1980 Delhi 83; Amrit Banaspati Co. Ltd. v. State of Punjab, (1975) 77 Punj. I.R. 557.

so called in that the representation relied upon need not be one of present fact but is in regard to something promised to be done in future.²¹

(b) *Its ingredients.* Before the doctrine of promissory estoppel can be invoked it must be proved—

- (1) that there was a representation or promise in regard to something to be done in future ;
- (2) that the representation or promise was intended to affect the legal relations of the parties and intended to be acted on accordingly ; and
- (3) that it is one on which the other side has acted to his prejudice.²²

A definite representation or assurance is essential. Mere expression of opinion or vague hope is not enough.²³ When there was no representation by Collector to give levy sugar relying on which the sugar dealers could have acted to their detriment the Government is not estopped.²⁴

The third ingredient as explained in some cases is that it is not necessary at all that the promisee, acting in reliance on the promise, should have suffered any detriment. What is necessary is only that the promisee should have altered his position in reliance on the promise. This alteration of position need not involve any detriment to the promisee. If detriment were a necessary element, there would be no need for the doctrine of promissory estoppel, because in that event, in quite a few cases, the detriment would form the consideration and the promise would be binding as a contract. The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise but the prejudice which would be caused to the promisee, were the promisor allowed to go back on the promise.²⁵ In

21. Halsbury's Laws of England, 3rd (Simond) Edition, page 175 ; Indo Foreign Commercial Agency v. Union of India, A.I.R. 1976 Delhi 4 ; Union of India v. Indo Afghan Agencies, A.I.R. 1968 S.C. 718 : (1968) 2 S.C.R. 366 ; Century Spinning & Manufacturing Co. Ltd. v. Udhastanagar Municipal Council, (1970) 3 S.C.R. 854 : A.I.R. 1971 S.C. 1021 ; B. Subramanyam v. State, A.I.R. 1975 A.P. 126 : (1974) 2 An. W.R. 228 : (1974) An. L.T. 289 ; Amrit Banaspati Co. Ltd. v. State of Punjab, (1975) 77 Punj. L. R. 557.
22. Air Corporations Employees' Union v. G. B. Bhirade, 71 Bom. L.R. 707 : A.I.R. 1971 Bom. 288 (last two ingredients not proved) ; Halsbury's Laws of England, 3rd Edition, Volume 15, p. 175 para 344. See also Behlpur Company Ltd. v. The State, 71 Bom.L.R. 856 ; Cooper Engineering Co. v. D. M. Aney, 72 Bom. L.R. 20.
23. P. C. Sethi v. Union of India, A. I.R. 1975 S.C. 2164 : (1975) 3 S.C.R. 201 : (1975) 4 S.C.C. 67 :

1975 S.C.W.R. 282 : 1975 Scrv. J., J. 202.

24. Rachapudi Subrahmanyam v. E. G. Kakinada, (1973) 2 An. W.R. 157 : I.L.R. 1974 A.P. 260 : A.I.R. 1974 A.P. 55.
25. M. P. Sugar Mills v. State of U. P., A.I.R. 1979 S.C. 621 relving on Central London Property Trust v. High Trees House, (1956) 1 All E.R. 256 : (1947) 1 K.B. 130 ; W. J. Alan & Co. Ltd. v. E. I. Nasar Export & Import Co., (1972) 2 All E.R. 127 ; observations of Viscount Simonds, Lord Tucker and Lord Cohen in Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co. Ltd., (1955) 2 All E. R. 657 that fundamental thing is alteration of position ; Ajayi v. Briscoe, (1964) 3 All E.R. 556 ; observations of Lord Diplock in Kammin's Ballrooms Ltd. v. Zenith Investments (Torguay) Ltd., (1970) 2 All F.R. 871 ; Judgment of Dixon J. in the Australian case of Grunt v. Great Boulder Pty. Gold Mines Ltd., (1938) 59 C.L.R. 641.

Mahendra and Mahendra Ltd. v. Union of India,¹ the Supreme Court reiterated that estoppel can arise only if a party to a proceeding has altered his position on the faith of a representation or promise made by another.. The same view was taken by Delhi High Court² holding that it is necessary to prove that but for the inducement, the petitioners lessees would not have altered their position.

When the representation made by Government to locate a health centre also provided certain conditions which were not fulfilled by the Gram Panchayat, no question of estoppel can arise.³ Where the termination of petitioners service was made in accordance with the terms of appointment, no question of estoppel can arise.⁴ Where a Government servant entered into service knowing that he did not possess the necessary qualification, his appointment and promotion being under a mistake, the Government cannot be estopped from terminating his services.⁵ Making of interim payments to a contractor does not estop the Government from withholding final bill and forfeiting security deposit, because under the terms of contract interim payments were not conclusive as to quality of work and materials.⁶

There must be a promise or assurance intended to be acted upon which in fact must have been acted upon and only then question to honour it arises. No estoppel arose where there is no evidence to show that a party acted on the representation made by the other not to claim compensation if the property was released.⁷

See also Note 2 (u) Equitable estoppel under Section 115.

(c) *Various names and history of origin.* The doctrine of promissory estoppel is also known by the name 'equitable estoppel', 'quasi estoppel' and 'new estoppel'. It has been the subject of considerable recent development.⁸

It is steadily expanding. It is a principle evolved by equity to avoid injustice.

(i) *England.* More than hundred years back it was thought that this doctrine is applicable only to representations as to some state of facts alleged to be at the time actually in existence and to promises *de futuro*, which if binding at all, must be binding only as contracts.⁹ Then in some cases decided by House of Lords the principle was applied as between parties who were already bound contractually one to the other and where one of the parties induced the other party to believe that the strict rights under the

1. (1979) 2 S.C.C. 529.

2. *Jasject Films (P) Ltd. v. Delhi Development Authority*, A.I.R. 1980 Delhi 83.

3. *Sk. Raffiquiddin v. Samsuddin*, (1971) 2 Cut. W.R. 733.

4. *West Janmura Coal Co. v. Workmen*, I.L.R. 1974 H.P. 358; 1974 Lab. I.C. 1151.

5. *R. S. Guahal v. C. E. Western Command*, 1971 Scr. L.R. 673; 1971 Lab. I.C. 1037.

6. I.L.R. (1971) 21 Raj. 457.

7. *Sat Narain v. Union of India*, (1968) 2 S.C.W.R. 335 relying on *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947)

1 K.B. 130; *Charles Rickard Ltd. v. Oppenheim*, (1950) 1 K.B. 616; *Lyle-Meller v. A. Lewis & Co. Ltd.*, (1956) 1 All.E.R. 247 (C.A.) and *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, (1955) 2 All E.R. 657.

8. *Combe v. Combe*, (1951) 2 K.B. 215 (CA); (1951) 1 All E.R. 767; *Charles Rickard Ltd. v. Oppenheim*, (1950) 1 K.B. 616; (1950) 1 All E.R. 420; *Wallis v. Semark*, (1951) 2 T.L.R. 222 (C.A.) at 226; *Lyle-Meller v. A. Lewis & Co. Ltd.*, (1956) 1 All E.R. 247. (C.A.)

9. *Jorden v. James William Baylen Money*, (1854) 5 H.L.C. 185.

contract would not be enforced.¹⁰ Lord Denning expanded the doctrine in 1947 when he observed that a promise must be honoured when it was made with the intention to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which in fact was so acted upon.¹¹

The limitation imposed upon the doctrine in *Hughes v. Metropolitan Rly. Co.*¹¹⁻¹ and *Birmingham & District Land Company v. London & Northern Western Rly. Company*¹¹⁻² about the existence of pre-existing contractual relationship between the parties was not considered essential when there is a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties.¹² This necessity of pre-existing contractual or legal relationship was not recognised in *High Trees* case and was considered unnecessary by L. J. Denning in *Evenden v. Guildford City Association Football Club Ltd.*,¹³ where the learned Judge observed that the doctrine applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act on it and he does act on it. L. J. Denning applied this doctrine of equity to prevent persons from insisting on strict legal rights arising under contract, title deeds or statute.¹⁴

The doctrine of consideration is so firmly entrenched in common law and judicial thinking in England that even after fusion of common law and equity (brought about by Supreme Court Judicature Acts, 1873 and 1925) the English Courts resisted any attempt at diluting the requirements of consideration. In the *Celebrated Central London Property Trust Ltd. v. High Trees Ltd.*¹⁵ and in *Combe v. Combe*,¹⁶ Lord Denning observed that the doctrine of promissory estoppel can never do away with the necessity of consideration and that it cannot found a cause of action in itself. He also sounded a note of caution in *Combe v. Combe*¹⁶⁻¹ that this doctrine should not be stretched too far. The doctrine was held to afford a defence against the enforcement or otherwise of enforceable rights: it was held not to create a cause of action.¹⁷ To give plaintiff a cause of action on a promissory estoppel must be little less than to allow an action in contract where consideration is not shown and that cannot be done because consideration still remains a cardinal necessity for formation of contract.¹⁸ The doctrine cannot create any new cause of action where none existed.¹⁹

The modern attitude towards the doctrine of consideration is changing. Lord Wright remarked in an article published in 49 *Harvard Law Review*, page 1225 that the doctrine of consideration in its present form serves no practical purpose and should be abolished. It has been criticised by Holdsworth

10. *Hughes v. Metropolitan Rly. Co.*, (1877) 2 A.C. 439; *Birmingham & District Land Co. v. London & North Western Railway Co.*, (1888) 40 Ch. D. 268.

11. *Central London Property Trust Ltd. v. High Trees House Ltd.*, (1956), 1 All E.R. 256; (1947) 1 K.B. 130.

11-1. (1877) 2 App. Cas 439.

11-2. (1880) 40 Ch. D. 268 (C.A.).

12. *Durham Fancy Goods Ltd. v. Jackson (Michael) (Fancy Goods) Ltd.*, (1968) 2 All. E.R. 927 (1968) 2 All E.R. 929.

13. (1975) 3 All E.R. 269.

14. *Crabb v. Arun, District Council*, (1975) 3 All. E.R. 865.

15. (1947) 1 K.B. 130; (1956) 1 All E.R. 256.

16. (1951) 2 K.B. 215; (1951) 1 All E.R. 767.

16-1. *Ibid.*

17. *Beesly v. Hallwood Estates Ltd.*, (1960) 3 All E.R. 314; (1960) 1 W.L.R. 549.

18. Sneller Bowler and Turner in their *Treatise*, 3rd Edition, page 384.

19. *Halsbury's Laws of England*, 4th Edition 1975 Vol. 18 page 1017.

in his History of English Law and by Sir Fredrick Pollock in 'Genesis of Common Law', page 91. Lord Denning has said that we should not be unduly anxious to protect this doctrine of consideration against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel.²⁰ Promissory estoppel has not been confused in later cases to a purely defensive or passive equity. It has been successfully invoked by a party to support his cause of action without actually founding his cause of action exclusively upon it.²¹ Even Lord Denning observed that there are estoppels and estoppels, some do give rise to a cause of action, some do not and added that in the species of promissory estoppel there is proprietary estoppel which does give rise to a cause of action.²²

In *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*,²³ it was observed that the doctrine may have been too widely stated in recent times. The limits of doctrine are not yet finally settled.²⁴ It was observed that the time may soon come when the whole sequence of cases based on promissory estoppel since the war beginning with *Central London Property Trust Ltd. v. High Trees Ltd.*²⁴⁻¹ may need to be reviewed and reduced to a coherent body of doctrine by the Courts.²⁵

(ii) *America*. Long before the decision in the *High Trees* case the American Law Institute's Reinstatement of the Law of Contracts came out with the following proposition in Article 90 :

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of the promisee; and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Subscription was promised to be made without request that the Church do anything on the faith of it. Later, the Church did incur expense to the knowledge of the promisor and in the reasonable belief that promise would be kept. Promise was held to be binding though there was no consideration for it.¹ A contractor about to tender for a contract, invites a sub-contractor to submit a bid for a sub-contract and after receiving his bid, the sub-contractor has been held unable to retract his bid and be liable in damages if he does so.² It was held that absence of consideration is not fatal to the enforcement of promise and that cause of action can be founded upon that promise.

(iii) *India*. M/s. Cohen & Brothers had contracted with Ganges Manufacturing Company to buy 1,80,000 gunny bags for cash on delivery. Subsequently, the plaintiffs Sourujmull and others agreed with M/s. Cohen to

20. *Dunlop Pneumatic Tyre Co. v. Selfridge*, 1915 A.C. 847; 1 E.L.T. 386.

21. *Robertson v. Minister of Pensions*, (1949) 1 K.B. 227; *Evenden v. Guildford City Association Football Club Ltd.*, (1975) 3 All E.R. 269.

22. *Crabb v. Arun District Council*, (1975) 3 All E.R. 865.

23. (1955) 2 All E.R. 657 (H.L.).

24. *Re. Venning*, (1947) 63 T.L.R. 394

(C.A.) per Somervell L. J.; *Combe v. Combe*, (1951) 2 K.B. 215.

24-1. 1947 K.B. 130.

25. *Woodhouse A. G. Israel Cocoa S. A. v. Nigerian Produce Marketing Co. Ltd.*, (1972) 2 All E.R. 271.

1. 12 N.Y. 18; 74 N.L. 72.

2. *Drennan v. Star Paving Co.*, (1958) 31 Cal. 2d. 409.

advance Rs. 15,000 against 87,500 bags. The defendants gave delivery orders to M/s. Cohen. The goods remained unpaid for. M/s. Cohen endorsed some delivery orders to the plaintiffs. On these orders the agents of the defendants at request of M/s. Cohen wrote that the bearer will personally take delivery of each lot as required. The plaintiff took delivery of 50,000 bags. The defendants refused to deliver to them the remainder on the ground that M/s. Cohen had not paid him according to terms of contract. The plaintiffs brought the suit which was decreed. On appeal the High Court of Calcutta held that by their conduct the defendants induced the plaintiffs to advance Rs. 15,000 to M/s. Cohen and it was not open to defendants to repudiate the transfer. This case is an important landmark in the development of doctrine of promissory estoppel in India. Three principles were established by this case (1) that equity by way of representation is a separate variety from one which is incorporated in Section 115 of the Evidence Act and that Court has always a power to invoke this principle in equity and good conscience to prevent a defendant from resiling from his promise, (2) that a promise or representation can furnish a cause of action and is not to be used merely by way of defence, and (3) that it is not necessary for the application of this rule of equity that consideration should pass between the promisor and promisee.³

Twenty years thereafter the principle was made applicable to a promise/representation made by Government. The predecessor of plaintiff Ahmad Yar Khan privately constructed Hajiwah canal on Sutlej river spending more than Rs. 9 lacs. Government permitted the canal to pass through the Government lands also on satisfying itself that in the district of Multan considerable area could be irrigated by this canal and there was hope of increase in Government revenue. Thereafter a large tract of land including lands under the canal were given to the predecessors of the plaintiff in recognition of their loyalty and good service to the Government and particularly for digging the Hajiwah canal. One of the terms in the grant was that Government could take over the management of the canal for a temporary period for better management in the interest of public. Thereafter the Government passed an order permanently taking over the management of the canal and seriously contesting the proprietary right of the plaintiff to the canal land. The plaintiff filed suit. The suit was decreed by the Privy Council. It was held that the Government must have intended the Khans to understand and in fact, must have led them to accept that all Government land required for the canal would be made over to them in proprietary right. It was recognised that the rule of equity can be used as a cause of action and absence of consideration is no bar for invoking the principle.⁴

In *Sat Narain v. Union of India*⁵ it was held that promissory estoppel is a shield for defence, but not a weapon of attack and does not furnish a basis for action. However in some other cases it was laid down that the representation constitutes the cause of action and that consideration for promise is not necessary.⁶

3. *Ganges Manufacturing Co. v. Sourajmull*, 1880 I.L.R. 5 Cal. 669.

4. *Ahmad Yar Khan v. Secretary of State for India*, (1901) 28 Ind. App. 211 following *Ramsden v. Dixon*, *Law Reports* (1886) 1 H.L. 129.

5. A.I.R. 1961 P.W. 814.

6. *A. S. Subramanian v. State*, (1974)

2 An. W.R. 228 : (1974) 1 An. L.T. 289 : 1.L.R. 1974 An. Pra. 972 : A.I.R. 1975 Andh. Pra. 126 ; *M. P. Sugar Mills v. State of U. P.*, A.I.R. 1979 S.C. 621 ; *Janjeet Films P. Ltd. v. Delhi Development Authority*, A.I.R. 1980 Delhi 88.

(d) *Applicability against Government and public bodies.* (i) *England.* Rowlatt J. in *Rederiaktiebolaget Amphitrite v. R.*⁷ held that an undertaking given by the British Government to certain neutral shipowners during the First World War that if the shipowners sent particular ship to the United Kingdom with a specified cargo, she would not be detained, was not enforceable against the British Government in a Court of law because it is not competent for Government to fetter its future executive action, which must necessarily be determined by the needs of community when the question arises. He also held that Government cannot by contract hamper its freedom of action in matters which concern the welfare of the State.

In *Commissioner of Crown Lands v. Page*⁸ it was held that when the Crown or any other person is entrusted, whether by virtue of prerogative or by statute, with discretionary powers to be exercised for public good, it does not when making a private contract in general terms undertake to fetter itself in the use of those powers and in the exercise of its discretion.

But Lord Denning in *Robertson v. Minister of Pension*⁹ said that the Crown cannot escape by saying that estoppel do not bind the Crown. He also observed that Crown cannot escape by praying in aid the doctrine of Executive necessity, that is, the doctrine that the Crown cannot bind itself so as to fetter its future executive action. This view of Lord Denning has not been disapproved by House of Lords in *Howell v. Falmouth*,¹⁰ though the actual decision of Lord Denning was overruled on another ground that the doctrine of promissory estoppel cannot be invoked to bar the Crown "from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it". As such though the position is not absolutely clear, but according to Supreme Court in the case of *M. P. Sugar Mills v. State of U. P.*¹¹ the judicially favoured view appears to be that in England Crown is not immune from liability under doctrine of promissory estoppel.

As regards public bodies it is well settled that a public authority cannot by contract fetter the exercise of its discretion. Similarly estoppel cannot be raised to prevent or hinder the exercise of the discretion conferred by Statutes.¹² A public utility corporation bound by statute not to charge greater or less compensation for any service is not bound by estoppel to claim proper charges.¹³

(ii) *America.* For a long time American Courts held that doctrine of promissory estoppel does not apply to Government. It is pointed out in the 2nd edition of American jurisprudence in paragraph 123:

"equitable estoppel will be invoked against the State when justified by the facts, though it should not be lightly invoked". Later in the same paragraph it is stated that "as a general rule doctrine of

7. (1921) 3 K.B. 500 : 136 L.T. 63.

8. (1960) 2 Q.B. 274 relying upon *Ayr Harbour Trustees v. Oswald*, (1883) 8 App. Cases 623 (H.L.) ; *Rederiaktiebolaget Amphitrite v. R.*, (1921) 3 K.B. 500 ; *Board of Trade v. Temperley Steam Shipping Co. Ltd.*, (1926) 26 L.P.L.R. 76 ; *Williams Cory & Sons Ltd. v. City of London Corporation* (1951)

2 K.B. 476 (C.A.).

9. (1949) 1 K.B. 227.

10. 1951 A.C. 837.

11. A.I.R. 1979 S.C. 621.

12. *Maritime Electric Co. v. General Dampier Ltd.*, 1937 A.C. 610 ; *South-end-on-Sea Corporation v. Hodgson*, (1962) 1 Q.B. 416.

13. *Maritime Electric Co. v. General Dairies Ltd.*, 1937 A.C. 610.

promissory estoppel will not be applied against the State in its Governmental, public or sovereign capacity unless its application is necessary to prevent fraud or manifest injustice."

In *Federal Crop Insurance Corporation v. Merrill*¹⁴ the majority decision of Supreme Court of America was against the applicability of rule of promissory estoppel on the ground that Wheat Crop Insurance Regulations prohibited insurance of receded wheat and the assurance given by the committee as the agent of the Corporation that the receded wheat was insurable being contrary to Wheat Crop Insurance Regulations, could not be held binding on Insurance Corporation. It is not said that even if assurance was not prohibited by law it would not be binding.

In *Valsonavich v. United States*¹⁵ it was held that Government would not be estopped by the acts of its officers and agents who without authority enter into agreements to do what the law does not sanction or permit and those dealing with an agent must be held to have notice of limitations of his authority.

(iii) *India.* (A) *When promise not recorded according to statutory requirement.* In 1865 the Government of Bombay called upon the predecessor-in-title of the Municipal Corporation of Bombay to remove old markets from a certain site and vacate it and on the application of Municipal Commissioner, the Government passed a resolution approving and authorising the grant of another site to the Municipality. The resolution further stated that the Government do not consider that any rent should be charged to the Municipality for the new site because the markets will be for the benefit of the whole community. The Municipal Corporation thereupon gave up the old site and spent Rs. 17 lacs in erecting markets on the new site. In 1940 the Collector assessed the new site to land revenue and the Municipal Council thereupon filed a suit for a declaration that the order of assessment was *ultra vires* and it was entitled to hold land for ever without payment of any land revenue. The High Court of Bombay decreed the suit on the basis of equity arising in favour of the Municipal Corporation. On appeal to Supreme Court by the Collector, the majority of Judges decided the case in favour of Municipal Corporation on the ground of acquisition of limited title by passage of time that is to hold land in perpetuity free of rent. But Chandreshekhar, J. rested his decision on promissory estoppel, holding that the Government is bound by its promise not to charge any rent. He observed that Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power. Equity was thus recognised by him to afford a cause of action. Patanjali Shastri, J. held that there is no room for the application of the principle of *Ramsden v. Dyson*.¹⁶ According to him the equitable principles cannot prevail against the statutory provision regarding the disposition of property or the making of contracts by Government than against the provisions of the Transfer of Property Act requiring registered instruments for effecting certain classes of transactions. He was of the view that Government made no representation, both parties knew the facts and none was misled.¹⁷

In exercise of the power conferred by the Imports and Exports (Control) Act, the Central Government issued the Imports (Central) Order, 1955 and

14. (1947) 332 U.S. 380 : 92 L. Ed. 10.

15. 335 F.R. 2 d. 96.

16. (1886) 1 H.L. 129 : 14 W.R. 926.

17. *Collector of Bombay v. Municipal Corporation of Bombay*, A.I.R. 1951 S.C. 469.

other orders setting out the policy governing the grant of import and export licences. In 1962 the Central Government promulgated the Export Promotion Scheme providing incentives to exporters of woollen textiles and goods. It provided for the grant to an exporter, certificates to import raw materials of a total amount equal to 100% of the F.O.B. value of his exports. The respondents exported woollen goods to Afghanistan and were issued an Import Entitlement Certificate by the Textile Commissioner not for the full value of the F.O.B. value of the goods exported but for a reduced amount. In doing so no opportunity was given to respondents to explain the materials on the basis of which the Import Entitlement was reduced. The respondents successfully challenged the order of the Textile Commissioner in the High Court. On appeal, the Supreme Court held that even if the scheme was executive in character, the Union Government and its officers were not entitled to ignore the promises made by the Government acting upon which the Exporter has acted to his prejudice. It was argued before the Supreme Court that the Government should not be held bound by the representation on promise because a formal contract required by Article 299 of the Constitution was not executed, but this argument was repelled on the ground that the respondents are not seeking to enforce any contractual right; they are seeking to enforce compliance with the obligation which is laid upon the Textile Commissioner by the terms of the Scheme and they were entitled to resort to Court and claim that the obligation so imposed upon the Textile Commissioner by the scheme be ordered to be carried out. The claim of the respondents was allowed on the basis of equity arising out of the representation made on behalf of Government of India, which was acted upon by the Exporters to their prejudice.¹⁸ Wherein it was held that the Government shall be bound to carry out the promise made by it even though the promise is not recorded in the form of a formal contract as required by the Constitution was approved. Observations of Chandrashekhar Aiyar, J. in 1952 SCR 43 were also approved.

The Century Spinning and Manufacturing Co. had set up its factory within the limits of a village on a site purchased from the State of Bombay within Industrial Area. No octroi duty was then payable in respect of goods imported into the Industrial Area. The State of Maharashtra constituted a Municipality including that Industrial Area but on representations the Government proclaimed that the Industrial Area be excluded from the Municipal jurisdiction. The District Municipality then represented to Government that the proclamation be withdrawn and promised to exempt existing factories including the company from payment of octroi for a period of seven years. A resolution was passed by Municipality exempting the existing factories from payment of octroi for 7 years from the date of levy of octroi tax and then the Government issued a notification withdrawing the proclamation and the Industrial Area became part of municipality. But after about a year the Municipality resolved to levy minimum rates of octroi duty with effect from January 1, 1969 and sought to recover the duty amounting to Rs. 15 lacs from the company. The company filed a writ petition relying on the plea of promissory estoppel. It alleged that relying upon the assurances it had expanded its activities and set up additional plant. The Supreme Court allowed the appeal of the Company and observed that if the statute requires

18. *Union of India & others v. M/s. Indo-Afghan Agencies Ltd.*, 1968 S. C.R. 367; *Municipal Corporation*

of the City of Bombay v. The Secretary of State for India in Council, I.L.R. 29 Bombay 580.

that the agreement should be in a particular form, no contract will result from the representation and acting thereon but even then in appropriate cases law will raise an equity against him to compel performance of the obligation arising out of his representation. It was also held that public bodies are as much bound as private individuals to carry out representations of facts and promises made by them relying on which other persons have altered their position to their prejudice.¹⁹

In *Turner Morrison & Co., Ltd. v. Hungerford Investments Trust Ltd.*,²⁰ it was held that the rule laid down in *High Trees* case, *Roberton v. Minister of Pension* case and the *Indo-Afghan Agencies* case advances the cause of justice and hence there is no hesitation in adopting it.

Failure to comply with the requirements of Article 299 of the Constitution makes the contract void. Since the provisions are enacted on the ground of public policy—on the ground of protection of general public, there is no question of estoppel or ratification in a case where there is contravention of Article 299 (1) of the Constitution.²¹ The question arises whether the view expressed in this case is really in conflict with that expressed in *Indo-Afghan Agencies* case and the other cases relied in that case. It would appear that there is no conflict since in *Mulaim Chand's* case the claim was to enforce contractual right, whereas in *Indo-Afghan Agencies* case the claim was not founded upon any contract but upon the equity which arose as a result of representation made on behalf of Government in the scheme. This distinction becomes clear from what the Supreme Court observed in the *Bihar Eastern Gangetic Fishermen Co-operative Society v. Sipahi Singh*.²²

That was a case where Government of Bihar ordered settlement of Jalkar for two years with respondent on his depositing Rs. 16,500. Thereafter the State Government changed their mind and settled Jalkar with appellant. The respondent's writ was allowed by High Court on the ground of promissory estoppel but the Supreme Court reversed the judgment of High Court on the ground that the settlement of Jalkar was not made and executed with respondent in the manner prescribed in Article 299 of the Constitution and the respondent could not base his claim on any valid contract, as he purported to do. It was also held that the respondent had not deposited the expenses for execution of lease and had not invested any amount in purchasing boats etc. and consequently no reliance could be placed on the doctrine of promissory estoppel as they had not altered their position to their prejudice.

The Supreme Court again held that the State or public authorities are bound by promissory estoppel to carry out the obligations though not recorded in the form of contract under Article 299 of the Constitution.²³

In *Motilal Pindampat Sugar Mills v. State of U. P.*²⁴ the Supreme Court held that where the Government makes a promise and the promisee acting upon the same alters his position, the Government is bound by the promise

19. *Century Spinning & Manufacturing Co., Ltd. v. Ulhasnagar Municipality Council*, A.I.R. 1971 S.C. 1021. Reliance was placed on *Union of India and others v. M/s. Indo-Afghan Agencies Ltd.*, 1968 S.C.R. 567.

20. (1972) 3 S.C.R. 711; J.O. 1972

S.C. 1311.

21. *Munawar Chand v. State of Madhya Pradesh*, A.I.R. 1968 S.C. 1218.

22. A.I.R. 1977 S.C. 2149.

23. *M/s. Radhakrishna Agarwal v. State of Bihar*, A.I.R. 1977 S.C. 1496.

24. A.I.R. 1979 S.C. 621.

which would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. In this case the Chief Secretary had made a representation on behalf of Government that the proposed Vanaspati Factory of the appellant would be entitled to exemption from Sales tax in respect of sales of vanaspati effected in U. P. for a period of 3 years. It was on that account that the appellant borrowed money, purchased plant and machines and set up a factory at Kanpur.

It appears to be fairly well settled that a representation or promise can be relied upon against the Government to establish a case of promissory estoppel even though it is not recorded in the form of a contract under Article 299 of the Constitution provided the claim is based on promissory estoppel and not on contract but if it is founded on contract the claim will fail.

(B) *Against executive action or policy of the State.* Sanction of the Government of a site to Municipal Board on nominal rent acting on which the Municipal Corporation spent money in constructing stables, workshops, etc. thereupon was held to amount to promissory estoppel against the Government in revising the policy by enhancing rent and in determining tenancy of Municipal Board.²⁵ The promise of Government to Municipality not to charge any rent for the new site acting upon which the Municipal Corporation gave up the old site and spent considerable money in erecting workshops on the new site was held to amount to promissory estoppel by Chandrashekhara Aiyer, J., while not amounting to any such equitable right by Patanjali Shastri, J., in *Collector of Bombay v. Municipal Corporation of the City of Bombay*.¹ The decision in *Municipal Corporation of Bombay v. Secretary of State* and the view of Chandrashekhara Aiyer, J. was approved in *Indo-Afghan Agencies case*,² wherein the Government was held bound to fulfil the representation made in Export Promotion Scheme and to give Import Entitlement Certificate for the full f.o.b. value of the goods exported. The Court observed :

"Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an *ex parte* appraisalment of the circumstances in which the obligation has arisen."

In *M. P. Sugar Mills v. State of U. P.*³ it was observed :

"The Government cannot claim to be immune from the applicability of the rule of Promissory Estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted the Government need not make

25. *Municipal Corporation of Bombay v. Secy. of State*, I.L.R. 29 Bom. 283.

1. 1946 B.L.M. 44; A.I.M. 1961 B.

C. 459.

2. A.I.R. 1946 S.C. 718.

3. A.I.R. 1979 S.C. 681.

a promise knowing or intending that it would be acted upon by the promisee and the promisee would alter his position relying upon it."

It was further observed in the above case—

"If it can be shown by Government that having regard to the facts as they have subsequently transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. . . . mere claim of change of policy would not be sufficient to exonerate the Government from liability; the Government would have to show what precisely is the changed policy and also its reason and justification so the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied on proper and adequate material placed by Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, then the Court would refuse to enforce the promise against the Government."

It was also held in the above-noted case that Government can 'resile from the promise on giving reasonable notice, giving the promisee a reasonable opportunity of resuming his position provided it is possible for the promisee to restore *status quo ante*. If, however, the promisee cannot resume his position, the promise could become final and irrevocable (reliance was placed on *Ajayi v. Briscoe*).⁴

Doctrine of promissory estoppel was again applied by Supreme Court to give relief to employees to whom State Government had held out certain promises as inducement to move into a newly created department. It was held that employees having acted upon the representations could not be denied rights and benefits promised to them by the State Government.⁵

Government was held bound by the principle of equitable or promissory estoppel to fulfil obligations imposed upon departmental authorities by orders which are executive in character relying upon which the petitioner supplied country spirit to Government warehouses and thus acted to his detriment.⁶

There is no estoppel against the State to the extent of impairing sovereign powers for example the enactment of taxation laws or its right to legislate and in asserting direct violation of a statutory provision but in other respects a State is estopped.⁷

When under the order of Government exemption was given from required qualification to a municipal servant and he was confirmed and pro-

4. (1964) 3 All E.R. 556; (1964) 1 W.L.R. 326.

5. Bhim Singh and others v. State of Haryana, AIR 1980 S.C. 788.

6. S. K. G. Sugar Mills v. State of Haryana, 1975 B.L.J.R. 192; A.I.R. 1975 Pat. 123.

7. Uma Shankar v. Board of High School, A.I.R. 1974 All. 890.

moted to a higher post, Government is estopped from withdrawing the exemption to the detriment of the employee.⁸

Where the Government announced that doctors who would perform military service would get double pay during such service and acting on the representation doctors opted for military service, the Government is estopped from withdrawing the concession.⁹

When Government revives earlier notification under Section 4 of Land Acquisition Act and also issues a fresh notification, but represents to the claimant that he will get compensation on the basis of fresh proceedings, and acting on it the claimant omits to avail remedy on the basis of earlier notification. The Government is estopped from saying that the proceedings were revived.¹⁰

The Government was estopped when the petitioner surrendered his legal rights under a prior lease deed on the basis of representation made by Government.¹¹ Even though as a general rule the doctrine would not be applied against the State in its governmental, public or sovereign capacity, the Court would allow the doctrine to be invoked in cases where it is necessary in order to prevent fraud or manifest injustice.¹²

On the date of action of licence for retail sale of country liquor there was in force a notification exempting sale of country liquor from payment of Sales Tax. On the day following notification was issued imposing sales tax. The auction purchaser claimed that relying on the notification then in force he invested money, but it was held that there can be no question of estoppel against the Government in the exercise of its legislative, sovereign or executive power.¹³

The doctrine of estoppel does not apply against the State in respect of activities which are executive in nature.¹⁴ Government cannot bind itself or succeeding Government to a fixed policy. The public dynamism requires review and revision of policy and Government must have right to change its policy at all times.¹⁵ Promissory estoppel does not apply to policy actions of Government.¹⁶ Since there can be no estoppel against the executive act of the Government, the Government is not estopped from changing its policy in respect of user of land which has been acquired under the Land Acquisition Act.¹⁷ Electricity Board, Bihar was held not estopped from withdrawing

8. *Banchanidhi Das v. State of Orissa*, 39 Cut. L.T. 801; 1974 M.C.C. 198; 1973 Serv. L.J. 934; (1974) 1 Serv. L.R. 236; (1973) 2 Cut. W.R. 1147; (1973) 2 Serv. L.R. 490.

9. *Sohan Singh v. Nirmal Prakash*, 1974 Serv. L.W.R. 733 (Punjab).

10. *R. C. Sood & Co. v. Union of India*, A.I.R. 1971 Delhi 170.

11. *K. C. Pant v. State of Orissa*, (1979) 47 C.L.T. 407; A.I.R. 1979 Orissa 120.

12. *M. Ramanathan Pillai v. State of Kerala*, (1974) 1 S.C.R. 515; A.I.R. 1975 S.C. 3841.

13. *Exche. Commissioner, U. P., Allahabad v. Ram Kumari*, A.I.R.

1976 S.C. 2237; *Bihar Eastern Gangetic Fishermen Co-operative Society, Ltd. v. Sipahi Singh*, A.I.R. 1977 S.C. 2149.

14. *A. Maamiah Naidu v. Commissioner of Survey and Settlement A.P. Board of Revenue, Hyderabad*, 1978 2 An.W.R. 11.

15. *State of Punjab v. Anrit Banaspati Co. Ltd.*, A.I.R. 1977 P. & H. 268; 1977 Rev. L.R. 252.

16. *Indo Foreign Commercial Agency v. Union of India*, A.I.R. 1976 Delhi 4.

17. *Smt. Meera Rani v. State of U.P.*, (1978) 4 A.L.R. 49; 1978 A.L.J. 48.

rebate granted by it to consumers on the basis of Government resolution when the resolution was modified by Government.¹⁸ A scheme for export was announced promising to pay incentives with a view to neutralise loss. The scheme was withdrawn when rates went up and when there could be no occasion for loss. It was held that principle of promissory estoppel did not apply as no loss was occasioned and further because the doctrine is not applicable when Government acts in a sovereign capacity.¹⁹ Representation made in advertisement for appointment in vacancies by selection issued by Public Service Commission is not binding on the Government. It is not possible to plead estoppel when no fraud was practised nor any manifest injustice was done.²⁰

In conclusion it may be stated that in appropriate cases the doctrine of promissory estoppel will apply against the Government even in respect of its governmental or executive acts or policies, if that is necessary to prevent fraud or manifest injustice, but the Government can escape from liability on account of governmental necessity such as difficult foreign exchange position or other material factors having a bearing on the general interest of the State, that is, on the ground of overriding public interest.

(C) *For preventing acts in discharge of duty enjoined by law.* Where there is statutory duty to dispose of land under rule 5 of the rules made under Cochin Land Acquisition Act or under the provisions of the Kerala Land Assignment Act, 30 of 1960, there is no question of the Government being estopped by a promise to return the land.²¹

Even when there may be an agreement between the Government and school teachers that the teachers would remain in service till the age of 58, the Government is not estopped from reducing the retirement age from 58 to 55. There cannot be an estoppel in respect of statutory provisions which are made for the benefit of some person other than the person against whom estoppel is asserted. By plea of estoppel the Government cannot be estopped from exercising its power under Article 309 of the Constitution by changing rules or under Kerala Education Act.²² Since the power under Section 99 of Tamil Nadu Hindu Religious and Charitable Endowment Act is one conferred on the Government to be exercised for public good or at any rate for the benefit of persons other than the Government, there is no estoppel against the Government for cancelling the sanction of lease already granted.²³ But where a company established an industry in Kerala on promise by the Government of cheap electric power, the Supreme Court held that when tariff was fixed for a particular period under a contract entered into in exercise of statutory power, such a stipulation must be valid and binding and it would exclude the exercise of other statutory powers in respect of the same subject-

18. *M/s. Usha Alloys & Steel Ltd. v. Bihar State Electricity Board*, A.I.R. 1979 N.O.C. 76 (Pat.) : 1978 B.I.J.R. 568.

19. *Mathura & Sons v. Union of India*, A.I.R. 1976 J. & K. 41.

20. *Balak Ram v. State of H.P.*, 1976 Lab. I.C. 1072 : I.L.R. (1975) Him. Pra. 489.

21. *Enakulam Mills Ltd. v. State of Kerala*, 1971 K.L.T. 318.

22. *Bankaramanayyan v. State of Kerala*, 1971 K.L.T. 318.

(S.C.) 1971 K.L.T. 422 : (1971) Lab. I.C. 1178 : 1971 S.C.D. 861 : A.I.R. 1971 S.C. 1997. See also *KOK Hoong v. Leong Cheong*, 1964 A.C. 993 : *Southend-on-Sea Corporation v. Hodgeson* (1962) 1 O.R. 416 : *R. v. Blenkinshop* 1892-1 Q.B. 43 : *Maritime Electric Co. v. General Dairies Ltd.*, 1937 A.C. 610.

23. *Achuthan Pillai and others v. State of Kerala and others*, A.I.R. 1979 Kerala 88 (F.B.).

matter during the period of contract. In other words, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such a stipulation fetters subsequent exercise of same statutory power or future exercise of another statutory power, it would be valid and the exercise of such statutory power would *pro tanto* stand restricted. The public body would not in such a case be free to denounce the stipulation as a nullity and claim to exercise its statutory power in disregard of it.²⁴

When the bid at a forest auction was accepted and money deposited, it cannot be cancelled later on by the State on the ground of non-compliance of procedural formalities envisaged in a rule which was directory and for benefit of State and which could be waived, as the petitioner changed his position to his detriment. The principle that there cannot be any estoppel against statute, does not apply where a particular provision of law is for the benefit of the State and the State had chosen not to insist on the performance of that provision.²⁵ Similarly doctrine of promissory estoppel was applied against Municipal Council in terminating the services of overseer who did not possess the qualifications required by rules but both at the time of appointment and at the time of inspection the Municipal authorities were satisfied that he was qualified for the post and the petitioner changed position to his detriment.¹

The Government is not estopped from imposing Sale Tax where exemption was promised without specifying any goods because under Section 4-A the exemption is only with reference to specified goods and so there was no binding representation made on behalf of the Government.² But if a person is liable to pay tax under two statutes, the State Government may decide to exempt him from payment of tax under one statute and to pay higher rate under other Statute in lieu of that exemption. If the State Government makes such an announcement and gives effect to it, thereby realising tax at enhanced rates under Act, if the State Government subsequently seeks to levy tax under that Act under which exemption was granted, plea of promissory estoppel can be raised.³

Since the question of public good is involved in acquiring land, State Government is not estopped in acquiring land even though with the approval of Municipal Commissioner building was constructed thereon⁴ and even though land is such on which electricity and other amenities were provided by authorities for residents on that land.⁵

The Executive Government cannot estop itself from discharging the obligations imposed upon it by an Act of Legislature.⁶ This proposition is un-

24. Indian Aluminium Company v. K. S. E. Board, A.I.R. 1975 S.C. 1967 relying upon Dowty Boulton v. Wolverhampton Corporation. (1971) 2 All E.R. 277.

25. N. C. Kapoor v. D. F. O. Bahraich and another, 1972 A.W.R. (H.C.) 265.

1. Raghavan v. The Municipal Council, Jharsuguda, A.I.R. 1973 Orissa 186.

2. Prachi Rubber Industries v. State of

U.P., 1974 U.P.T.C. 587 : 1975 Tax.L.R. 1759.

3. Gappen Lal Munni Lal v. State of U.P., 1971 A.I.R. 796 (F.B.).

4. Chelliah Konar v. State of Tamil Nadu, (1972) 85 M.L.W. 557 : (1973) 2 Mad. L.J. 208.

5. (1971) 2 Delhi 392.

6. State of Punjab v. Amrit Banaspati Co. Ltd., A.I.R. 1977 P. & H. 268 : (1977) Rev. L.R. 252.

exceptionable when Government owes a duty to public to act in a particular manner.⁷

In the case of *Laker Airways Ltd. v. Department of Trade*⁸ Lord Denning said :

"The Crown cannot be estopped from exercising its powers, whether given in a Statute or by Common Law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice to a private individual. It can, however, be estopped when it is not exercising its powers, but is misusing them : and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public."

(D) *To compel an act prohibited by law.* In *Federal Crop Insurance Corporation v. Morrill*⁹ the regulations made by Corporation prohibited the insurance of reseeded wheat, it was held that Corporation is not bound by promissory estoppel on the policy of insurance. In *Howell v. Falmouth Boat Construction Co., Ltd.*¹⁰ the House of Lords expressed the view that no representation or promise made by an officer can preclude the Government from enforcing a statutory prohibition. The doctrine cannot be invoked to compel the Government or even a private party to do an act prohibited by law.¹¹ If the protected tenant under the Bihar Tenancy Act (VIII of 1885) which expressly prohibits such tenant from transferring land without the Collector's permission nevertheless transfers land and receives consideration, the tenant is not estopped from challenging the transaction.¹²

(E) *No estoppel against Legislature.* There can be no estoppel against the exercise of Legislative power.¹³

If retirement age is reduced by legislative action promissory estoppel-is of no avail.¹⁴ When a licensed dealer was induced to purchase wheat at higher rate from open market for making wheat products but subsequently law is made making it compulsory on every licensed dealer to part with 50% of stock at lower rate, Government is not estopped in making law.¹⁵

7. *M. P. Sugar Mills v. State of U. P.*, A.I.R. 1979 S.C. 621.
8. (1977) W.L.R. 234 : (1977) 2 All E.R. 182.
9. (1947) 332 U.S. 380.
10. 1961 A.C. 837.
11. *State of Punjab v. Amrit Banaspati Co. Ltd.*, A.I.R. 1977 P. & H. 268 ; *M. P. Sugar Mills v. State of U.P.*, A.I.R. 1979 S.C. 621.
12. *Madan Bari v. State of Bihar*, 1968 P.L.J.R. 52 : 1968 B.L.J.R. 342 (346).
13. *State of Kerala v. Gwalior Rayan Silk Manufacturing (Weaving) Co. Ltd.*, (1974) 1 S.C.R. 671 : A.I.R. 1973 S.C. 2799 (Govt. had promised not to acquire land of Company for 60 yrs. but law was made for its acquisition) ; *M.P. Sugar Mills v. State of U.P.*, A.I.R. 1979 S.C. 621 ; P.G.R. Rao v. State, (1972) 2 A.P.L.J. 281 (1973) 2 Andh. W.R. 206 : A.I.R. 1973 A.P. 236 ; *A. Kaunaiah Naidu v. Commissioner of Survey and Settlement A.P. Board of Revenue, Hyderabad*, (1978) 2 An. W.R. 11 ; *State of Punjab v. Amrit Banaspati Co. Ltd.*, A.I.R. 1977 P. & H. 268 : (1977) Rev. I.R. 252 in which it was also held that Govt. cannot be estopped from legislating contrary to promises held out earlier by it in executive capacity.
14. *L. R. Gard v. State of Karnataka*, 1975 Lab. I.C. 799 : (1974) 2 Kant. L.J. 275 : I.L.R. (1974) Kant. 852.
15. *Ram Roller Flour Mills v. Regional Food Controller*, A.I.R. 1976 All. 897.

(F) *Estoppel in respect of promise made by Government servant.* There is a difference between an act done by an officer of Government and by the Government. An officer can bind the Government only if he is authorised to make the representation or promise.¹⁶

In *Robertson v. Minister of Pensions*,¹⁷ Lord Denning observed :

"I come, therefore, to the most difficult question in the case. Is the Minister of Pensions bound by the war office letter? I think he is. The appellant thought, no doubt, that, as he was serving in the army, his claim to attributability would be dealt with by or through the war office. So he wrote to the war office. The war office did not refer him to the Minister of Pensions. They assumed authority over the matter and assured the appellant that his disability had been accepted as attributable to military service. He was entitled to assume that they had consulted the other departments that might be concerned, such as the Minister of Pensions, before they gave the assurance. He was entitled to assume that the Board of Medical Officers who examined him were recognised by Minister of Pensions for the purpose of giving certificate as to attributability. Can it be seriously suggested that, having got that assurance, he was not entitled to rely on it? In my opinion if a Government department in its dealings with a subject takes it upon itself to assure authority upon a matter with which he is concerned, he is entitled to rely upon having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also, and as the Crown is bound, so are the departments, for they are but agents of the Crown. The war office letter therefore, binds the Crown, and, through the Crown, it binds the Minister of Pensions."

That decision has been disapproved by House of Lords in *Howell v. Falmouth Board Construction Co., Ltd.*¹⁸ and it was observed that the illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a Government officer, however high or low in the hierarchy; the character of an act done in face of a statutory prohibition is not affected by the fact that it has been induced by a misleading assumption of authority.

The Supreme Court had an occasion to consider both these decisions in *Asstt. Custodian v. Brij Kishore*¹⁹ where the facts were that before the purchase of property the respondent had applied to appellant to be informed whether the property in question is an evacuee property and received a reply in the negative. The respondent purchased the property but thereafter the appellant passed an order declaring it an evacuee property. The respondents placed reliance on *Robertson v. Minister of Pensions*. The Supreme Court observed that that decision cannot help the respondent, because the view taken therein has been overruled by House of Lords. The Supreme Court

16. *State of Rajasthan v. Moti Ram*,
1973 W.L.N. 1325 : 1973 Raj. L.
W. 339 : A.I.R. 1973 Raj. 223.
17. (1949) 1 K.B. 227.

18. 1951 A.C. 837.
19. (1975) 2 S.C.R. 359 : A.I.R. 1974
S.C. 2325.

laid down that the view taken in Howell's case is the correct one and not the one taken in Robertson's case. In *M. P. Sugar Mills v. State of U. P.*²⁰ the Supreme Court held that the Government would not be estopped by the act of its officers and agents who without authority enter into agreements to do what the law does not sanction or permit; those dealing with an agent of the Government must be held to have notice of limitations of his authority. But if the acts or remissions of the officers of the Government are within the scope of their authority and are not otherwise impermissible under the law they will work estoppel against the Government.

8. **Estoppel distinguished from similar conceptions.** In order to understand accurately and adequately the scope of estoppel, one must make a comparative study of it with similar conceptions like—

- (a) admission,
- (b) conclusive proof,
- (c) fraud,
- (d) presumption,
- (e) *res judicata*, and
- (f) waiver.

(a) *Admission.* An admission, as already set out, is a confession or a voluntary acknowledgment made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue in the case. The term is confined to civil transactions in English Law, and, under the Evidence Act, Sections 17 to 22 is applicable to civil as well as criminal cases. Statements by the accused are admissions under Sections 17 and 18 and *prima facie* evidence against the maker but not in his favour.²¹ Confessions constitute the species of which admissions are the genus. Thus, a statement amounting under Sections 24–30 to a confession in a criminal proceeding may be an admission under Section 31 in a civil proceeding.²² Sections 23 and 31 apply especially to civil cases and similarly Sections 24 to 30 to criminal cases. Admissions might be oral, documentary or by conduct (Section 8). They may be deliberate or incidental, that is to say, made in some other connection. Admissions are self-harming evidence. The twin purposes they serve are destructive purposes and testimonial purposes. In the former case, the truth of the admission is not relied on and it is used as a piece of information for contradiction. In the latter case, the truth of the admission is relied on when such admissions state facts against interest, as when they admit a claim or a fact relied upon by the adverse party. So, admissions constitute a piece of substantive evidence when relied upon for proving the truth of the facts embodied in them and have the effect of shifting the *onus* of proving the contrary on the party against whom they are produced, because, in the absence of a satisfactory explanation, they will be presumed to be true. In fact, the principle on which admissions are received is to use the expression of Baron Parke in *Slatterie v. Pooley*²³ that what a party himself admits to be true may reasonably be presumed to be so. It

20. A.I.R. 1979 S.C. 621 referring Federal Crop. Insurance v. Morrill, (1947) 332 U.S. 380: 92 L.E.D. 10 and Valsonavich v. United State, 335 F.R. 2 d. 96.

21. Azimaddy v. Emperor, A.I.R., 1927 Cal. 17: 28 Cr. L.J. 99.

22. Bishendas v. Ramlabhaya, A.I.R. 1916 Lah. 133.

23. (1840) 6 M. & W. 664.

need not be added in order to have any value that the admission should be clear and definite.

An admission, in the legal sense, is not always an admission in the popular sense, that is to say, a statement which at the time it was made was against the real or apparent interest of the party.²⁴ The object of an admission is not limited to facts against the party's interest at the time: for, though the weight of credit to be given to such statements is increased where the fact stated is against the persons interested at the time, that circumstance has no bearing upon their admissibility.²⁵ In effect and broadly it may be stated that anything said by a party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or testimony.

Admissions are receivable to prove matters of law or law and fact, though, unless amounting to estoppels, they are generally of little weight, being necessarily founded on mere opinion. But unlike the English rule, oral admissions are not receivable to prove the contents of a document except when secondary evidence is admissible or the genuineness of a document produced is in question [Sections 22 and 65, clause (b)]. The execution of documents, whether attested or not, which are not required by law to be attested, may be proved by admissions, or otherwise (Section 72). In the case of documents required by law to be attested, the admission of a party of its execution by himself is sufficient proof (Section 70). Admissions may even sometimes be received on the matters protected by privilege, provided they are proved by third persons. The classes of persons by whom admissions may be made or set out in Section 18 (2) to (6) and Sections 19 (7) and 20 (vicarious admission). The persons to whom admissions may be made are covered by Sections 18 and 19 of the Evidence Act.

An admission can operate as estoppel, if the case falls within this section. But, if it does not create an estoppel, it can be withdrawn.¹

A voter qualified to vote at an election has an independent right to challenge an order passed by the Returning Officer and he is not estopped by the admission of disqualification by a candidate for election made before the Returning Officer.²

An admission in a previous suit by the predecessor of the defendant in the present suit can be regarded as evidence that the plaintiff-Sabha had been duly registered under the Societies Registration Act 21 of 1860.³

So far as admissibility in evidence is concerned, it is immaterial to whom an admission is made,⁴ e. g., a stranger or opponent. It is provable by a third person even when admissions are made in confidence to a legal adviser or wife. (Sections 122, 126 to 129 of the Evidence Act.)

24. Phipson, Evidence, 11th edition, 504 *et seq.*

25. Wigmore, Evidence, 1048 and foll.

1. Abdul Hammed Khan v. Commissioner of Income-tax, A.I.R. 1967 A.P. 211 : (1967) Andh. W.R. 441; citing R.N. Kelly & Bishby;

(1835) 3 Knapp 375.

2. Desai v. Mehta, 10 Guj. L.R. 697 : A.I.R. 1969 Guj. 251 (255).

3. Shanti Sarup v. Radhaswami Satsangh Sabha, A.I.R. 1960 All. 249 (256).

4. Beat on Evidence, 528.

Finally admissions can be classified under two heads: (i) judicial admissions and (ii) extra-judicial admissions (see discussion below). In the former case, they are fully binding on the party to them and constitute a waiver of proof (Section 58), and can be made the foundation of the rights of parties. In the latter case, they are not conclusive and are only partially binding on the party against whom they are set up (Section 31) and may be shown to be untrue, or induced by fraud, or made under mistake of law or fact, or uttered in ignorance, abnormal condition of mind, etc. The *onus* of substantiating any of these objections lies on the party making the admission.⁵ Admission shifts the onus on the persons admitting the fact, etc. Where the facts are once ascertained, the presumption arising from conduct cannot establish a right which the fact themselves disprove.⁶ They become conclusive and binding only in case they operate as, or have the effect of, estoppel. It is well settled that, in order to evaluate admissions, the whole statement containing the admissions must be taken together.

Thus, though in both admissions and estoppels there are statements, an admission does not ripen into an estoppel unless the person to whom the representation is made believes it and acts upon such belief, whereas, in the case of a mere admission evidence can be given to show that the admission was wrongly made.⁷

(b) *Conclusive proof.* Conclusive proof is defined in Section 4, *ante*, and in the case of conclusive proof, on the proof of one fact the Court believes another, whereas in the case of estoppel the very same fact contained in the statement cannot be denied. *

(c) *Fraud.* The essence of fraud is a deliberate mis-statement or suppression giving rise to a cause of action for deceit against a person playing the fraud, whereas, in the case of estoppel, the fact that the statement might have been made honestly believing in its truth or because of an honest mistake, makes no difference if another person believes it and acts upon it, and does not give rise to a cause of action whether in contract or in tort.

(d) *Presumption.* Where the Court may presume certain facts or shall presume these certain facts, the presumption drawn in either case is a rebuttable presumption, and it is only in the case of conclusive proof defined in Section 4, *ante*, that it becomes irrebuttable. So, the position of conclusive proof and estoppel can be equated. But, whereas in the case of estoppel the party would be estopped from denying the truth of a representation if the representation had been believed in and acted upon by another, rebuttal evidence can be given in the case of rebuttable presumptions.

(e) *Res judicata.* There is a fundamental difference between estoppel and *res judicata*. Estoppel shuts the mouth of a person and prevents him from making contradictory statements whereas *res judicata* ousts the jurisdiction of the Court and prevents it from deciding over again a matter decided upon by a competent Court.

5. *Ajodhya Prasad v. Bhavanishanker*, A.I.R. 1957 All. 1; I.L.R. (1956) 2 All. 899 (F.B.).

6. *Kishorilal v. Chalte*, 1989 (Sup.) 1

S.C.R. 698 : 1959 S.C.J. 560 : A.I.R. 1959 S.C. 504.

7. *Badri v. Gulbi*, A.I.R. 1962 Pat. 216.

Res judicata is estoppel by judgment or estoppel by record. The principle of constructive *res judicata* is applicable to execution proceedings.⁸

8-A. Consent order. A consent order raises an estoppel in the same way as a judgment entered after a *lis* is fought out to the end.⁹

9. Waiver and Estoppel. There is confusion of thought upon the subjects of estoppel and waiver. The question of estoppel is governed by Section 115 of the Evidence Act which does not differ from the law in England in regard to estoppel *in pais*. "Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which destroy the cause of action. It is a rule of evidence which comes into operation, if (a) a statement of the existence of a fact has been made by the defendant, or an authorised agent of his, to the plaintiff or someone on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right.... There is no such thing as estoppel by waiver."¹⁰ Waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.¹¹ There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.¹²

Nor can there be waiver of an illegality. Thus, the invalidity of a resolution of no confidence passed by the members of a village panchayat cannot be waived by the Chairman against whom it was passed.¹³ Just as acceptance of rent after permission of the District Magistrate and before institution of

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8. *Mohan Lal v. Benoy Kishan*, (1953) 2 S.C.R. 377 : 1953 S.C.J. 130 : (1953) 1 M.L.J. 449 : A.I.R. 1953 S.C. 65 (71) ; *Basarayya v. Hanumantha Reddy*, I.L.R. 1945 Mad. 211 (212) ; *Venkatarami Naidu v. Sornammal*, (1969) 2 M.L.J. 609 (618) : 82 M.L.W. 401 ; *Jagan-nath Ramaniya v. Lakshminarayan Tripathi*, A.I.R. 1960 Orissa 197 (F.B.) ; *Damodar Mohapatra v. Raghunath Pradhani*, (1969) 35 Cut. L.J. 139.
9. *South American and Mexican Co., Re, Ex parte Bank of England*, (1895) 1 Ch. 37 : 64 L.J. Ch. 189 : 71 L.T. 594 : 43 W.R. 131 ; *Margaret Gomes v. Kanapada Bhowmik*, (1966) 70 C.W.N. 949 ; *Victoria Secondary School v. Board of Western Education* (1969) 73 C.W.N. 328 (337).
10. *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha*, 1935 P.C. 79 : 62 I.A. 100 : I.L.R. 13 Rang. 256 : 155 I.C. 1 ; *Union of India v. Ram Nath*, A.I.R. 1974 All.
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11. *Dhanukdhari v. Nathuni Sahu*, 6 C.L.J. 62 : 11 C.W.N. 848 (852) ; *Nirpati Nath v. Jatindra Kumar*, 1926 Cal. 577 : 91 I.C. 407 ; *Bashesharnath v. Commissioner of Income-tax, Delhi and Rajasthan*, A.I.R. 1959 S.C. 149 ; *Waryam Singh v. Channan Singh*, A.I.R. 1960 Punj. 308.
12. *Associated Hotels of India, Ltd. v. S. B. Sardar Ranjit Singh*, (1968) 2 S.C.R. 548 : (1968) 2 S.C.J. 441 : (1968) 1 S.C.W.R. 914 : 1968 Cut. L.J. 724 : (1968) 70 P.L.R. (D) 88 : A.I.R. 1968 S.C. 933 (937). See *V. N. Nadgir v. Union of India*, 1970 Serv. L.R. 134 (143) : 1970 Lab. I.C. 614 (Mysore).
13. *K. S. Kotrabasappa v. T. M. Pan-chayya*, 9 Law Rep. 174 : (1967) 1 Mys. L.J. 405 (409) (meeting convened by Secretary without authority to convene it).

the suit does not amount to waiver of the permission granted and the consequent right to sue,¹⁴ the acceptance of rent after default under Section 3 (a) of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, has become a fact and before institution of the suit based on that default does not amount to waiver of the default and the consequent right to sue.¹⁵ An acceptance without objection by landlord of rent for a period subsequent to the forfeiture of a lease or for a period subsequent to the failure of tenant to do a statutory duty, would amount to waiver.¹⁶ The doctrine of waiver has no application in the case of fundamental rights under the Constitution.¹⁷ It is an implied agreement not to exercise legal rights.¹⁸ A unilateral act or conduct of a person, that is to say, act or conduct of one person which is not relied upon by another person to his detriment, is nothing more than mere waiver, acquiescence or laches, while act or conduct of a person amounting to an abandonment of his right and inducing another person to change his position to his detriment certainly raises the bar of estoppel. Further, whatever be the effect of mere waiver, acquiescence or laches on the part of a person on his claim to equitable remedy to enforce his rights under an executory contract, it is clear, on the authorities, that mere waiver, acquiescence or laches which does not amount to an abandonment of his right or to an estoppel against him cannot disentitle that person from claiming relief in equity in respect of his executed and not merely executory interest.¹⁹ There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights.²⁰ Waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question.²¹ It has been held, that in order that a legal remedy which a party is entitled to enforce should be deemed to have been waived or abandoned by him, there must be an express mention of the circumstances by the party either by word or by deed or there should be clear indication by his conduct from which it can be implied that there has been such a waiver or abandonment.²² Where the court ordered that a party can get the goods released on furnishing a bank guarantee and undertaking to renew it as and when required till the

14. *Devi Prasad v. Janki Prasad*, 1963 A.L.J. 403.

15. *Faiyaz Ahmad v. Brij Nandan Lal Goyal*, 1969 A.L.J. 365 (368) : 1969 A.W.R. (H.C.) 185 : 1969 Ren. C.J. 418 but see contra. *Kalikhumar v. Makhan Lal*, 1969 Assam I.R. 50 A.I.R. 1969 Assam 66 (75) (F.B.), a case under the Assam Urban Areas Rent Control Act, 1955.

16. *M/s. Sen & Co. v. Smt. Mem Mala Sadhu*, A.I.R. 1980 Cal. 155.

17. *Bhashesharnath v. Commissioner of Income-tax, Delhi and Rajasthan*, 1959 S.C.R. 528 : 1959 S.C.J. 1207 : I.L.R. 1959 Punj. 319 : (1959) 35 I.T.R. 186 : A.I.R. 1959 S.C. 149 : Ram Gopal Gupta v. Asstt. Housing Commissioner, A.I.R. 1969 All 278 (280) (F.B.).

18. *Midnapore Zamindari Co., Ltd. v. Kumar Chandra Singh*, 1943 Cal. 544 : 210 I.C. 594 : 77 C.L.J. 317 : A.I.R. 1961 Cal. 65.

19. *Sha Mulchand & Co. Ltd. v. Jawahar Mills Ltd.*, 1953 S.C. 98 : 1953 S.C.A. 987 : 1953 S.C.J. 68, reversing *Jawahar Mills, Ltd. v. Sha Mulchand & Co. Ltd.*, 1951 Mad. 572 : I.L.R. 1950 Mad. 339 : (1949) 2 M.L.J. 88.

20. *Dhanukdhari Singh v. Nathuni Sahu*, 6 C.L.J. 62, supra; *Midnapore Zemindari Co. Ltd. v. Kumar Chandra Singh*, 1948 Cal. 544, supra; *Manik Ratan Guin v. Prakash Chandra*, 1955 Cal. 338 : 58 C.W.N. 545 : *Jorawar Khan v. Mukarram*, 1952 Nag. 40; see also *Izhar Fatima Bibi v. Mst. Ansar Fatma Bibi*, 1939 All. 318 : 182 I.C. 801 : 1939 A.L.J. 612.

21. *Manak Lal v. Dr. Prem Chand Singhai*, 1957 S.C. 425 at 431 : 1957 S.C.R. 575 : 1957 S.C.A. 719 : *Nathmull Tolaram v. Killa & Co.*, 47 C.W.N. 733.

22. *Kanniah Gupta v. Subharami Reddi*, 1952 Mad. 687.

disposal of the appeal, and the party submitted to this order, it does not amount to waiver of any right of the party as it was not an order by consent.²³

Where the Sales Tax Department did not raise any objection before the High Court when the affidavits filed by the assessee were taken into evidence, it cannot contend before the Supreme Court that the High Court acted illegally in taking those affidavits into evidence.²⁴

In a departmental inquiry a person cannot be the Inquiry Officer as well as a witness.²⁵ But if this objection was not taken before the Inquiry Officer, it must be held to have been waived.¹

Where a right or privilege guaranteed by law rests in the individual and is primarily intended for his benefit and does not infringe the right of others, it can be waived provided such waiver is not forbidden by law and does not contravene public policy.² Section 1-A of U. P. (Temporary) Control of Rent and Eviction Act, 1947 was meant for the benefit of owners of buildings which were under erection or were constructed after January 1, 1951. If an owner did not wish to avail of the benefit no question of policy, much less public policy, was involved and such a benefit or advantage could always be waived.³ The waiver of privilege conferred by the proviso to Section 51, Civil Procedure Code, 1908, does infringe public policy because by inserting this privilege for the judgment-debtor in that section, the Legislature was guided by public policy, namely, that a debtor should not be put in prison when he is unable to pay his debt for reasons beyond his control. The judgment-debtor cannot, therefore, waive the privilege.⁴ To waive rights there must be not only knowledge of these but unequivocal expression of intention to waive them.⁵

Where the State took exception to the maintainability of a suit for want of two months' notice under Section 80, C. P. C. and the objection was overruled, and the State, though a party to the appeal, did not object to the finding, it must be deemed to have waived its objection.⁶

23. Collector of Customs and Central Excise, West Bengal v. Hindustan Motors, Ltd., A.I.R. 1975 Cal. 368.

24. State of Madras v. Habibur Rehman and Sons, (1968) 1 S.C.R. 381 : (1968) 1 S.C.J. 759 : (1968) 1 Andh. W.R. (S.C.) 148 : 14 Law Rep. 391 : (1968) 1 M.L.J. (S.C.) 148 : 21 S.T.C. 51 : A.I.R. 1968 S.C. 339 (345).

25. Satkhosei Thangoo v. President, District Soldiers' Sailors' and Airmen's Board, 1968 Lab. I.C. 1275 : A.I.R. 1968 Manipur 68 (70) : Ashutosh Das v. State of W. Bengal, A. I.R. 1956 Cal. 278.

1. Manaklal v. Dr. Prem Chand Singhvi, 1957 S.C.R. 557 : 1957 S.C.A. 719 : 1957 S.C.J. 359 : (1957) 1 M.L.J. (Cr.) 254 : A.I.R. 1957 S.C. 425 (432) : Satkhosei Thangoo v. President, District Soldiers' Sailors' and Airmen's Board, 1968 Lab. I.C. 1275 : A.I.R. 1968 Manipur 68 (70).

2. Bhashesharnath v. Commissioner of Income-tax, Delhi and Rajasthan, 1959 (Sup.) 1 S.C.R. 528 : 1959 S.C.J. 1207 : (1959) 35 I.T.R. 180 : A.I.R. 1959 S.C. 149; Maxwell on Interpretation, (1962) 11th Ed., p. 376; M/s. Sen & Co. v. Smt. Mani Mala Sadhui, A.I.R. 1980 Cal. 155.

3. Lachoo Mal v. Radhey Shyam, A. I.R. 1971 S.C. 2213.

4. Jogendra Missir v. Ramanandan Singh, I.L.R. 46 Pat. 1142 : A.I.R. 1968 Pat. 218 (221).

5. Cekap v. Asian Refractories, Ltd., (1969) 73 C.W.N. 192 (204) (waiver by foreign State of privilege or claim for immunity—entering unconditional appearance—no waiver by conduct).

6. K. Karthiayani v. Neelacanta, I.L.R. (1969) 1 Ker. 440 : 1969 K.L.J. 59 : 1969 K.L.R. 194 : 1968 K.L.T. 836 : A.I.R. 1969 Ker. 280 (285).

Objection as to non-joinder of parties not taken in the trial Court before the first hearing shall be deemed to have been waived.⁷

Where the judgment-debtors on notice of execution of decree did not in the first instance object to the jurisdiction of the Court to execute the decree against them, they cannot raise it in a second application for execution, the first one having been dismissed for non-prosecution.⁸

A question of proof of a document is a question of procedure and can be waived if the objection to the secondary evidence is not taken when the same is being allowed to be recorded.⁹

Proof of conduct of waiver on the part of defendants so as to give rise to an estoppel in favour of the plaintiffs cannot be said to be barred by section 92 *ante*. It is always open to a party to give up his rights in a document which by law is not required to be in writing and registered.¹⁰

If trustees, not fully conscious of their rights or aware of the true state of law or facts, submit to the dictates of the Trust Board, their conduct neither amounts to waiver of their rights nor to acquiescence with knowledge of their legal rights.¹¹

Whatever was stated in the Arbitration Agreement regarding the number of Arbitrators was waived by the petitioner (defendant) when it had appeared before five out of the seven Arbitrators, had argued its case and had even taken advantage of the concessions made by the plaintiff: in such a case the petitioner is estopped from challenging the validity of the award.¹² But the mere fact that the defendants appeared before the arbitrator at earlier stages of the proceedings and had filed objections against the claim of the plaintiff would not operate as estoppel against the defendants in challenging the jurisdiction of the arbitrator to give an award.¹³

Waiver of a right cannot lightly be inferred and at any rate something more than inaction is necessary. Thus, from the mere fact that the landlord, having obtained permission to evict the tenant, delayed taking the necessary steps cannot raise an inference of waiver of the landlord's right.¹⁴

Where no plea of waiver (of notice) was raised in the trial Court and no specific question on that point was put to the plaintiff, waiver being a question of fact, it cannot be raised for the first time in appeal.¹⁵

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| <p>7. Commissioner under H. R. & C. E. Act v. Ratnavarma Temple, 19 Law Rep. 22 : (1969) 2 Mys. L.J. 23 (26).</p> <p>8. Ram Dayal v. Kisturi, I.L.R. (1970) 20 Raj. 364 : 1970 Raj. L. W. 217 : A.I.R. 1970 Raj. 246 (250).</p> <p>9. Subba Rao v. Venkata Rama Rao, A.I.R. 1964 A.P. 53 ; Tara Ram Chand v. State, 1971 Cr. L.J. 1201 (1203) (Punj.).</p> <p>10. Shantibai v. James Edward Peters, 1972 J.L.J. 70 (75) : 1972 M.P. L.J. 122 : 1972 M.P.W.R. 89.</p> <p>11. Bihar State Religious Trust Board v. Mahant Jalashwar Gir, 1968 P</p> | <p>L.J.R. 507 (514) see section 67 of Bihar Hindu Religious Trust Act, 1950 (Bihar Act 1 of 1951).</p> <p>12. Tisco Oriya Co-operative Credit Society Ltd. v. Biabun Charan Mahanty, 1968 P.L.J.R. 218.</p> <p>13. Jagannath Kapoor v. Premier Credit and Instalment Corporation Ltd., A.I.R. 1973 All. 49.</p> <p>14. Ram Raksh Pal v. Brij Nandan Swarup, A.I.R. 1967 All. 325.</p> <p>15. Munshi Lal v. Nazir, 1967 A.L.J. 371 (373, 374) ; Battoo Mal v. Rameshwar Nath, A.I.R. 1971 Delhi 98.</p> |
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10. Waiver and Admission: Distinction between. There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of error.¹⁶ Waiver differs from estoppel inasmuch as it is contractual, whilst estoppel is a rule of evidence. Every unconscious submission to law, which is subsequently declared to be invalid, would not give rise to a plea of waiver. This is all the more so in the domain of constitutional rights, which, if such a plea be accepted, would render them illusory and depend, for their effectiveness on the off-chance of a timely challenge.¹⁷ "Where a man with the knowledge of the irregularity of particular course nevertheless concurs in it, he cannot afterwards take advantage of the irregularity."¹⁸ The failure of a party to object when it had a right to do so before the trial Court constitutes a waiver of the right to object and precludes him from exercising the said right in the Appellate Court. Such waiver or estoppel may arise from mere silence or inaction or from inconsistent conduct or statements or from admission, concession, consent or acquiescence or from acceptance of the benefits of a ruling of the trial Court or its judgment or decree or from an error which was invited by the party itself.¹⁹ Where an agreement to sell provides for payment of the purchase money by instalments with a forfeiture clause, the seller may waive his right to insist upon regular payment of instalments by accepting irregular payments.²⁰ A right of permanent tenancy may be waived by the tenant accepting a new lease.²¹ Between landlord and tenant, there can be no waiver of a right to eject, unless both the parties regard the lease as subsisting. Where a notice to quit has been given but the landlord still accepted rent, it could not on that account be said to be waived, where the tenant himself was resolving to vacate the premises.²²

The efficacy of a plea of estoppel depends on the ability of the respondent to prove that the appellant knew the true facts from which an intention on his part to object to a mis-statement in the proclamation of sale can be inferred.²³ Thus, if a judgment-debtor did not know the true facts, namely, absence of his valuation from the proclamation of sale, there was not deliberate intention on his part to waive his right to a mis-statement (really a failure to state his valuation) in the proclamation of sale and no

16. *Shyam Sunder Singh v. Kaluram*, 1938 P.C. 230, 231; 176 I.C. 2; 1938 A.W.R. 186; 68 C.L.J. 145; 42 C.W.N. 1041.
17. *Basheshar Nath v. C.I.T.*, Delhi, A.I.R. 1959 S.C. 149.
18. *A. R. V. Achar v. Madras State*, 1954 Mad. 568; I.L.R. 1954 Mad. 908; (1954) 1 M.L.J. 102; *Panchayat Pandra Padu v. State of Andhra*, 1957 Andh. Pra. 355; *Lala Raj Kishore v. District Board of Saharanpur*, 1954 All 675; 1954 A.L.J. 405.
19. *Inder Singh v. Dy. Commissioner*, 1957 Punj. 60; see also *Narayanan Thampi v. Chitarau Somayajipadu*, 1950 T.C. 79.
20. *Rahmatumisa v. Shimoga Co-operative Bank, Ltd.*, 1951 Mys. 59; 1.

- I.R. 1951 Mys. 196; 30 Mys. L.J. 33; see also *Raja Chetty v. Jagannathadas*, 1950 Mad. 284; (1949) 2 M.L.J. 694; 62 L.W. 860; 1949 M.W.N. 773.
21. *Abdul Ghafoor v. Kunj Behari Lal*, 1957 All. 346.
22. *Kamaksha Prasad v. Parvatibai, A.* I.R. 1960 Madh. Pra. 192; *Abdul Karim Bhai v. Abdul Rahman, A.* I.R. 1960 Madh. Pra. 16.
23. *Marudanavagam Pillai v. Manickavasakam Chettiar, A.I.R.* 1945 P.C. 67 at p. 70; I.L.R. 1945 Mad. 601 at p. 607; *V. Rajagopala Naidu v. Muthulakshmi Ammal, I.* L.R. (1969) 1 Mad. 781; (1969) 2 M.L.J. 421; 81 M.L.W. 190; A.I.R. 1969 Mad 5 (8).

estoppel can arise for estoppel must be certain to every intent and must not be taken by argument or (*sic*) inference.²⁴

It has been held that parties may by conduct of waiver in the course of a suit preclude themselves from asserting the rights which they have waived.²⁵ The plaintiff in a suit brought in *forma pauperis* died, but in ignorance of her death the Court passed a decree in her favour. The defendant appealed, making respondent to his appeal a lady whom he alleged to be the legal representative of the deceased plaintiff. On this appeal an order was passed by consent of parties sending back the suit to be re-tried on the merits as between the defendant and the person nominated by him as plaintiff, and it was so re-tried and a decree was again passed in favour of the plaintiff. It was held that it was not thereafter open to the defendant to object that there had been no enquiry into the right of the representative of the original plaintiff to sue as a pauper.¹ In the undermentioned case, a mortgagor was held to be precluded from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgage suit was invalid by reason of the decree *nisi* not having been made absolute if such objection was not raised at an early stage of the proceedings.² In the undermentioned case, a judgment-debtor obtained the postponement of an execution sale on the undertaking that he would not raise any objection on the ground of illegality or irregularity. After the sale took place on the postponed date, he applied to set it aside on the ground of an illegality or irregularity of which he was cognisant at the time he gave his undertaking. It was held that he could not be allowed to impeach the sale.³ There can be no estoppel arising out of legal proceedings when the truth of the matter appears on the face of the proceedings.⁴ In the case cited, the plaintiff was held estopped by his own proceeding in an arbitration wherein he received his share of the property belonging to his father upon the footing of the exclusion of the mother, from claiming a share therein through his mother.⁵ No estoppel can arise from ignorance of law, which both parties must be presumed to know.⁶ A person can be precluded by his conduct from objecting to an irregularity in procedure which he himself invites.⁷ But though defects in procedure may be waived, a defect which goes to the root of the matter, such as lack of jurisdiction could not be waived. Where the very constitution of an arbitration tribunal was invalid, a party could nevertheless challenge the award on that ground, although he had participated in the enquiry.⁸

Where a judgment-debtor who had appealed for reversal of an *ex parte* money decree against him had consented to the attachment of his occupancy

24. *V. Rajagopala Naidu v. Muthulakshmi Ammal*, I.L.R. (1969) 1 Mad. 781 : (1969) 2 M.L.J. 421 : A.I.R. 1969 Mad. 5 (9).

25. *Janaki Ammal v. Kamalathammal*, (1875) 7 Mad. H.C.R. 263.

1. *Akbar Husain v. Alia Bibi*, (1902) 25 A. 137 : 22 A.W.N. 206.

2. *Gunindar Prosad v. Baijnath Singh*, (1903) 31 C. 570 ; *Ramchander v. Jamna Shanker*, I.L.R. (1961) 11 Raj. 76 : A.I.R. 1962 Raj 76.

3. *Lakshmi v. Rajindar*, 1918 Cal. 293 : 47 I.C. 831.

4. *Tara Lal v. Sarobar Singh*, 27 I.A. 33 : I.L.R. 27 Cal. 407 : 4 C.W.

N. 533 : 2 Bom. L.R. 5. There is no estoppel when the facts are known; *Sarada Prosad Roy v. Ananda Moy Dutta*, 1918 Cal. 248: 46 I.C. 228.

5. *Muhammad Wali Khan v. Muhammad Mohi-ud-din*, 1919 P.C. 47 : 58 I.C. 843 : 24 C.W.N. 321 (P. C.).

6. *Gurulingaswami v. Ramalakshammamma*, (1894) 18 M. 53.

7. *Timmana v. Putabhatta*, (1900) 2 Bom. L.R. 90.

8. *Ramlal Roshan Lal v. B. C. Paul and Sons*, A.I.R. 1960 Cal. 547.

holding pending the re-hearing proceeding and subsequently, on the decree being confirmed, objected to the sale on the ground of non-transferability of the holding without the landlord's consent, it was held that the attachment by consent did not estop the judgment-debtor from objecting to the sale. The primary object of an attachment is that pending the sale the right of the judgment-debtor in the property attached shall be maintained intact for the benefit of any possible purchaser. On the judgment-debtor objecting to the sale on the ground that the holding was not transferable by custom without the landlord's consent, the first Court held that the judgment-debtor was estopped from resisting the objection as he had consented to the attachment and his decision was affirmed on appeal by the District Judge and the sale was held and confirmed pending second appeal to the High Court. It was held that there was no question of estoppel involved. The judgment-debtor was entitled to object to the sale and to prefer a second appeal to the High Court against the appellate order affirming the primary Court's decision.⁹ To a suit filed on the Small Cause Side of the Munsif's Court the defendant pleaded want of jurisdiction and on his objection the Court returned the plaint for presentation on the Ordinary Side. Against the decree of the District Munsif there was an appeal to the Subordinate Judge and against the appellate order of the latter a revision petition was filed in the High Court. The defendant raised the objection in the High Court that the suit was of a Small Cause Court nature and that no appeal lay to the Subordinate Judge. It was held that the defendant was estopped from raising the objection.¹⁰ Generally as to admissions made in the course of judicial proceedings, see note below.¹¹ The principle is also extended to criminal cases. Where an accused successfully puts in a plea of want of sanction and gets acquitted at the previous trial, he cannot, when he is tried again after obtaining fresh sanction, contend that there was double jeopardy under Section 403 (1), Criminal Procedure Code, and for that purpose plead that the former trial was one on the merits and was valid.¹²

11. Waiver and Estoppel: Distinction between. The terms "estoppel" and "waiver" are often used interchangeably, particularly with reference to situations arising under insurance policies. Under some circumstances, a waiver may amount to an estoppel, but it does not necessarily do so. There is a well-recognised distinction between the two, and the one may exist without or apart from the other.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Unless it arises from conduct creating an estoppel, it must be supported by an agreement founded upon a valid consideration. It carries no implication of fraud and does not necessarily imply that the party asserting it has been misled to his prejudice or into an altered position. It involves the act or conduct of only one of the parties. An equitable estoppel may

9. *Bochai Mahton v. Isri Jaji*, 1918 Pat. 604 : 47 I.C. 29 : 5 P.L.W. 185.

10. *Aiyathurai Pillai v. Gnanaprakasa Odayar*, 52 I.C. 829.

11. *Tweedie v. Poorno Chunder*, (1867) 8 W.R. 125 : *Civa Rau v. Javana Rau*, (1864) 2 Mad. H.C.R. 81 : *Vallabh Bhuloe v. Rama*, (1872) 9 Bom. H.C.R. 65 : see *Casperaz*, op. cit., 4th Ed. (1915), (Ch. X, where the subject is discussed) the conclusiveness or otherwise of such

admission being treated as by conduct, referable to the general rule of estoppel which is explained in the notes herein to §. 115, post. As to estoppel by pleading see *Dinomoney Dabee v. Doorga Pershad*, (1873) 12 B.L.R. 274, 276 : *Luchman Chander v. Kali Churn*, (1873) 19 W.R. 292, 297.

12. *Mahabir v. State*, A I R 1959 All. 783 : 1959 All. L.J. 27.

arise, however, in the absence of any intention on the part of the person estopped to relinquish or change any existing right, and it need not be supported by any consideration, agreement or legal obligation. It frequently carries the implication of fraud. It involves the conduct of both parties, since it is based upon some misleading conduct or language of one person and reliance thereon by another who is misled thereby to his prejudice. The dividing line between estoppel and express waiver is not difficult to preserve, but the line is somewhat less distinct between estoppel and waiver implied from conduct.¹³

12. Ratification and Estoppel. Ratification differs from estoppel in essential particulars, although the distinction has not always been kept by the Courts. The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct. Ratification is a matter of intention; its existence is a question of fact; in order that there be a ratification there must be a voluntary assumption of the unauthorised act either on full information or on less than full information, if undertaken deliberately in disregard of the fact that all knowledge of the transaction available has not been obtained. It does not rest upon prejudice. It has been stated that the distinction between being bound by reason of ratification and being bound by an estoppel is that, in the former case, the party is bound because he intended to be; in the latter, he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treats him as legally bound.

13. Laches and Estoppel. The doctrine of laches and estoppel are closely related especially where, as in the case in most jurisdictions, delay alone is not regarded as constituting laches, but only delay which places another at a disadvantage. Laches is sometimes spoken of as a species of estoppel and is often an element in estoppel. Clearly, however, the terms are not synonymous, since laches is a doctrine peculiar to courts of equity while the doctrine of estoppel is applied as readily at law as in equity. Moreover, laches is a wholly negative thing so far as concerns the party against which it is asserted, while estoppel may involve affirmative action on his part.¹⁴

14. Estoppel: Intent¹⁵ or Motive. An actual intent to mislead or defraud is not essential to the creation of an equitable estoppel. Nor is it essential that the representation or conduct relied upon be motivated by the actual malice. An intention to influence the action of the particular person claiming the estoppel is not necessary in all cases. It is enough, if there was a holding out to all, who might have occasion to act, of the existence of a certain state of facts which they might assume to be true and upon which they might act. According to some authority, the result of particular conduct rather than intent is the criterion. It is ordinarily essential, however, that the party concluded by the estoppel must have intended that his words or conduct be relied upon by others and influence their action, or that he knew or had reason to believe that they were meant to be relied and acted upon. An admission or statement will not work an estoppel if it was addressed to, and designed solely for, the information of another and was not intended to influence the conduct of the person who claims the estoppel.

13. 19 Am. Jur.

14. 19 Am. Jur.

15. *Construed in Harbans v. Divisional Supdt., A.I.R. 1960 All. 164.*

15. **Wilfulness.** Wilfulness is frequently mentioned as an element in equitable estoppel. In general, this term is used as including some or all of the elements of knowledge of rights or facts, intent to influence the action of others, and intent to deceive.

16. **Fraud or Bad Faith.** Estoppel *in pais* is sometimes said to be a matter of morals, and it has been stated, that to permit the enforcement of estoppel of this character such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct. In its last analysis, the doctrine rests upon the principles of fraud, and it has been said that cases where a party is concluded from asserting his original rights in consequence of his acts or conduct in which the presence of fraud, actual or constructive, is wanting are generally referable to principles other than those of equitable estoppel. In many instances, however, it is necessary to extend the term "fraud" or "fraudulent" to situations which are more accurately described as "unconscionable" or "inequitable". Neither actual fraud nor bad faith is generally considered an essential element. There must, however, be either actual fraud involving an intent to deceive or constructive fraud resulting from gross negligence or from admissions, declarations, or conduct intended or calculated, or such as might reasonably be expected, to influence the conduct of the other party and which have so misled him to his prejudice that it would work a fraud to allow the true state of facts to be proved. It has already been pointed out that it is not always necessary that a fraudulent purpose be present at the inception of the transaction. The fraud may, and frequently does, consist in the subsequent attempt to controvert the representation and to get rid of its effects and thus to injure the one who has relied on it. In other words, the doctrine of estoppel *in pais* is based upon a fraudulent purpose or a fraudulent result. An act or declaration consistent with good faith, the injurious result of which could not have been foreseen or anticipated by any ordinary forecast, ought not ordinarily to operate as an estoppel, although injury results therefrom to a third party.¹⁶

17. **Estoppel: Opinions or Estimates.** The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel. *A fortiori*, since it is essential to every estoppel *in pais* that it relates to some matter of fact, the mere expression of an erroneous opinion on a matter of law raises no estoppel.

18. **Estoppel in pais by misrepresentation.** The law of estoppel *in pais* by misrepresentation received in England its distinctive enunciation and form with the leading case of *Pickard v. Sears*,¹⁷ a case which bears much

16. 19 Am. Jur.

17. (1837) 6 A. & E. 469. ("But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing

at the same time", per Lord Denman, C. J.). It will be observed from the remarks in the text that the cases anterior to 1837 will be of little practical assistance on this branch of the law. The principle was stated more broadly by Lord Denman in *Gregg v. Wells*, (1839) 10 A. & E. 90, 97; both cases were followed by *Freeman v. Cooke*, (1848) 2 Ex. R. 654.

the same relation to this part of the law of estoppel, as that of the *Duchess of Kingston*¹⁸ does to estoppel by record. "Prior to the passing of this Act of 1872, the doctrine of estoppel by representation was enunciated in various forms by the Indian Courts, and generally in a manner hostile to its technicality."¹⁹ Since that date, the following Sections 116 and 117 have been interpreted by many Indian decisions which will be found collected in the notes thereto. The Privy Council have moreover given a full exposition of the law as enacted by Section 115, in the case of *Sarat Chunder Dey v. Gopal Laha*,²⁰ which is to be regarded as the leading authority in this country on the subject of estoppel by misrepresentation.

19. Essentials of Estoppel by Misrepresentation. The essentials of estoppel by misrepresentation are :

1. There must be misrepresentation either—

- (a) by the estoppel-denier (personal misrepresentation) ; or
- (b) by some person whose representation he has made credible (assisted misrepresentation).

2. There must be a disregard of some duty.

3. The misrepresentation must be as to fact or law—not merely of intention or opinion.

4. The misrepresentation must be of something material.

5. Fraud or bad faith in the estoppel-denier is not essential—an innocent misrepresentation will estop.

6. Negligence (carelessness) is sometimes essential.

7. The estoppel-asserter must be a person to whom immediately or mediately the misrepresentation was made.

8. The estoppel-asserter must, on the faith of the misrepresentation, change his position prejudicially.

9. The estoppel-denier must have reasonable grounds for anticipating some change of position upon the faith of the misrepresentation.

10. The change of position must be reasonably consequent upon the misrepresentation or the assistance.

(1) *There must be misrepresentation—*

Misrepresentation may be—

- 1. Personal, or
- 2. Assisted.

And may be

- 1. Direct, or
- 2. Indirect.

18. *v. ante*, §. 40.

19. Caspersz, *op. cit.*, 41, 42.

20. 1892 I.R. 19 I.A. 203

And may be

1. Active, or
2. Passive.

And may be

1. Expressed, or
2. Implied.

Misrepresentation must be made either (1) by estoppel-denier (personal misrepresentation) ; or (2) by some person whose misrepresentation the estoppel-denier has made credible (assisted misrepresentation). Personal misrepresentation needs little explanation. It means merely that a man is not to be damaged by misrepresentation which he has neither made nor authorised, unless indeed he comes within the second class of cases. For example, if a man be held out as a member of a firm he cannot be liable if he was ignorant and innocent of all that was done.

The second alternative—assisted misrepresentation—presents problems peculiar to the law of estoppel. It implies that a man may, under certain circumstances, be estopped not merely by his own misrepresentation but by the misrepresentation of another person. It implies further that he may be estopped by such misrepresentation if he has assisted it, although he has been perfectly innocent of any intention to do so and although unaware of the misrepresentation until after mischief has been accomplished.

Under what circumstances shall one person be estopped by reason of assistance given to the misrepresentation of another ?

Mr. Ewart crisply puts it as follows, viz., that one man may be estopped by a representation made by another when the former in breach of some duty to the deceived person has supplied the defrauder with that which was necessary to make the representation credible. If the fraud was accomplished without assistance there can of course be no estoppel of any one but the defrauder. If although there was assistance yet the assistance was an immaterial fact in the accomplishment of the fraud, there ought likewise to be no estoppel—the assistance did not furnish the occasion or the opportunity for the fraud. But if the assistance was in some way essential to the success of the fraud—furnish the occasion or the opportunity for it, made credible a representation which without it could not have been successfully made—then there has been a breach of some duty in rendering that assistance and estoppel will ensue.

The cases illustrative of the subject arise from (a) principal and agent, (b) bills and notes, (c) partnership, (d) certificates of shares, (e) notaries, (f) trustees, (g) ostensible ownership and finally (h) standing by.

Perhaps, as Mr. Ewart points out, the most familiar form of assisted misrepresentation is that in which an owner of property stands by while it is sold by another person to an innocent purchaser.

(2) *There must be disregard of some duty.* In regard to which, in an elaborate discussion in Chapter V, Mr. Ewart has summed up what has been said as follows :

1. The duty of "an appropriate measure of prudence to avoid causing

harm to others" ought to be enforced as well by estoppel as by an action in tort.

2. Such duty has already in various departments of the law been admitted as a governing principle of decision.
3. But in many of them other reasons have been given and these are now current and believed to be satisfactory.
4. The existence of the duty has been altogether denied in cases in which the criminal law penalizes the resulting "harm to others". "The prevention of crime is, perhaps, better left to the operation of the criminal law." [Estoppel is a rule of civil actions. But even in criminal proceedings matters which in civil action create an estoppel are usually so cogent that it would be almost useless to set up a different story.]²¹
5. But there can be no difference in this respect "between a fraud carried out by means of a forgery (a crime) and any other fraud".
6. And there are numerous cases in which the intervention of neither fraud nor crime has been allowed to save the negligent party from the burden of the loss which his disregard of duty has brought about.
7. While it is impossible to formulate a rule "not to facilitate fraud", there is no difficulty in the application of a rule requiring the exercise of "an appropriate measure of prudence".
8. A large number of well-decided cases can be supported only by the acceptance, express or implied, of such a rule.
9. Without such a rule in the realm of torts, social life would be impossible. Without it as the working principle in the law of estoppel, financial and commercial affairs would be much impeded and distracted.

(3) *The misrepresentation must be as to fact or law, not as to intention or opinion.*

A representation as to intention may, under certain circumstances, be a representation of fact. Bowen, L. J., has well said: "The state of a man's mind is as much a fact as the state of his digestion. For example, if a note be shown to me by one, who to my knowledge contemplates purchasing it, and I say that I intend to pay it at maturity, I ought to be estopped as against my interlocutor from denying my signature to the note; for, the expression of intention to pay involved a representation that the note was a real obligation." There are also some other cases in which it is said that a representation as to intention not amounting to representation of fact will estop from afterwards changing the intention.

Two reasons have been put forward in support of the assertion that relief can be granted upon a misrepresentation of law: (1) that everybody is assumed to know the law and therefore there can be no effective misrepresentation of it, and (2) that nobody should depend or act upon what another

21. *Maha Ram v. Emperor*, 40 A 393; 45 I.C. 519; A.I.R., 1918 A. 168.

person asserts to be the law for it is a matter of opinion only. Though Lord Ellenborough's oft quoted dictum in *Bilbie v. Lumley*,²² is endlessly relied upon, books, as pointed out by Mr. Ewart, are full of its modifications and contradictions and the cases are numerous in which the plain fact that this man did not know the law has been allowed to assert itself. It will be more reasonable to hold that every man must be taken to be cognisant of the facts with reference to which he is dealing than that every man must be taken to be cognisant of the law. For denying relief in cases of misrepresentation of law, viz. that law is a matter of opinion only and that therefore no one ought to depend or act upon another person's representation of it, it is quite true that every representation of law was always accompanied, expressly or impliedly, by the remark that it was given as a matter of opinion only. But the authorities supply many cases in which precisely the opposite remark is made or implied—cases in which, by purposely and strenuously misstating the law, a fraud is accomplished.

Then there is this difficulty that if there is one rule as to misrepresentation of law and another as to misrepresentation of fact, one shall have to come to a clear understanding as to the difference between them. But unfortunately fact and law are so inextricably mixed that several difficulties arise when confronted by them. In *Cooper v. Phibbs*,²³ it has been said :

"There is not a single fact connected with personal status that does not more or less involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or in some countries before. Therefore, to state that it is not a representation of fact seems to arise from a confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of ten thousand pounds a year, the notion of possession is a legal notion and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to ten thousand pounds involves all sorts of law." A statement of mixed law and fact may give rise to an estoppel. As pointed out by Jessel, M. R.,²⁴ it is extremely difficult to make any statement in a matter of business, which does not involve some inference or proposition of law. Such statements, however, are not merely, by this circumstance, rendered statements of law, if law and fact are inextricably interwoven as the compound structure of the statement,²⁵ they may, therefore, properly create an estoppel. A statement as to title to, or interest in, a particular estate is a statement of fact, and a plea of estoppel may be founded on it.¹

There are, moreover, as Mr. Ewart pertinently points out two very important points to be noticed in connection with this maxim *ignorantia juris neminem excusat*. If the word *juris* is used in the sense of denoting general law, as has been declared to be the correct sense of it, the maxim can apply to ignorance of a well-known rule of law. Story in *Equity* points out: "The

22. (1802) 2 East, 469.

23. (1867) L.R. 2 H.L. 149.

24. *Eaglefield v. Marquis of Londonderry*, (1876) 4 C.D. 693 (C.A.).

25. *Jones v. Edny*, (1812) 4 Camp

285; *Raynell v. Spye*, (1852) 1 Dr. G.M. & G. 660; *Burrows v. Rhodes*, (1898) 1 Q.B. 816.

1. *Cooper v. Phibbs*, (1867) L. R. 2 H.L. 149.

distinction between cases of mistake of a plain and settled principle of law, and cases of mistake of a principle of law not plain to persons generally, but which is yet constructively certain as a foundation of title, is not of itself very intelligible or practically speaking very easy of application."¹⁻¹ Then there is a very important consideration that it is precisely in cases in which there has been a display of ignorance of a well-known rule of law that relief is often granted because the ignorance of a plain and established doctrine so generally known and of such constant occurrence as a common canon of descent may well give rise to a presumption that there has been some undue influence, imposition, mental imbecility, or confidence abused.

Therefore, the conclusion is that the maxim applies only to cases of ignorance of well-known rules of law, that is to say, which people are presumed to be familiar with as plain principles, and that when they are not so, Courts will recognise the fact and will relieve upon the ground of fraud.

Before leaving the subject, it should be noted that it is not at all necessary for relief that the misrepresentation should be fraudulent. An innocent misrepresentation is just as disastrous to a person deceived as one tainted with falsehood; and it is equally a ground for estoppel.

(4) *The misrepresentation must be of something material.* The test of materiality may be stated as follows:

"It must be a representation '*dons locum contractui*' that is a representation giving occasion to the contract; the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into it; or the suppression of a fact the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether."

Or, in the language of Pollock on Contracts:

"Anything which would affect the judgment of a reasonable man, governing himself by the principles on which men in practice act in the kind of business in hand."

It is always very difficult when a misrepresentation has been followed by action for a misrepresentator to contend that his misstatement is immaterial. The onus lies heavily upon him to disprove the *propter hoc*.

It is obvious in cases of assisted misrepresentation that not only must misrepresentation have been material but also must have been of such a character as to have influenced the result.

(5) *Fraud or bad faith is not essential.* Fraud or bad faith is not a requisite of estoppel; although it is found in misrepresentation and is a necessary element in cases of misrepresentation by passivity; and misrepresentation is of course essential to estoppel.

(6) *Negligence (carelessness) is sometimes essential.* Mr. Ewart sums up the discussion as follows:

- (i) There can be no estoppel without misrepresentation; there can be no such thing as estoppel by carelessness unless someone has been deceived.

- (ii) It is not, however, at all necessary that the person said to be estopped by the carelessness should have himself made the representation, or should have been in any way a party to it.
- (iii) Upon the contrary, estoppel by carelessness never arises where the misrepresentation is chargeable to the careless party. That would be a case of personal misrepresentation; and in such cases estoppel would ensue whether there was carelessness or not.
- (iv) It only arises where the carelessness is by one person and the misrepresentation by another; that is, in cases of assisted misrepresentation.
- (v) Rule No. 1: "That there must be neglect of some duty that is owing to the person misled", is of general application, and is not confined to cases of estoppel by carelessness.
- (vi) Rule No. 2: "That the neglect must be in the transaction itself", is not a rule possible in estoppel by carelessness—the neglect is necessarily always either prior or subsequent to "the transaction itself".
- (vii) Rule No. 3: "That the neglect must be the proximate cause of the leading of the person into the mistake", is impossible of application in cases of estoppel by carelessness. The proper rule is that "the estoppel-asserter's change of position must have been reasonably consequent upon the carelessness."
- (viii) Cases of estoppel by carelessness are not at present uncommon. They should be determined upon the ground well known in actions of tort that people ought to be punished for "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do"—punished sometimes by damages, and sometimes by estoppel.

(7) *The estoppel-asserter must be a person to whom immediately or mediately the misrepresentation was made.* The mere fact that there has been a misrepresentation, and that somebody has acted on it, will not be sufficient to work an estoppel. As was said by Lord Cranworth²:

"It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good."

And as was said by Cleasby, B., in *Hosegood v. Bull*³:

"When A asks B his opinion in confidence, respecting the solvency of C, and the question is answered by B, without any intimation having been given to him that the information was sought for the purpose of its being communicated by A, to any particular individual, I cannot help thinking that the case does not come within any class of cases in which relief on the ground of misrepresentation can be obtained against B, by the individual to whom the information has been communicated by A."

2. *Jorden v. Money*, (1854) 5 H.L. 363. 3. (1877) 36 L.T. 617.
C. 185 : 23 L.J. Ch. 865.

(8) *The estoppel-asserter must, on the faith of the misrepresentation, have changed his position prejudicially.* This involves the consideration under the following heads: (1) change of position, (2) on the faith, etc., (3) prejudicially.

Change of position. The misrepresentation bears somewhat the same relation as consideration to contract. A misrepresentation without consequences must surely remain without consequences. There can of course be no sure change of position as will result in estoppel, if it chronologically precedes the misrepresentation complained of. It is impossible, too, that any representation can be acted upon if its existence be unknown to the estoppel-asserter. It is frequently said that misrepresentation must have been acted upon in order that it may produce estoppel. This is not quite accurate; for, if the misrepresentation arrested action, it would have the same effect. A change of position—relative position—is the requisite. There are many cases of estoppel in which a person has been "lulled into security" and had "rested satisfied". It is sometimes said that a change of position will not work an estoppel, if the estoppel-asserter could reasonably have ascertained the falsity of the misrepresentation made to him. On the other hand, it is broadly laid down that a misrepresentation, acted upon by the estoppel-asserter, "is not the less a ground for relief because he had the means of knowledge".

Where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement cannot get rid of the estoppel which arises from another man acting upon it, by saying that if the person to whom he made the statement had reflected and thought all about it, he would have cause to see that it could not be true.⁵

The very representation relied on may have caused the party to desist from inquiry and neglect his means of information, and it does not rest with him who made them to say that their falsity might have been ascertained, and it was wrong to credit them.⁶

In this connection not objecting to accounts raises important consideration. Suppose that a man whose forged cheques have been paid by his banker had no actual notice of the forgeries, but that had he examined his bank pass-book he would have found them charged against him; is he estopped by reason of his inactivity? It has been said that "a depositor owes no duty to a bank to examine his pass-book or cancelled cheques with a view to the detection of forgeries".⁷

And even if the depositor should execute from time to time, at the instance of the bank, the usual certificate that the balance shown by the pass-book is correct, it may well be said that such transaction is nothing but an account stated, which may be rectified if it be erroneous.

Custom, however, must be reckoned with here as elsewhere.

Onus of proof. Suppose an interesting point arises in connection with onus of proof: suppose misrepresentation is to be followed by a change of

4. *Wilmott v. Barber*, (1880) 15 Ch. D. 96: 49 L.J. Ch. 792.

5. Per Lord Herschell in *Bloomenthal v. Ford*, 1897 A.C. 156: 66 L.J. Ch. 253.

6. *Graham v. Thompson*, (1892) 55 Ark. 290: 16 S.W.R. 58.

7. *Wachsmann v. Columbia Bank*, (1895) 56 N.Y. 601.

position, must the estoppel-asserter prove that it was the misrepresentation which induced the change of position? Must that be assumed until the contrary is shown? Probably much depends upon the fact of each case.

Several reasons for changing position. Although the estoppel-denier in changing his position may have relied not only upon the mis-statement complained of, but also upon some mistake of his own—

"His loss none the less resulted from that mis-statement. It is not necessary to show that the mis-statement was the sole cause of his acting as he did."⁸

In another place it is said that

"If, however, the plaintiff mainly and substantially relied upon the fraudulent representation, he will have his action for damages, though he was in part influenced by other causes."⁹

Prejudicially. The change of position, to effectuate estoppel, must have been prejudicial to the estoppel-asserter. If he is really benefited by the change or was in no way hurt by it, he has nothing to complain of. This is plain enough, but is not always remembered. Generally, it may be said that there must have been some change of position; and perhaps it can be said that the requisite will be satisfied if the estoppel-asserter has lost a fair chance to retrieve his position.

(9) *The estoppel-denier must have reasonable ground for anticipating some change of position upon the faith of the representation.* The conclusions drawn by Mr. Ewart are:

1. "No one can be estopped by a deceptive answer to a question which he may rightly deem impertinent." He must have had reasonable ground for supposing that the person whom he was misleading was going to act upon what he was saying; that is to say, reasonable ground for anticipating some change of position. This is a rule for personal misrepresentation.
2. In cases of estoppel by passive assistance there is no duty to speak unless "I perceive his mistake"; that is to say, unless I have reasonable ground for anticipating some change of position upon the faith of my silence.
3. The requisite under consideration is not applicable to cases of estoppel by active assistance.

(10) *The change of position must be reasonably consequent upon the misrepresentation or the assistance.* The following can be affirmed. In cases of personal misrepresentation the change of position must have been that reasonably consequent upon the misrepresentation. In cases of assisted misrepresentation by passivity the rule is *ex necessitate rei* that the change must have been reasonably consequent upon the assistance rendered to the misrepresentation. And in cases of actively assisted misrepresentation the same rule must apply. The rule therefore for all classes of cases is that "the change of

8. *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459.

9. *McAleer v. Horsey*, (1871) 35 Md. 453.

position must be reasonably consequent upon the misrepresentation or assistance". If the "particular consequence" has been "intended or foreseen" by the estoppel-denier, that "is to him at all events natural and probable".

20. Salient features of Estoppel by Misrepresentation—

(1) *Belief and Reliance.* It is essential to the existence of an equitable estoppel that the representation, whether consisting of words, acts, or omissions, of the party against whom the estoppel is asserted shall have been believed by the party claiming the benefit thereof and that he shall have relied thereon and been influenced and misled thereby. It follows that no estoppel can arise in favour of one who was ignorant of the fact that any representation had been made, since it is obvious that one cannot rely upon what he does not know or be misled by something of which he is not informed. Estoppel cannot rest upon reliance alone in the absence of other essential elements.

(2) *Change of position.* Not only must the party claiming an estoppel have believed and relied upon the words or conduct of the other party, but also he must have been thereby induced to act, or to refrain from acting, in such a manner and to such an extent as to change his position or status from that which he would otherwise have occupied. Estoppel cannot be based upon representation which tends only to induce a party to do some act which he is already legally bound to do. Nor can one who has already irrevocably changed his position claim an estoppel based upon representations made after the change took place. The rule that acts done subsequent to the other person's change of position, which they do not invite or influence, will not operate as an estoppel has no application, however, to prevent a receipt of payment, made long after the acts which induced the original change of position from being relied on as such where the payment was made as part of the original transaction and before the true facts were discovered.

There is some difference of opinion as to whether the bringing of a suit or other legal proceeding is a change of position within the law of estoppel. By the weight of authority, it is not. Some cases, however, have taken the opposite view and still others suggest a middle ground that the estoppel should be invoked to the amount of the costs and expenses incurred, but no further.

(3) *Injury or prejudice.* Estoppel rests largely upon injury or prejudice to the rights of him who asserts it. Since the function and purpose of the doctrine are the prevention of fraud and injustice, there can be no estoppel where there is no loss, injury, damage, or prejudice to the party claiming it. Moreover, the injury or prejudice involved must be actual and substantial and not merely technical or formal. The difference of opinion previously referred to as to whether the bringing of a suit or other legal proceeding is a change of position within the law of estoppel is caused largely by a difference in views as to whether the expense of the costs and charges of the suit or proceeding constitutes such a prejudice as is sufficient to support an estoppel; the Courts which regard it as sufficient hold that the bringing of the proceeding is a change of position, while those which take the opposite view hold that it is not. Obviously, no act which is clearly beneficial to a person can be relied upon as creating an estoppel in his favour.

The rule that estoppel arises only where there is prejudice applies whether the estoppel is based upon words, conduct, silence, delay, negligence, or acceptance of benefits. This rule does not mean that in order to invoke the

doctrine of estoppel, a party must, as a result of the inequitable conduct of the other party, have suffered some detriment or injury without regard to whether or not the estoppel is allowed, but only that he will be prejudiced if the estoppel is not given effect. In other words, to entitle a party to the benefit of an estoppel, he must have been misled and induced to alter his position in such a way that he will suffer injury; if the estoppel is denied and the other person is not held to the representation or attitude on which the estoppel is predicated.

(4) *Good Faith : Diligence and ignorance of Facts.* Since the doctrine of estoppel *in pais* is founded upon principles of morality and fair dealing and is available only for the protection of claims made in good faith, the party setting up an estoppel is himself bound to the exercise of good faith in the transaction and in his reliance upon the words or conduct of the other party. Obviously, one who has full knowledge of the facts cannot rely in good faith upon words or conduct of another which are inconsistent with the truth. Hence, ignorance of the truth as to the matter invoked is, generally speaking, a prerequisite to the right to assert an estoppel *in pais*. It is not always true, however, that no estoppel will arise when the party to whom the representation is made has knowledge as to the truth of all the facts. For example, the owner of a known right or title may by his representations, acts, or silence so lead another to act in the belief that the owner has waived, surrendered, or abandoned his right or title that he will be estopped from asserting it to the injury of him who has changed his position in reliance upon the owner's representations, acts, or silence. Likewise, it seems that where property is taken for public uses, it is not necessary, in order to enable the taker to invoke the doctrine of estoppel against the owner, that he shall have been acting in ignorance of the real condition of the title.

There is some authority to the effect that the knowledge that the facts were otherwise than as represented, which will preclude a representation from forming the basis of an estoppel, must be actual as distinguished from merely constructive knowledge. Good faith is generally regarded, however, as requiring the exercise of reasonable diligence to learn the truth, and, accordingly, estoppel is denied where the party claiming it was put on inquiry as to the truth and had available means of ascertaining it, at least where the element of actual fraud is absent. Ordinarily, the Courts refuse to give effect to an estoppel where the parties were equally well informed as to the essential facts or where the means of knowledge were equally open to them. A distinction is sometimes made as to the duty of exercising diligence to learn the truth between cases where the claim of estoppel is based on mere silence or inaction and those where it is based on affirmative representation or conduct, the view being taken that the availability of a means of knowing the true state of facts, as by reference to the public records, bars a claim of estoppel in cases of the former class, but not in those of the latter class. (19 Am. Jur.).

21. Breach of Contract and Estoppel. The boundary line between estoppel and breach of contract is often apt to be obscured, but must not be confounded. For one and the same false statement may well be a deceit and a breach of contract and capable of operating by estoppel. These possible qualities of a false representation are not mutually exclusive.¹⁰ Even

10. Pollock on Contract, 6th Ed., 503, 506.

though the matter may have passed from the stage of a representation into an agreement, there are cases where the Courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuity of action.¹¹ "Situations may arise, in which a contract should be held an estoppel, as in certain cases where only an inadequate right of action would, if the estoppel were not allowed, exist in favour of the injured party. In such a case, the estoppel may sometimes be available to prevent fraud and a circuity of action."¹² A false representation must operate in one of four ways if it is to produce any legal consequences: (a) it may be a term in a contract in which case its falsity will, according to circumstances, either render the contract voidable or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. The common case of a warranty is an instance of a representation forming part of a contract; (b) it may operate as an estoppel preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it; (c) it may afford a cause of action in tort for deceit; (d) it may amount to a criminal offence. A false pretence by which money is obtained is an instance of a representation amounting to crime.¹³ In the first and third instances the representation gives rise to a cause of action; in the fourth, it produces grounds for the institution of criminal proceedings. An estoppel, however, is only a rule of evidence which precludes a person from denying the truth of some statement previously made by himself or the conventional statements of facts upon the basis of which an agreement has been entered into. An action cannot be founded upon an estoppel which is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said. One party is assisted to relief owing to his opponent being estopped from denying the truth of something which he has said or done. In such a case, the estoppel fills up a gap in the evidence, and by preventing either plaintiff or defendant from disputing a particular fact alleged, becomes effective either by furthering the action to a successful issue or by annihilating and destroying it. Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact alleged; for example, if an assignee of A sues A's trustee to recover the fund assigned, and the trustee is prevented from denying its existence in his hands. Or, in the converse case, an estoppel may be a defence; as if a joint-stock company were to sue a share-holder for calls and they were estopped from denying that the shares were paid up, their action would fail.¹⁴

Referring, again, to the classification of estoppels under English and American law it will be observed that the only classes to which the Act expressly or impliedly refers, are the estoppels by record or judgment (Sections 40-41), and the estoppel *in pais* in its modern forms of estoppel by conduct and agreement or contract (Sections 115-117). These latter sections do not

11. *Sunderabai v. Devaji Shanker*, 1954 S.C. 82 at 85 : 1953 S.C.J. 693 : (1953) 2 M.L.J. 782.

12. *See* *Law on Estoppel*, 6th Ed., pp. 689-690.

13. *See* *Alderson v. Maddison*, L.R. 5 Exch. D. 293, 296; a representation which influences the conduct of a person to whom it is made is not

legally enforceable against the person who makes it unless it operates either as a contract or as an estoppel.

14. *Low v. Bourverie*, 1891 L.R. 3 Ch. 82; *see* *Caspersz op. cit.*, 4, 28-30; *M. Alavi v. State*, A.I.R. 1960 Ker. 94 : 1959 Ker. L.J. 684.

enact anything different from the law of England on their subject-matter,¹⁵ and moreover are not, as already observed, exhaustive of the law of estoppel.¹⁶ It is not here possible to enumerate all the cases in which effect has been given to estoppels in English Courts, nor to minutely classify a branch of the law which is not only of recent but of actual present growth. As cases of difficulty from time to time arise for determination, recourse must be had to the large body of decisions which exists on this subject in England and America, as also in this country, some of which will be found collected in the notes to the following Sections 116 and 117.

22. Estoppel: General. Sections 115 and 117 are exhaustive of these rules of estoppel which are rules of evidence. But, as pointed out by Garth, C. J., in *Ganges Manufacturing Co. v. Sourujmull*,¹⁷ estoppels in the sense in which the term is used in English legal phraseology are matters of infinite variety and are by no means confined to the subjects which are dealt with in Chapter VII of the Indian Evidence Act. All rules of estoppel are not also rules of evidence. Thus, a man may be estopped not only from giving particular evidence but from doing the act or relying on any particular argument or contention which the rules of equity and good conscience prevent him from using as against his opponent.¹⁸ Section 115 does not enact anything different from the English rule on the subject. Estoppel, except as a bar to testimony by itself, does not create a cause of action or title. There is no estoppel in criminal cases, though even in such proceedings matters which in civil action create an estoppel are usually so cogent that it will be inefficacious to set up a different story. Estoppel should be pleaded if relied upon; because the rule of estoppel depends for its application on certain question of fact¹⁹ and therefore should be specifically pleaded unless there is no opportunity of doing so, as in cases where there are no pleadings and in which case the party relying on estoppel must raise it by objection in some other form at the earliest possible stage of the proceedings.²⁰ So, where estoppel is not specifically pleaded a party will not be permitted to rely upon it at a subsequent stage. Either party may plead estoppel²¹ and the burden of substantiating the plea is on the party relying on it.²² Where an issue is framed on a plea of estoppel raised by the defendant but the issue is not pressed at the hearing the defendant is not entitled to raise the question in appeal.²³ A plea of estoppel affecting only one of the plaintiffs does not affect the other.²⁴ An erroneous statement by counsel in the course of argument cannot estop the client from taking the correct legal position afterwards.²⁵ Estoppel can arise by accepting benefit without protest under judgment, order, decree or other arrangement and the party accepting the benefit will be estopped

15. See *Sarat Chunder v. Gopal Chunder*, 19 I.A. 203 : (1902) 20 C. 296, the Indian leading case on the subject of estoppel.
16. *Ganges Manufacturing Co. v. Sourujmull*, (1880) 5 Cal. 669; *Rup Chand v. Sarbeswar Chandra*, (1906) 10 C.W.N. 747: s.c. 3 C.L.J. 629, but see *Asmatunessa Khatun v. Harendra Lal Biswas*, (1908) 35 C. 904.
17. (1880) 5 Cal. 669.
18. *Ibid.*
19. *Sheo Tahal Ram v. Binaek Shukul*, A.I.R. 1931 All. 689 : I.L.R. 53 A. 747.

20. *Jado v. Bishunath*, A.I.R. 1942 Pat. 71 : 196 I.C. 849.
21. *Tej Bahadur v. Nakko*, A.I.R. 1927 Oudh 97 : 99 I.C. 472.
22. *Sunder v. Shah*, 212 I.C. 168 : A.I.R. 1944 All. 42 : *Mitra v. Janki*, 51 I.A. 326 : I.L.R. 46 A. 728 : 82 I.C. 946 : A.I.R. 1924 P.C. 213.
23. *Prosanna v. Adya*, A.I.R. 1942 Cal. 586 : 203 I.C. 680.
24. *Jethibai v. Chabildas*, A.I.R. 1935 Sind 142.
25. *Allahabad Bank v. Punjab National Bank*, A.I.R. 1939 Lah. 303.

from questioning the same. This is based on the maxim *allegans contraria non est audiendus* and an objector would not be allowed to take advantage of the decree by its enforcement and also claim to go behind it.¹ It is on this principle also that a judgment-debtor who gets execution of his properties postponed by giving an undertaking that he would not raise any objection on the grounds of illegality or irregularity, cannot after the sale has taken place on the postponed date seek to set it aside on the ground of illegality or irregularity of which he was cognisant at the time he gave his undertaking.² It is unnecessary to set out in detail the familiar line of cases where the judgment-debtors giving certain undertakings obtain certain advantages and alter prejudicially the position of the decree-holder were not allowed to turn round and challenge the execution or seek to do other act contrary to the undertakings.³ But a mere petition to postpone the sale without the further admission of undertaking does not create any estoppel against the judgment-debtor.⁴ But where statements were made by an objector amounting to admissions in proceedings under Order 21, Rule 58, C.P.C., and where the statements were proved to be wrong in subsequent proceedings, the objector was not estopped from challenging the title of another person with respect to the property.⁵ Similarly, a mere promise by a third party to pay the decretal amount in instalments, if the sale is not confirmed, does not estop him from challenging the validity of the attachment and title of the judgment-debtor.⁶ Culpable neglect by a party may sometimes give rise to a plea of estoppel against him. Such cases come within the fourth proposition laid down in *Carr v. London & N. W. Ry. Co.*,⁷ and the familiar instances are estoppels by signing a blank paper capable of being converted into a negotiable instrument and negligent dealing with share certificates, transfer forms and title-deeds and mortgagee negligently endorsing payment on the mortgage-deed and third person lending money on the security of the property. The Privy Council has held that the rule of English law that equity will support a transaction after it has been acted upon even if it is clothed in an imperfect legal form is applicable to India. Though a party has complete power to resile from an incomplete engagement such a power will be denied when the acts and conduct of the parties have carried the incompletely executed engagement into effect.⁸ This doctrine which is known by the theory of part performance is based on the principle that where a transaction required by law to be reduced to a particular form has not been given that form but has been acted upon, the law will not allow the parties to ignore the transaction. The amended Section 49 of the Registration Act and the newly inserted Section 53-A of the Transfer of Property Act afford illustration of this species of estoppel. The rule of estoppel enacted by Section 115 of the Evidence Act is wide enough to cover the ground covered by the theory of part performance. It may be laid down as a broad proposition that one who without mistake induced by the opposite party has taken a particular position deliberately in the course of the litigation must act consistently with it, one cannot play

1. Ghulamulla v. Papurbhai, A.I.R. 1928 Sind 175 : 112 I.C. 286.
2. Potta Reddi v. Karuppu, A.I.R. 1935 Mad. 150.
3. Uttamchand v. Khetra, 29 Cal. 377; Coventry v. Tulshi, 51 Cal. 822; Subramania Pillai v. Gorera, 86 I. C. 723 : A.I.R. 1925 Mad. 457; Narayana v. Raoji, 28 Bom. 393.

4. Mina v. Jugat, 10 I.A. 119 : 10 Cal. 196.
5. Badri v. Gulbi, A.I.R. 1962 Pat. 218 : 1961 B.L.J.R. 795.
6. Satyanarain v. Baidyanath, A.I.R. 1953 Pat. 383 : 8 D.L.R. Pat. 45.
7. (1875) L.R. 10 C.P. 307.
8. Mansingh v. Nawal, A.I.R. 1923 Pat. 492 : I.L.R. 2 Pat. 607 : 73 I.C. 822.

fast and loose.⁹ It is a well-settled principle that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent; and this wholesome doctrine applies not only to the successive stages of the same suit but also to a suit other than the one in which the position was taken up provided that the second suit grows out of the judgment of the first suit.¹⁰ Parties cannot be permitted to vary a case which they have set up in the Lower Court or recede from admissions made there.¹¹ The Code of Civil Procedure does not prohibit inconsistent pleadings. There is nothing to prevent either party from setting up two or more sets of material facts and claiming relief thereon in the alternative.¹² But a litigant who avails himself of the right to press inconsistent cases before the Court will be trying to ride two horses at the same time and would plainly place himself in peril and hardly inspire confidence in his evidence.¹³ A person, however, is not precluded from setting up in litigation a case inconsistent with the one set up by him in a prior litigation and there would be no estoppel unless the position taken up in the previous litigation amounted to representation which was acted upon by the other side to his detriment.¹⁴ Parties are precluded from making out a new case *de hors* the issues framed. Where two persons who are not eligible for marriage with each other, live as husband and wife, the invalid marriage cannot be validated by resorting to the doctrine of estoppel.¹⁵ The State is entitled, as well as subject, to a plea of estoppel. But the neglect or omissions of a public officer as to his proper duties will not work an estoppel against the State. A mistake in interpretation made by the Government officers of the grant by the State and the consequent mistaken acts are not binding on the State and would not create an estoppel against the State.¹⁶

Finally, a defrauding party cannot be allowed to disclose his fraud for the purpose of resiling from his position. The party fails who first has to allege the fraud in which he has participated.¹⁷ But though the law recognises no estoppel as between parties *in pari delicto*, a distinction has always been drawn between cases where fraud has been perpetrated and fraud has been attempted; the real owner, for instance, is not estopped from maintaining an action for the recovery of property on the principle of *locus*

9. Mahadeo v. Pudai, I.L.R. 5 Luck. 645 : 124 I.C. 671 : A.I.R. 1931 Oudh 123.

10. Hemanta v. Prasanna, I.L.R. 56 C. 584 : 120 I.C. 249 : A.I.R. 1930 Cal. 32 ; Chidambar v. Chennappa, 153 I.C. 637 : A.I.R. 1934 Bom. 329 ; Dwijendra v. Jogge, A.I.R. 1924 Cal. 600 : see also Shyama Bhai v. Purshotham, A.I.R. 1925 Mad. 645 : 90 I.C. 124 ; Nagubai Ammal v. Shama Rao, 1956 S.C.R. 451 : 1956 S.C.A. 959 : 1956 S.C.C. 655 : I.L.R. 1956 Mys. 152 : 1956 Andh. L.T. 1029 : A.I.R. 1956 S. C. 593 ; Official Receiver, Kurnool v. Mounamuna, I.L.R. 1969 A.P. 676 : (1969) 1 An. L.T. 9 : A.I.R. 1968 A.P. 336 (344) ; Hari Narain v. Ram Raj, 1968 A.W.R. (H.C.) 500 ; Abdul Qayum v. Fida Hussain, A.I.R. 1915 All 463 ;

Kartar Singh v. Nanda, A.I.R. 1926 All. 664 ; Ram Khelawan Singh v. Maharajah of Benares, A.I.R. 1930 All. 15.

11. Satyabhama v. Krishna, 6 Cal. 55 : Caspersz, s. 65.

12. Bhupen v. Kumud, 82 I.C. 934 : A.I.R. 1924 Cal. 467.

13. Official Assignee of Calcutta v. Bidyasundari, 54 I.C. 700.

14. Shyama Bhai v. Purshotham, A.I.R. 1925 Mad. 645 : 90 I.C. 124.

15. Bai Kashi v. Jamuna, 16 I.C. 135 : 14 Bom. L.R. 547.

16. Secretary of State v. Fareedoon, A.I.R. 1934 Bom. 494 : 154 I.C. 278.

17. Ali Mahommed v. Shamsunissa, A.I.R. 1938 Cal. 602 : 42 C.W.N. 1059, approving Kamayya v. Mamayya, A.I.R. 1918 Mad. 365 : 43 I. C. 352.

paenitentiae. In cases, where the fraudulent or illegal purposes have actually been effected by collusion the principle followed is *in pari delicto potior est conditio possidentis*. The Court will help neither party and the estate will lie where it falls. In regard to estoppels in transactions void for immoral purposes or opposed to public policy the principle of equity would prevent the Court from giving aid to the person guilty of immoral conduct to recover the property.¹⁸ In fact, in a case where the transfer of a hereditary religious office is opposed to public policy the alienor as representative will not be estopped from contesting its validity.¹⁹ No one is allowed in a court of justice, said Lord Bowen, in *Overseers of Putney v. L. & S. W. Rly. Co.*,²⁰ in order to escape from liability to put forward a plea that that which he is doing is illegal. Wherever it can be done rightfully, he is not allowed to say against any person entitled to the property or the right that he has done it wrongfully.²¹ Where a person possesses two separate characters, representation made by or to him in one character is not binding on or available to him in the other character.²²

115. *Estoppel*. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

A intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it.

The land afterwards becomes the property of *A*, and *A*, seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Sections 116, 117 (Estoppel of tenant, licensee, acceptor, bailee).

Bigelow's Treatise on the Law of Estoppel, 6th Ed. (1913) ; Everest and Strode's Law of Estoppel, 2nd Ed. (1907) ; Cababe, Principles of Estoppel (1888) ; Estoppel by Representation and *Res judicata* in British India, by A. Caspersz, 4th Ed. (1915) ; see also general text-books on Evidence sub. voc. "Estoppel".

SYNOPSIS

1. Principle.
2. Scope of the section.
 - (a) General.
 - (b) Essentials.
 - (c) Waiver and Estoppel.
 - (d) Laches and Estoppel.
 - (e) No estoppel against statute or the exercise of statutory power.
 - (f) No estoppel on question of law.
 - (g) Estoppel on void contracts.
 - (h) Estoppel in case of void proceedings.
 - (i) Estoppel, if order without jurisdiction.

18. *Sabava v. Yamanappa*, A.I.R. 1933 Bom. 209 : 35 Bom. L.R. 345.
19. *Nallasami v. Sadasiva*, 67 M.L.J. 759.
20. (1891) 1 Q.B. 440.
21. *Per Jessel, M.R., in Re Hallett's Estate*, (1880) 13 Ch. D. 696 and

- In *re Tarun Kumar*, 62 Cal. 114 : 157 I.C. 975 : A.I.R. 1905 C. 509.
22. *Ram Harakh v. Hanwant Ram*, A.I.R. 1930 P.C. 269 (1) : 32 L.W. 412 ; *Subramania Iyer v. Ramkrishna Iyer*, 1950 Cr. L.J. 932.

- (j) Estoppel of party taking the aid of law from questioning its validity.
- (k) Estoppel by Election.
- (l) Estoppel against estoppel.
- (m) Estoppel against one of several plaintiffs.
- (n) Admission, Estoppel by.
- (o) Estoppel—mixed question of fact and law.
- (p) Estoppel must be pleaded.
- (q) Party not taking up a legal position—if can challenge it.
- (r) Benefit received under an illegal act or transaction. No estoppel.
- (s) Pre-emption cases.
- (t) Income-tax cases.
- (u) Equitable Estoppel.
- 3 "One person"
- 4 Minor not estopped from pleading minority.
- 5 Infant's fraud, Effect of.
- 6 Corporation.
- 7 The State.
- 8 Joint administrators.
- 9 Principal and agent.
- 10 Creation of agency by estoppel:
 - (a) Estoppel by holding out. Essentials.
 - (b) What is estoppel by holding out?
 - (c) Estoppel to assert agency.
 - (d) Estoppel to deny agency.
 - (e) Estoppel of agent to deny agency.
 - (f) Estoppel of principal to deny agency as against the agent.
 - (g) Estoppel of principal to deny agency as against third parties.
 - (h) Implied agency distinguished from agency by estoppel.
- 11 Partners.
- 12 Estoppel of partners:
 - (a) General.
 - (b) Modes of conduct or holding out.
 - (c) Estoppel of third persons to deny agency.
- 13 Trustees.
- 14 Executors and legatees.
- 15 "Declaration, act or omission".
- 16 Representation must be clear and unambiguous.
- 17 Representation must be of an existing fact.
- 18 No estoppel on point of law.
- 19 Intention and motive immaterial.
- 20 Modes in which estoppel by representation may arise:
 - (a) Fraudulent representation by 'declaration' or 'act'.
 - (b) Representation without fraud, by 'declaration' or 'act'.
 - (c) Representation by 'act' or 'conduct'.
 - (d) Representation by omission or negligence.
 - (e) Neglect of duty to the other party.
 - (f) Representation by Government.
21. Estoppel by negligence.
22. Estoppel by conduct:
 - (a) Estoppel by pleading.
 - (b) No estoppel where party has no special knowledge.
 - (c) No estoppel where act or conduct founded on a mistake of facts.
 - (d) Mistake of officers cannot operate as estoppel against Government.
 - (e) Parties acting under common misapprehension.
 - (f) Party labouring under mistake of law.
23. Estoppel by omission, Silence.
24. Acquiescence.
25. Acquiescence whether equitable estoppel:
 - (a) Mere silence is not acquiescence.
 - (b) Acquiescence in jurisdiction: No estoppel.
26. Estoppel by election:
 - (a) Issue-estoppel.
 - (b) Estoppel in matter of employment under Union or States.
27. Benami transaction:
 - (a) General.
 - (b) Fraud on third parties.
 - (c) Fraud on creditors.
 - (d) Estoppel as between parties to fraud.
 - (e) Promissory note.
28. Family arrangements.
29. Invalid adoption acted upon.
30. Other instances of estoppel by conduct.
31. Estoppel in case of inconsistent positions.
32. Representation in writing.
33. Recitals.
34. "Intentionally."
35. "To believe."
36. "A thing."
37. "To act."
38. "Representative."
39. Illustration.
40. Estoppel and Fundamental Rights.
41. Miscellaneous.

1. Principle. The principle upon which the rule of estoppel rests is that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced

ed another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.²³ As has been pointed out by several High Courts in India in a large number of cases, estoppel is based on equity and good conscience, and the object is to prevent fraud and secure justice between parties by promotion of honesty and good faith.²⁴

2. Scope of the section. (a) General. This section enacts—

(1) one person must have—

(a) by his declaration, act or omission,

(b) intentionally,

(c) caused or permitted another person to believe a thing to be true, and

(d) to act upon such belief;

(2) if the above conditions are fulfilled, neither he nor his representative can be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

In dealing with this and the following sections, it is to be remembered, first, that they are not exhaustive of the law of estoppel,²⁵ since all rules of estoppel are not also rules of evidence.¹ as estoppel may have the effect of creating substantive rights as against the person estopped;² secondly, that neither this,³ nor, it may be added, the following section enacts as law in

23. *Sarat Chunder v. Gopal Chunder*, (1892) 19 I.A. 203, 215, 216 : I.L.R. 20 Cal. 296; see also *Citizens Bank v. First National Bank*, I.L.R. 6 E. & I.A. 352, 360; *Mst. Rajana v. Musahab Ali*, 1935 Oudh 387, 391 : 155 I.C. 23; *Govindsa Marotisa v. Ismail*, 1950 Nag. 22 : I.L.R. 1949 Nag. 933 : 1950 N.L.J. 1.

24. *Chajja Singh v. Pritam Singh*, 1950 Pepsu 59 : 2 Pepsu L.R. 174 (F.B.) ; *Dhalbhum Trades Industries, Ltd. v. Commissioner, Jugsalai Notified Area Committee*, 1969 B.L.J.R. 283 (287).

25. *Jaikaran Singh v. Sitaram Agarwal*, A.I.R. 1974 Pat. 364.

1. *Ganges Manufacturing Co. v. Souvaimull*, (1880) 5 Cal. 669; *Satbhhusan v. The Corporation of Calcutta*, 1949 Cal. 20; *Chajja Singh v. Pritam Singh*, 1950 Pepsu 59 (F.B.) ; *Ajitulla v. Bilati Bibi*, 1932 Cal. 383 (2) : 137 I.C. 556; 85 C.W.N. 652; *Mrs. N. Johnstone v. Gopal Singh*, 1931 Lah. 419 : I.L.R. 12 Lah. 546 : 133 I.C. 628; *Baz Bahadur Singh v. Raghubar Prasad*, 1927 All. 385 : I.L.R. 49 All. 707 : 100 I.C. 1037, but see *Darbari Lal v. Raneeaganj Coal Association Ltd.*, 1944 Pat. 30 : I.L.

R. 22 Pat. 554.

2. *Mercantile Bank of India Ltd. v. Central Bank of India, Ltd.*, 1938 P.C. 52 infra; *Veeraraghava v. Kanvilamma*, 1951 Mad. 403 : (1950) 2 M.L.J. 575; 63 L.W. 952.

3. *Sarat Chunder v. Gopal Chunder*, (1892) 19 I.A. 203, 215 : S.C. 20 C. 296 (The learned Counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law in England on the subject of estoppel and their Lordships entirely adopt that view); *Ram Lal Sahu v. Mst. Bibi Zohra*, 1939 Pat. 296 : 182 I.C. 618; *Mercantile Bank of India Ltd. v. Central Bank of India, Ltd.*, 1938 P.C. 52 : 65 I.A. 75 : I.L.R. 1938 Mad. 360 : 172 I.C. 745; *Chajja Singh v. Pritam Singh*, 1950 Pepsu 59 (F.B.) ; *Lachman Lal v. Munshi Mahton*, 1933 Pat. 708 (2); *Khan Gul v. Lakha Singh*, 1928 Lah. 609 : I.L.R. 9 Lah. 701; 111 I.C. 175 (F.B.); *Dawson's Bank v. Nippon Menkwa Kabushiki Kaisha*, 1935 P.C. 79 : 62 I.A. 100; I.L.R. 13 Rang. 256 : 155 I.C. 1.

India anything different from the law of England on the subject of estoppel. Cases of estoppel may, therefore, arise which are not within the purview of these sections at all, and those which, though they are within such purview, will (in the absence of an authoritative ruling of the Courts of this country) be determinable upon the principles which regulate English Courts, and which are to be found embodied in English decisions.⁴

The sole function of estoppel is either to place an obstacle in the way of a case which otherwise might succeed or to remove an impediment out of the way of a case which otherwise might fail. It is neither a cause of action in itself nor creates one. It merely operates as a bar to the suit; it does not extinguish the right.⁵

It does not create interest in property, but Section 43 of Transfer of Property Act may be said to be an exception to this principle.⁶

This section deals with estoppels by "representation", or "misrepresentation", these terms include both express and implied statements. They may be described as estoppels by "misrepresentation", for though, in strict legal theory, the proposition that the representation must be untrue is probably not essential and the person is none the less bound to admit a fact because it is true; still, in practice, the doctrine only obtains legal significance when there has been a misleading, or, in other words, when the admission exacted from A, by reason of his conduct, is of facts which are not capable of actual proof.⁷ It is not necessary that there should be an express statement; whatever word, action, or conduct conveys a clear impression as of a fact is embraced in the term. Indeed, the term practically includes silence in certain cases; for silence, where one is bound to speak, is ordinarily equivalent to an admission of the fact.⁸ And so, the section speaks not only of declarations but also of acts and omissions. As it is immaterial in what form the representation is made, so it be a representation, so also is it immaterial to know what the motive or the state of knowledge is of the party making the representation. *The main determining element, in every case, is not the motive or the state of knowledge of the party estopped, but the effect of his representation by declaration, act or omission or conduct, as having induced another to act on the faith of such representation, act or conduct.*⁹ As pointed out in *Sarat Chunder v. Gopal Chunder*,¹⁰ the main question is: whether the representation has caused the person to whom it has been made to action

4. American decisions, though not of course of authority, may, in so far as American law is founded upon English law, also be referred to as aids to determination upon this or other question of evidence. See Preface.

5. *Ram Niwas v. State of Haryana*, I. L. R. (1970) 1 Punj. 689 : 1970 Cur. L.J. 276 : 72 P.L.R. 233 : A.I.R. 1970 Punj. 462 (467) (F.B.).

6. *Management Committee v. T. K. Ghosh's Academy*, 1974 U.J. (S.C.) 310 : (1974) 2 S.C.C. 354 : 1974 Rent. Cas. 247 : 1974 B.B.C.J. 583 : 1975 Pat. L.J.R. 49 : (1974) 3 S.C.R. 872 : A.I.R. 1974 S.C.

1495.

7. *Cababe's Estoppel*, 60.

8. *Bigelow*, op. cit., 6th Ed., 648; *Carr v. London Ry. Co.*, I. R. (1875) 10 C.P. 307, 316, 317.

9. *Sarat Chunder v. Gopal Chunder*, (1892) 19 I.A. 203, 215 : I.L.R. 20 Cal. 296 followed in *Dharam Prakash v. Mst. Kalawati Devi*, 1928 All. 459 : I.L.R. 50 All. 885 : 10 I.C. 665. As to mistake of law see *Kuverji v. Babai*, (1890) 19 B. 374, and mistake of fact; *Nathubhai v. Mulchand*, (1901) 3 Bom. I.R. 535; *Helan Dasi v. Durga Das*, 4 C.L.J. 323.

10. (1892) 19 I.A. 203, 215, 216 : I.L.R. 20 Cal. 296.

the faith of it? It is not essential that the intention of the person whose declaration, act or omission has induced another to act, or abstain from acting, must have been fraudulent' or that he should not have been under a mistake, or misapprehension.¹¹ The principle upon which the rule rests is that the position of the one party having been changed by the representation, the person who made the latter shall not be permitted to disaffirm the statement which has induced such change.¹² If one of the parties by its representation make the other party to change its position, then the party who makes the representation cannot be allowed to affect the right of the other party which it has acquired in the property by that representation. There may also be a case of estoppel when one of the parties stands by, and allows the other party to change his position. In that case also, the first party is estopped. And there may be a case, where one party, in a mistaken belief of his right, incurs expense, while the other party, knowing of his mistake, does not disillusion him of his mistake; in such a case also, the other party is estopped from subsequently asserting his rights to the detriment of the first party.¹³

(b) *Essentials.* (See Note 4 of the Introduction "Elements of Estoppel".) Three things only are necessary in order to bring a case within the scope of this section :

- (i) there must have been a "representation",¹⁴ which amounts to an intentional causing or permitting belief in another ;
- (ii) there must have been belief on the part of that other ; and
- (iii) there must have been action arising out of that belief.

The Supreme Court has laid down that to invoke the doctrine of estoppel three conditions must be satisfied :

- (1) there should be a representation by a person to another ;
- (2) the other shall have acted upon the said representation ;
- (3) such action shall have been detrimental to the interests of the person to whom the representation has been made.

There is no scope for invoking the doctrine where two conditions are satisfied but the third is not, for instance, the condition as to detriment.¹⁵

11. *Venkatarathnam v. Bullemina*, A.I.R. 1965 A.P. 163 : (1965) 1 Andh. W.R. 112.

12. *Sarat Chunder v. Gopal Chunder*, (1892) 19 I.A. 203, 215. Bigelow, op. cit., 6th Ed. 453 ; *Citizens Bank v. First National Bank*, L.R. 6 H.L. 352, 360.

13. *Ramjidas v. State of Assam*, A.I.R. 1964 Assam 60, 63-64.

14. *Ananta Nalvade v. Ganu*, 1921 Bom. 417 : I.L.R. 45 Bom. 80, it was held that the plaintiff had by his conduct permitted the defendants to believe that they would have a right of easement upon repair of a well. In *Bahadur Singh v. Mohar Singh*, 29 I.A. 1 : I.L.R. 24 All. 94 : 4 Bom. L.R. 235 : 6 C.W.N. 169, the Privy Council held that there was no evidence of any representation on which to found an es-

toppel. So also in *Kuverji v. Municipality of Lonavala*, 1921 Bom. 198 : I.L.R. 45 Bom. 164 ; *Nageswara Rao v. Principal, Medical College*, A.I.R. 1962 A.P. 212.

15. *Gyarsi Bai v. Dhansukh Lal*, (1965) 2 S.C.R. 154 : 1966 S.C.D. 222 : 1965 S.C.J. 783 : (1966) 2 An. L.T. 9 : A.I.R. 1965 S.C. 1055 (1061), citing *Canada and Dominion Sugar Co., Ltd. v. Canadian National West Indies Steamships Ltd.*, A.I.R. 1947 P.C. 40 ; *Marketing and Advertising Associates (Pvt) Ltd. v. Telerad Private Ltd.*, 71 Bom. L.R. 38 : 1969 Mad. L.J. 292 : 39 Com.Cas. 436 : (1969) 2 Comp. L.J. 91 : A.I.R. 1969 Bom. 323 (328) ; *George A. Leslie v. State of Kerala*, 1969 K.L.R. 617 : 1969 K.L.T. 578 : A.I.R. 1970 Ker. 21 (27) (F.B.) (detriment essential to

When these facts are shown, an estoppel arises which consists in holding for truth the representation acted upon, when the person who made it seeks, or his privies seek, to deny its truth and to deprive the party who has acted upon it of the benefit obtained.¹⁶ There can be no estoppel where truth is accessible. Again, there can be no estoppel in the absence of representation or conduct amounting to such. Further, there can be no estoppel where a party is not misled and has not been induced to do something detrimental to his interest owing to the action of the other party.¹⁷

Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted upon, action on the faith of it, resulting detriment to the actor.¹⁸ Before an estoppel can arise, there must be, first, a representation of an existing fact as distinct from a mere promise *de futuro* made by one party to the other; secondly, the other party, believing it, must have been induced to act on the faith of it; and thirdly, he must have so acted to his detriment.¹⁹

Assuming that all the conditions necessary to effect an estoppel are not fulfilled, a representation may still operate as an admission; that is, a statement which suggests any inference as to any fact in issue or relevant fact, and may be evidence, though not conclusive, against the party who has made it.²⁰ As has been pointed out in the undernoted case:²¹ "It is true that the doctrine of estoppel precludes a party from taking up a position which is inconsistent with an admission which he has previously made, but this doctrine comes into play only when the admission was designed actually or apparently to influence the conduct of the party claiming the estoppel, and when the said party has changed his position in reliance on the admission." It does not apply to an erroneous admission on a point of law,²² or when the admis-

- foundling plea of estoppel); *State of Orissa v. Indupalli Babaji*, (1969) 35 Cut. L.T. 60 (79) (condition of detriment not satisfied—father of minor child representing the date of its birth as being such to the school authorities—father estopped from challenging its correctness); *Srinivas v. Narayan*, A.I.R. 1971 Mys. 174.
16. Bigelow, *op. cit.*, 6th Ed., 604; *Gaosi Bai v. Dhansukh Lal*, (1965) 2 S.C.J. 783; A.I.R. 1965 S.C. 1055; (1965) 2 S.C.R. 154; 1966 S.C.D. 222; (1966) 2 An. L.T. 9; *State of Orissa v. Indupalli Babaji*, I.L.R. 1968 Cut. 859; (1969) 34 Cut. L.T. 60 (78) (third condition of detriment not satisfied).
17. *Ram Singh v. Baldeo Prasad*, 1932 All. 643; 138 I.C. 552; 1932 A. I. J. 605.
18. *Canada and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.*, 1947 P.C. 40; 228 I.C. 614; 13 B.R. 299.
19. *Dhiyan Singh v. Jugal Kishore*, 1952 S.C. 145; 1952 S.C.A. 417; 1952 S.C.J. 142; 1952 S.C.R. 478; I. I. R. (1953) 1 All. 225; 1952 A. I. J. 324; 90 C.L.J. 206; see also *Munyaraj v. Venkatapati*, A.I.R. 1955 Hyd. 172; I.L.R. 1954 Hyd. 745; *M/s. Byford Private Ltd. v. Union of India*, A.I.R. 1972 Delhi 59; *Radha Cinema v. Chitra Gupta Film*, 1974 Tax. L.R. 2180.
20. *ante*, ss. 17-23, 31; see *Yashwant Putu v. Radhabhai*, (1889) 14 Bom. 312; *Pandit Hanuman v. Mufti Assodullah*, (1875) 7 N.W.P. 145; *Veeraraghava Reddi v. Kamalamma*, 1951 Mad. 403; (1950) 2 M.I.J. 575; 63 L.W. 952; 1950 M.W.N. 710; *Jagannath Prasad v. Badiul Mulk Khan*, 1954 Pat. 447; 2 B. I. J. 300; *Baghel Singh v. Mihan Singh*, 1953 Punj. 171; 55 P.L.R. 877; *Ramkrishna Pillai v. Varadarajaswami Koil*, 1957 Mad. 785; *Chote Lal v. Mangali*, 1957 All. 135.
21. *Mst. Chinto v. Narinjan Singh*, 1957 Punj. 317 at 320.
22. *Kalidas Dhanjibhai v. State of Bombay*, 1955 S.C. 62; 1955 S.C.A. 340; 1955 S.C.J. 150; (1955) 1 S.C.R. 887 (admission as to legal effect of admitted facts); *Ghulab Chand v. Bhaiya Lal*, 1929 Nag. 343; 119 I.C. 698; *Ram Bharose v. Ram Bahadur Singh*, 1948 Oudh. 125; I.I.R. 23 Luck. 58; 1947 A.W.R. (C.C.) 278.

sion is gratuitous,²³ and a party making such an admission is entitled to retract the same²⁴ and to prove that the admission was mistaken or untrue.²⁵ Thus, estoppel is ruled out when both the parties are labouring under a mistake, and one party is not more to blame than the other. Estoppel arises only when the plaintiff, by his acts or conduct, makes a representation to the defendant of a certain state of facts which is believed to be true and acted upon by the defendant *to his detriment*. It is only then that the plaintiff is estopped from setting up a different state of facts. If a person has to pay a certain amount to another for obtaining something, he pays what he has to pay. By paying the amount, in such a case, he does nothing more than discharge his liability. The discharge of the legal liability cannot, in any sense of the term, be described as *detrimental* to him. Whether the representation was made or not, he had to pay that amount, and, by paying that amount, he secures a benefit, that is, the discharge of his liability. There is no scope in such a case to invoke the doctrine of estoppel.¹ Where Government gave an assurance of exemption from excise duty but did not make any permanent commitment, plea of estoppel against Government was not accepted.²

Where the representation is in regard to a position of law, no estoppel arises when the mistake of law is common to both the parties.³

Where a party receives no benefit under an act or transaction, there can be no estoppel against him.⁴ Instances of such cases are where there is a surrender.⁵ Where, however, there is an alienation or transfer of property for consideration, the doctrine of estoppel is applicable.⁶ Where the application of the rule of estoppel rests upon a failure to object, it can have no application where there is no occasion to raise an objection.⁷

(c) *Waiver and Estoppel*. See Notes 9, 10 and 11 of the Introduction.

A right created by contract may be waived. The waiver may be express or implied. In either case, a unilateral giving up of rights does not, by itself, create any right in the other party. Such a right can be created only, where it is agreed between the parties that the right created by contract shall be given up and the other side, as a result thereof, *alters* his position. Where a party has *two* rights, the mere exercise of one right does not amount to waiver of the other, but if there are *alternative* rights, the exercise of one right may imply that the party has waived the exercise of the other.⁸

A contracting party can waive a stipulation in his favour and not one

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23. Mohamad Imam Ali Khan v. Husain Khan, 25 I.A. 161 : I.L.R. 26 Cal. 81 : 2 C.W.N. 737 (P.C.) ; Budha Ram v. Uttam Chand, 1928 Lah. 726 : 109 I.C. 26.
 24. Sita Ram v. Pir Baksh, 1931 Lah. 6 : 130 I.C. 406 : 32 P.L.R. 413.
 25. Abdul Karim v. Rashiduddin, 1931 Oudh 246 : 131 I.C. 903 : 8 O.W.N. 300.
 1. Garsi Bai v. Dhansukhlal (1965) 2 S.C.J. 783 : A.I.R. 1965 S.C. 1055.
 2. Synthetics and Chemicals Ltd. v. State of U.P., 1973 All. L.J. 732.

3. Sales Tax Officer, Banares v. Kanhaiya Lal, A.I.R. 1959 S.C. 135.
4. Ram Prasad Singh v. Sital Prasad, A.I.R. 1965 Pat. 47.
5. *Ibid*.
6. Rangaswami v. Nachiappa, 40 I.A. 72 : A.I.R. 1918 P.C. 196 ; Ramgouda v. Bhansaheb, 54 I.A. 396 : A.I.R. 1927 P.C. 227.
7. Collector, Monghyr v. Keshav Prasad, (1962) 2 S.C.A. 708 : A.I.R. 1962 S.C. 1694 : 1962 B.L.J.R. 863.
8. Humayan Properties, Ltd. v. Ferrazinis (P.), Ltd., A.I.R. 1963 C. 473.

creating liability against him.⁹ Such waiver may be express or implied.¹⁰ Where after notice of rescission of a contract the contractor continued to work and was paid in full, Government waived the right to rescind the contract as well as the right to forfeit security deposit.¹¹ Where under the terms of contract all suits arising under the contract were to be filed at the place of execution of contract, the party is not deemed to have waived his right to sue at another place where contract was performed.¹²

The question of estoppel is governed by this section. Estoppel is *not a cause of action*. It can assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation, if—

- (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or someone on **his behalf,**
- (b) with the intention that the plaintiff should act upon the faith of **the statement, and**
- (c) the plaintiff does act upon the faith of the statement and alters **his position.**

On the other hand, waiver is *contractual*, and *may constitute a cause of action*.¹³ It is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then, subject to any other question, such as consideration, the principal will be bound, but *he will be bound by contract, not by estoppel*. There is no such thing as estoppel by waiver.¹⁴

A unilateral act or conduct of one person, *which is not relied upon by another person to his detriment*, is nothing more than mere waiver, acquiescence or laches, while an act or conduct of a person, amounting to an abandonment of his right and inducing another person *to change his position to his detriment*, raises the bar of estoppel.¹⁵

The principle of waiver may be applied both to directory and mandatory provisions. But there are two limitations to its application, namely,—

- (1) a party cannot waive a statutory requirement which has been inserted by law *in the public interest* as distinguished from the interest of the parties to an action;
- (2) the parties cannot, by waiver, invest a tribunal with a jurisdiction which it does not have.¹⁶

9. *Dr. Jiwan Lal v. Brij Mohan Mehra*, (1972) 2 S.C.C. 757 : (1972) Civ. App. J. 292; (1973) 2 S.C.J. 594 : (1973) 2 S.C.R. 230 : A.I.R. 1973 S.C. 559 ; *Debabrata Mukherjee v. L.I.C. of India*, I.L.R. (1973) 1 Cal. 499 (D.B.).

10. *Chhotalal v. Ram Gulam*, (1976) 80 C.W.N. 36 : A.I.R. 1975 Cal. 436.

11. *State of Rajasthan v. Satya Nand Sardana*, 1971 W.L.N. 575.

12. *M/s. Maltex Malsters (P.) Ltd. v. M/s. Allied Engineers*, I.L.R. (1975) 2 Delhi 57 : A.I.R. 1975

Delhi 57.

13. *S. L. Deb v. S.K. Deb*, 78 Cal. W. N. 357.

14. *Dawsons Bank, Ltd. v. Nippon, etc.*, 62 I.A. 100 : I.L.R. 13 Rang. 256; 155 I.C. 1 : A.I.R. 1935 P.C. 79; *Shiva Dutt v. Kedar Nath*, A.I.R. 1972 H.P. 20 : (1971) 1 Sim. L. J. (H.P.) 1.

15. *Shah Mulchand & Co., Ltd. v. Jawahar Mills, Ltd.*, A.I.R. 1953 S.C. 98.

16. *Modern Builders v. Hukmatrai*, A.I.R. 1967 B. 373 (377) : 69 Bom. L. R. 237.

Thus, the right to challenge a decree can be waived even by conduct after the passing of the decree.¹⁷ Whether or not there has been a waiver depends upon the facts and circumstances of each case. Merely because a person has waived a certain right, e. g., the right to remuneration for earlier periods, it does not follow from it that he has waived his remuneration also for a period subsequent to such waiver. Waiver is a matter of proof, not of inference.¹⁸ It may be stated, as a general rule, that if the statute is solely for the benefit of a person, he may waive his right or the benefit, if he thinks fit, or give up the rights of a personal or private nature created under an agreement, but he cannot waive a benefit conferred by a statute, *which has public policy for its object*. There is a difference between a statute solely meant for the benefit of an individual, and a statute which has public policy for its benefit, that is, an advantage or benefit intended for an individual and one in which the public have an interest. Therefore, an individual, who has the benefit given to him by a statute, may waive it, but he cannot waive it, where the public have an interest. The rule of waiver cannot apply to matters based on public policy.¹⁹ So, where a notice is required to be given by statute on principles of public policy, the defect of not giving notice cannot be waived.²⁰ Protection afforded by law under Section 60, C.P.C. cannot be waived as it is based on public policy.²¹ When there is statutory provision for payment of decretal amount in 17 instalments, the agreement of judgment-debtor to pay in lesser instalments would not amount to waiver of his right because the privilege has been conferred upon the judgment-debtor on the principle of public policy.²² Rules of procedure are not rules of public policy and therefore do not preclude parties from waiving the benefit of such rules.²³ Since giving of notice under Section 49 of Punjab Municipal Act is mandatory, defendant can be allowed to raise the plea of want of notice even at the stage of revision, he will not be deemed to have waived it.²⁴ By giving a second notice a landlord waives the first notice of ejection.²⁵ It is not possible to waive a notice required under Section 19 (2) of Industrial Disputes Act.¹ But a notice under Section 106, T. P. Act can be waived.² If the State deliberately and intentionally does not object to the validity of notice under Section 80, C. P. C., the principle of waiver would apply.³ Principle of waiver does not avail a person who sues the Government and alleges that it is not possible to comply with the requirement of giving notice under Section 80, C. P. C.⁴ The consent of parties may make admissible evidence given in a previous judicial proceeding between them in which the conditions, prescribed by Section 33, *ante* (the

17. Ram Chander v. Jamna Shanker, I. L.R. 1961 Raj. 76; A.I.R. 1962 Raj. 12.

18. Krishnaswami v. Stressed Concrete Constructions (Private) Ltd., A.I.R. 1964 M. 191; (1964) 1 M.L.J. 18.

19. Abdul Waheed Khan v. Mrs. Reny Charles, A.I.R. 1965 Mys. 303; P. Appa Rao v. P. Dasamuni Reddy, (1973) 1 A.P.L.J. 103; B. C. Beg v. N. C. Majumdar, (1972) 73 Cal. W.N. 368.

20. V.K. Gooyee v. Commissioner of Income-tax, A.I.R. 1966 C. 488; 69 C.W.N. 921.

21. Gowrana v. Basavana, A.I.R. 1975 Kant. 84.

22. Isaac v. Kunju Poul, 1972 Ker. I.R. 715.

23. Dalim Kumar Sain v. Nandarani Dassi, 73 C.W.N. 877; A.I.R. 1970 Cal. 292.

24. I.L.R. (1972) Delhi 708.

25. I.L.R. 1972 Guj. 24.

1. Glaxo Laboratories v. Industrial Tribunal, 1975 Lab. I.C. 1545.

2. Ram Pratap v. Birla Cotton & Spinning Mill, A.I.R. 1973 Delhi 124; Baloo Mal v. Rameshwar Nath, A.I.R. 1971 Delhi 98; K.N. Ramakrishnan v. C. Keral Chand, A.I.R. 1971 Mad. 150; Boota Singh v. Roshan Lal, A.I.R. 1971 Punj. 269.

3. Salig Ram v. Shiv Shankar, A.I.R. 1971 Punj. 437.

4. State of Bihar v. Jivan Das, A.I.R. 1971 Pat. 141.

benefit of which can be waived) do not exist.⁵

Another important essential of waiver is that the foregoing of right should be a conscious act.⁶ Hence there is no waiver when there is no evidence of such conscious abandonment of one's statutory right.⁷ A candidate appearing before Selection Committee unaware that one of the members was interested in the selection of any other candidate cannot be said to have waived his right to object at a later stage.⁸ But if one consciously waives his right to reappointment to a subsequent vacancy and another person is appointed, there is waiver.⁹

In order that the plea of waiver of a fundamental right under Article 30 of the Constitution of India may succeed, it must be proved that the person or persons was or were aware of the right waived. On the facts and circumstances of the case, no waiver of fundamental rights could be inferred.¹⁰ There can be no question of the loss of a fundamental right merely by the non-exercise of it.¹¹

Waiver of the mandatory provisions of Article 299 of the Constitution is impermissible.¹² Rights under Articles 14 and 15 of the Constitution cannot be waived.¹³

(d) *Laches and Estoppel.* (See Note 13 of Introduction). Laches is often an element in estoppel.¹⁴ A trustee is estopped due to laches in challenging the validity of trust after expiry of sufficient time.¹⁵ When a claim is not made within time and no request for condonation of delay is made, estoppel applies due to the laches.¹⁶ When fraud was detected 21 years after and immediately proceedings were instituted, there is no question of laches or estoppel.¹⁷ When the initial appointment of a Government employee was not illegal and he had not made any misrepresentation about his educational qualifications, his reversion 21 years afterwards on the ground that it had been discovered that he was not sufficiently qualified is impermissible on the ground of estoppel arising out of the inaction, laches and silence of the authorities for such a long time.¹⁸

5. *Bibi Saheba v. Hyderally Saheb*, I. L.R. 43 Mad. 609 : A.I.R. 1920 Mad. 547.
6. *George v. Thekkekar*, A.I.R. 1979 Ker. 1 (F.B.).
7. *Eyvakku v. Onnaloepan*, 1973 Ker. L.T. 796 : A.I.R. 1974 Ker. 189; *Narayan Pillai v. Deputy Director of Public Institutions*, 1972 Ker. L.R. 430 : 1972 Ker. L.J. 761 : (1973) 1 Lab. L.J. 360 : 1973 Lab. I.C. 1526.
8. *A. Nizami v. D.D. Chitale*, 1973 (1) An. W.R. 208 : 1973 Serv. I.C. 543 : (1973) 2 Serv. L.R. 119; 1973 Serv. L.J. 426 : I.L.R. 1973 A.P. 276.
9. *Kannan v. Lakshmi*, 1970 Ker. L.T. 373 : I.L.R. (1972) 1 Ker. 266.
10. *K. O. Vaykey v. State of Kerala*, I. L.R. (1969) 1 Ker. 48 : 1968 K.L.J. 799 : 1968 K.L.T. 815 : A.I.R. 1969 Ker. 191 (196).
11. *In re Kerala Education Bill*, 1957, 1958 K.L.J. 465 at p. 501 : A.I. L.E.-372
12. *State of M.P. v. Firm Gopi Chand Sarju Prasad*, A.I.R. 1972 M.P. 43.
13. *Pradeep Tandon v. State*, A.I.R. 1975 All. 1.
14. *Habibulla v. Special Deputy Collector*, A.I.R. 1967 M. 118 : 79 L.W. 469.
15. *G. Moorthanna v. G. Chinna Ankiah*, (1974) 2 A.P.L.J. 243 : (1975) 1 Andh. W.R. 113 : 1975 Andh L.T. 1 : A.I.R. 1975 Andh. Pra. 97.
16. *A. C. B. Venkatacharyulu v. I. Kondamacharyulu*, (1971) 2 Andh. W.R. 129.
17. *L. Arunachalam v. The Deputy Chief Mechanical Engineer, Southern Rly.*, (1975) 1 Lab. L. J. 270 : (1975) 88 M.L.W. 595.
18. *V. P. Thirunavukkarsu v. State of T.N.*, (1974) 1 Lab. L.J. 323 : 86 Mad. L.W. 483 : (1973) 2 Mad. L.J. 181.

(e) *No estoppel against statute or the exercise of statutory power.* The doctrine of estoppel cannot be applied to an Act of the Legislature, and it is not competent to parties to a contract to estop themselves or anybody else in the face of such an Act. There can be no estoppel against a statute.¹⁹ Thus, for example, where a statute such as Section 27, Santhal Parganas Settlement Regulation III of 1887, prohibits altogether transfers by a *raiya* of his right in the holding by sale or mortgage, unless they be entered in the Record of Rights, it would not be open to the vendor after the sale, to urge that the sale was void because of the prohibition under Section 27.²⁰ An assurance by the State that a tax would not be collected, would not estop it from claiming the tax.²¹ Where a class of shareholders had been deprived of their rights under Sections 397 and 398 of the Indian Companies Act, 1956, their omission to be present at the meeting when it was decided upon or

19. Darbari Lal v. Ranceganj Coal Association, Ltd., 1944 Pat. 30 : I.L.R. 22 Pat. 554 : 25 P.L.T. 120 ; Ariff v. Jadunath Majumdar, 1931 P.C. 79 : 58 I.A. 91 : I.L.R. 58 Cal. 1235 : 131 I.O. 762 ; Walzi Chhatri v. Ganpat Singh, 1943 Pat. 386 : I.L.R. 22 Pat. 532 : 209 I.C. 438 : 10 B.R. 156 : 24 P.L.T. 418 ; Narendra Prosad Singh v. State of West Bengal, 1957 Cal. 98 ; Bhanwar Lal v. Mst. Mangi Bai, 1955 Raj. 129 ; Mahabir Singh v. Narain Tewari, 1931 All. 490 : 134 I.C. 236 (F.B.) ; Ajudhia Prasad v. Chandan Lal, 1937 All. 610 : I.L.R. 1937 All. 860 : 170 I.C. 934 (F.B.) ; Ganesh Shanker Bhat v. Ganga Bai Shambhu Bhat, 1939 Bom. 114 : 181 I.C. 608 : 41 Bom. L.R. 170 ; Prem Prakash v. Mohan Lal, 1943 Lah. 268 : 45 P.L.R. 432 (F.B.) ; Uchit Lal v. Raghunandan, 1934 Pat. 666 : 153 I.C. 183 : 15 P.L.T. 661 (F.B.) ; Ma Mo. E v. Ma Keen Hlaing, 1941 Rang. 234 : 197 I.C. 20 : 1941 R.L.R. 309 ; Amar Singh Ji v. State of Rajasthan, 1955 S.C. 504 : 1955 S.C.A. 766 : 1955 S.C.J. 523 : (1955) 2 S.C.R. 303 ; Albion Jute Mills Co., Ltd. v. Jute and Gunny Brokers, Ltd., 1953 Cal. 458 : 92 C.L.J. 48 : 57 C.W.N. 541 (S.B.) ; Mohammad Maqsood Ali Khan v. Hoshiar Singh, 1945 All. 377 : I.L.R. 1945 All. 394 : 1945 A.L.J. 185 ; Jai Sri Singh v. Prabhu Narain Singh, 1935 All. 127 : 152 I.C. 508 : 1935 A.L.J. 21 ; New Delhi Municipal Committee v. H. S. Rikhy, 1956 Punj. 181 ; Quarabali v. Govt. of Rajasthan, I.L.R. (1959) 9 Raj. 1084 ; Municipal Committee v. Sha Raisi, A.I.R. 1960 M.P. 217 ; The State of Bihar v. Kamakshiya Singh, 1961 Pat. I.R. 89 ; Gokul Ram v. Bhagvandas, 1962 Jab. L.J. 286 (estoppel against statute explained with reference to

- Companies Act) ; Mohan Lal v. Punjab Company, A.I.R. 1961 Punj. 485 ; State of Bihar v. Dukhulal Das, A.I.R. 1962 Pat. 140 ; M/s. Mathura Pd. & Sons v. State of Punjab, A.I.R. 1962 S.C. 745. See also Shiv Ram v. Shiv Charan, I.L.R. 1964 Raj. 26 : A.I.R. 1964 Raj. 126 ; Virendra v. University of Jodhpur, I.L.R. 1964 Raj. 163 : A.I.R. 1964 Raj. 161 ; Kisto Chand Mandal v. Anila Bala Das, A.I.R. 1968 Pat. 487 (496) ; Liberty Talkies v. State of Gujarat, 8 Guj. I.R. 609 : A.I.R. 1968 Guj. 280 (287) (case under Bombay Entertainment Duty Act, 1923) ; Madan Bari v. State of Bihar, 1968 P.L.J.R. 52 : 1968 B.L.J.R. 312 (348) ; Sankaranarayanan v. State of Kerala, I.L.R. (1968) 2 Ker. 664, affirmed in 1971 K.L.T. 422 (S.C.) ; E. S. I. Corporation v. M/s. Sri Krishna Bottlers, 1974 (2) An. W.R. 59 ; R. M. Rao v. R. T. O., Nizamabad, 1972 Tax. L.R. 2318 ; Kashmir House v. Deputy Commissioner of Commercial Taxes, 1971 Tax. L.R. 2318 ; Firm Gappulal Jaiswal v. State of M.P., 1971 Tax L.R. 385 (M.P.) ; Jiwan Das v. Municipal Corporation of Delhi, 1971 Serv. L.R. 277 : 1971 Lab. I.C. 795.
20. Vanguard Fire Insurance v. Sarla Devi, 1959 Punj. 297. See also Papanasam Labour Union v. State of Madras, (1959) 2 M.L.J. 69 (a case under Industrial Disputes Act) ; Bahu Balla v. Mandalal, 1957 Pat. L.R. 288 ; Raghavendra Kripal v. Municipal Board, A.I.R. 1959 All. 192 ; State of Bihar v. Dukhulal Das, 1962 Pat. 140.
 21. Messrs. Mathura Prasad & Sons v. State of Punjab, 1962 S.C. 745 ; Rishabhi Kumar v. State of U.P., 1973 U.P.T.C. 135.

failure to object at the subsequent proceedings, was held not to estop them from agitating their statutory rights under the Act.²² The principle has, however, no application when the estoppel operates before the provisions of the statute come into play.²³ The Act (The Displaced Persons Debt Adjustment Act) enacted special provisions which revived the claim of the applicant and it can be said that a fresh right was conferred on the applicant by the Act to recover the amount due on the policy for the loss of the goods kept in the shop and in that view of the matter any principle of estoppel cannot bar the applicant's claim.²⁴ A variety of situations may develop during the pendency of a disciplinary enquiry which may weigh with the authority in dispensing with the enquiry and resorting to one or other provisos appended to Article 311 (2). The right of the administration to dispense with enquiry cannot be forfeited on the principle of estoppel.²⁵

See also cases in Note 7 to Introduction under the head "Promissory Estoppel".

The principle that there cannot be an estoppel against the statute, does not apply where a particular provision of law is for benefit of the State.¹ There cannot be an estoppel in respect of the exercise of a statutory power which is to be exercised for the public good or for the benefit of someone other than the person against whom the estoppel is asserted.²

In *In re A Bankruptcy Notice*,³ Lord Atkin remarked: "Whatever the principle may be (referring to a contention as regards approbation and reprobation), it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid." So, there can be no estoppel from questioning the validity of a document which is by law required to be registered and is not registered.⁴ And a Municipal Corporation or Company cannot be estopped from recovering taxes or other dues fixed by statute.⁵ So also, in the face of a clear legislative enactment like the fourth section of the Indian Companies Act, X of 1868, the law recognises no estoppel as between parties who are *in pari delicto*, as the parties in the case cited below were held to be, and the defendants cannot be estopped from setting up the plea of illegality.⁶ Where a

22. *Mohan Lal v. Punjab Company, A. I.R. 1961 Punj. 485.*

23. *Ambika Devi v. Sachia Nandan, A. I.R. 1960 Pat. 289 : 1960 Pat. L. R. 65.* distinguishing *Ariff v. Jadunath Mazumdar, 60 M.L.J. 538.*

24. *The National Assurance Company v. S. N. Jaggi, A.I.R. 1971 All. 421.*

25. *Sri Naganbulha v. Union Territory of Mizoram and others, 1974 Lab. I. C. 861.*

1. *N. C. Kapoor v. D.F.O., 1972 A.W. R. (H.C.) 265 (271).*

2. *Achuthan Pillai v. State of Kerala, 1970 K.L.T. 838 (846) (F.R.).*

3. (1924) 2 Ch. 76 at 37 : 93 L.J. Ch. 497 : 131 L.T. 307 : 68 S.J. 458 : 1924 B.S.C.R. 188. (C.A.) relied on in *Kauleshwari Kuer v. Surajnath Rai, 1957 B.L.J.R. 319 : A.I.R.*

1957 Pat. 456.

4. *Mst. Kauleshwari Kuer v. Surajnath Rai, A.I.R. 1957 Pat. 456 : 1957 B.L.J.R. 319.*

5. *Maritime Electric Co., Ltd. v. General Dairies, Ltd., 1937 P.C. 114 : 168 I.C. 616 : 46 L.W. 105; Corporation of Calcutta v. Shashi Bhusan, 1947 Cal. 273 : 50 C.W.N. 263.*

6. *Madras Hindu Mutual Fund v. Ragava Chetti, (1895) 19 M. 200, 207, 208 : see Jogini Mohan v. Bhoot Nath, (1903) 31 C. 146. Estoppel cannot be invoked to defeat the plain provisions of a statute : see Jagabandu v. Magremoyi, 1918 Cal. 961 : I.L.R. 44 Cal. 555 : 36 I.C. 884 ; Alimuddi v. Chitaharan, 1919 Cal. 504 : 51 I.C. 403 and parties to a*

party seeks to set aside an award on the ground that it is delivered after the time fixed, it is not open to the other party to plead that the first party is estopped by conduct from challenging the award on that ground as there can be no estoppel against the statute.⁷ It has, however, been held that failure of the arbitrators to appoint an umpire is not such a breach of the provisions of the Arbitration Act, 1940, as to vitiate an award. It might amount to an irregularity which it is possible to waive, so that if the parties instead of moving the arbitrators or the Court to appoint an umpire, appear before the arbitrators and produce all their evidence, they would be estopped from questioning the award.⁸ And parties cannot estop themselves from pleading limitation. An agreement by a debtor not to raise that plea is void under Section 23 of the Indian Contract Act, for it would defeat the provisions of the Limitation Act.⁹ Order XXI, Rule 2 of the Civil Procedure Code enacts a special law for a special purpose and so overrides the general law of estoppel; so, where, after an adjustment of decree, which had not been certified or recorded, the decree-holder acted on the adjustment and then applied for execution, it was held that he was not estopped.¹⁰ There is an absolutely fundamental limitation on the application of the doctrine of estoppel that it cannot be applied with the object or result of altering the law of the land. The law, for instance, imposes fetters upon the capacity of certain persons to incur legal obligations and particularly upon their contractual capacity. And it invalidates and renders null and void certain transactions, on the ground that they are illegal. Further, it attaches certain incidents to property, as, for instance, by prescribing the mode in which it shall be transferred. This general law is in no way altered by the doctrine of estoppel, which is not allowed to enlarge the status or capacity of parties, nor to be a cloak for illegality, nor to alter the incidents of property. The admission exacted must always be of something, which can legally be done by the party from whom it is exacted.¹¹ The principle of estoppel cannot be invoked to evade the plain provisions of a statute.¹² No Court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed, by the consent of the parties, or by a failure to plead or to argue the point at the outset.¹³ Legal representatives of deceased defendant substituted without any objection from them on the point of limitation are not estopped from contending in appeal that their substitution was illegal,

consent decree are not estopped from objecting to it if the decree is contrary to statute; *Ramchandra v. Venkatalakshminarayana*, 1919 Mad. 429 : 50 I.C. 577 : 37 M.L.J. -65.

7. *Kamta Prasad Nigam v. Ram Dayal*, 1951 All. 711 : 1951 A.W.R. (H. C.) 626, followed in *Lakhmir Singh v. Union of India*, 1957 Pat. 633 : 1957 B.L.J.R. 608.

8. *Shambhu Nath v. Hari Shankar Lal*, 1954 All. 673 : 1954 A.L.J. 332; but see *Jwala Prasad v. Amar Nath*, 1951 All. 474.

9. *Shridhar v. Babaji*, 1914 Bom. 248 : I.L.R. 38 Bom. 709 : 28 I.C. 134; *Chidambara v. Vaidilinga*, 1916 Mad. 821 : I.L.R. 38 Mad. 519 : 30 I.C. 408.

10. *Chidambara v. Vaidilinga*, 1916

Mad. 821 : I.L.R. 38 Mad. 519 : 30 I.C. 408.

11. *Cababe's Estoppel*, 123, 124 : see also *Vaikuntarama Pillai v. Authimoolam Chettiar*, I.L.R. 38 Mad. 1071 : 23 I.C. 799 : A.I.R. 1914 M. 641 (2); *Gadigoppa v. Balan-gowda*, 1931 Bom. 561 : I.L.R. 55 Bom. 741 : 135 I.C. 161 : 33 Bom. L.R. 1313 (F.B.).

12. *Jagadbandhu v. Radha Krishna*, 36 Cal. 920 : 4 I.C. 414; *Assuribai v. Haribai*, 1943 Sind 177 : I.L.R. 1943 Kar. 227.

13. *Surajmull v. Triton Insurance Co., Ltd.*, 1925 P.C. 83 : 52 I.A. 126 : I.L.R. 52 Cal. 408 (411) : 86 I.C. 545 ; *Tinsukia Municipal Board v. Hari Kishore*, 1957 Assam 10.

having been made after expiry of period of limitation.¹⁴ This section must be read subject to the provisions of the Contract Act, which, for instance, declares a transaction entered into by a minor to be void.¹⁵ And, when a contract is not drawn up in the manner provided by law, there can be no question of a party to it being estopped by its admissions.¹⁶

The principle is well settled that everyone has the right to waive and to agree to waive the advantage of a law or rule, made solely for the benefit and protection of the individuals in their private capacity, provided that such waiver does not result in any infringement of any public right or public policy. The waiver may be made by a course of conduct or by expressly contracting out of the law providing for the benefit or protection of the individual. Where the enactment contains an express prohibition against contracting out of it, no question of waiver can arise.¹⁷

"Where, in an Act, there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether, it is an Act which is intended, as a matter of public policy, to have a more extensive operation."¹⁸ "Everyone has a right to waive and to agree to waive, the advantage of law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy."¹⁹ A particular private right is a matter of fact, though depending upon rules of law.²⁰ In the case of the sections of a statute, which are enacted for the benefit of a section of the public, that is on ground of public policy, in a general sense, where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence, which under certain special circumstances can be invoked by a party to an action; it cannot, therefore, avail, in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law.²¹ A Corporation cannot indirectly do, by placing itself under the disability of estoppel, what it could not have directly done by reason of statutory prohibitions.

There is a fundamental distinction between the capacity of a natural person and of an artificial person which has been created by statute or charter. To a natural person whatever is not expressly forbidden by the law is

14. *Sadasiva v. Jose*, A.I.R. 1976 Goa 11.

15. *Khan Gul v. Lakhan Singh*, 1928 Lah. 609 : I.L.R. 9 Lah. 701 : 111 I.C. 175 (F.B.) ; *Manmatha Kumar v. Exchange Loan Co., Ltd.*, 1936 Cal. 567 : 165 I.C. 363 : 41 C.W. N. 115 ; *Maung Tin v. Ma Lun*, 1927 Rang. 108 : 99 I.C. 148.

16. *New Delhi Municipal Committee v. H.S. Rikhy*, 1956 Punj. 181 : I.L.R. 1956 Punj. 1279.

17. *T. K. Sivarajan v. Official Receiver*, 1953 T.C. 205 at 207 : I.L.R.

1953 T.C. 30 ; see also *Raja Chetty v. Jaganathadasa Govindas*, 1950 Mad. 284 : (1949) 2 M.L.J. 694 : 62 L.W. 860 : 1949 M.W.N. 775.

18. *Soho Square Syndicate, Ltd. v. Pollard & Co.*, 1940 Ch. 638 : 109 L.J. 266 : (1940) 2 All. E.R. 601.

19. Maxwell, 11th Ed., p. 376.

20. *Kunjammalu v. Sekhara Menon*, 1951 T.C. 127 : 1950 K.L.T. 679.

21. *Maritime Electric Company, Ltd. v. General Dairies, Ltd.*, 1937 P.C. 114 : 168 I.C. 616 : 46 L.W. 105.

permitted by the law. He has the capacity to do everything save and except those forbidden by law. In the case of an artificial person—e. g., a corporation, which can be created either by charter or by statute,—the role applicable to a natural person is revised. Whatever is not permitted expressly or by necessary implication by the constituting instrument is prohibited, not by any express or implied prohibition of the Legislature but by the doctrine of *ultra vires*.²² Personal estoppel is not necessarily a question of policy. If a question of estoppel were dependent on the determination of some facts, a party may certainly be estopped from pleading it. But, if it is patent and apparent on the record, then, even if there were estoppel against a party, a court would not be estopped from considering the point. Indeed, if it involves a question of jurisdiction, it would be the duty of the Court to take it into account. The principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a court, as a party cannot by its admission or previous conduct confer jurisdiction on a court where none exists.²³ Whether the principle of estoppel applies, or there are circumstances attendant upon the transactions which disentitle the plaintiff to recover back something which he has given, depends upon the facts and circumstances of each case. No question of estoppel can arise, if both the parties are labouring under a mistake of law and one party is not more to blame than the other. Estoppel arises only, when the plaintiff, by his acts or conduct, makes a representation to the defendant on a certain state of facts which is acted upon by the defendant to his detriment. It is only then that the plaintiff is estopped from setting up a different state of facts.²⁴ This means that there can be no estoppel against law or a statute. The rule of estoppel is applied specifically upon the ground that the party, on the faith of the representation, has changed his position and has suffered thereby, in the shape of some detriment. There can be no estoppel where the party has not suffered any detriment. There can be no prejudice in a case, where the plaintiff subsequently pleads that he filed a suit in a wrong Court. For, in such a case, the prejudice, if any, can be compensated by payment of costs. It is settled that the parties cannot, by consent or by course of conduct, or inaction, create jurisdiction in a court where none exists. A decree, order or judgment by a court, which has no jurisdiction, is void and a nullity. The doctrine of approbate and reprobate, of blowing hot and cold, has no application, in cases, where the Court is asked to decide when it has no jurisdiction. The plaintiff's invitation to decide cannot invest the Court, having no jurisdiction, with a competence to decide.²⁵

There cannot be any estoppel against a statute, particularly when the non-compliance with the statute goes to the root of the thing. So, where a workman receives a sum paid by the employer in final settlement, he is not prevented from demanding any further payment, or from urging that a cer-

22. *Satibhusan Mukerjee v. The Corporation of Calcutta*, 1949 Cal. 20 at 23 and 24, relying on *Ashbury Railway Carriage and Iron Co. v. Riche*, 1875 L.R. 7 H.L. 653 (44 L.J. Ex. 185); *Attorney-General v. Great Eastern Railway Company*, (1880) 5 A.C. 475 at 481 (49 L.J. Ch. 545).

23. *Mahabir v. Narain*, 1931 All 400:

184 I.C. 236 : 1931 A.L.J. 715 (F.B.); *Bhagwan Singh v. Tasadduq Husain*, 1929 All. 549 : 115 I.C. 642.

24. *Sales Tax Officer v. Kanhaiya Lal*, 1959 S.C.R. 1350 : A.I.R. 1959 S.C. 135.

25. *Gopi Krishna v. Anil Bose*, A.I.R. 1965 C. 59 : 69 C.W.N. 545.

tain provision of law has not been complied with.¹ It is evident that a mistake of law may be corrected.²

If the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done contrary to the terms of such a statute will be *ultra vires* and no person can be estopped from putting forward the contention that what was done was illegal or void.³ A person cannot be estopped from challenging the validity of fixing different ex-factory prices in an impugned Cement Control Order of 1967 merely because he failed to challenge the same contained in the previous Order of 1961.⁴ An interpretation of a document is purely a question of law and there can be no estoppel in such matters.⁵ Again, when the question before the Court is not one of pure law but a mixed one of law and fact, there can be no estoppel. Thus, the question whether certain fully paid-up shares were issued by the Company as price of the 'goodwill' of the agency owned by the State as the price of the assets of the agency or in lieu of grant of monopoly rights by the State to the Company depends on the interpretation of the various documents which passed between the Company and the State and the question being a mixed question of fact and law gives rise to no estoppel.⁶ The nominal or face value of shares issued by a Company is not conclusive and the Company is not prevented from showing that the consideration for the issue of shares had failed or that the transaction of particular shares had become illusory or inoperative.⁷

The question whether a notice was valid or not is a question of law and no admission by counsel on this question can be binding on his client.⁸

An erroneous admission on a question of law made by a party or his agent (in the instant case, counsel) is not binding and it does not preclude the party from making an assertion contrary to the admission and from seeking the relief to which on a proper construction of the law he is entitled.⁹ Admission as to whether a particular provision of law is applicable or not does not operate as estoppel.¹⁰

Unknown and subsequently discovered facts cannot be foundation of an estoppel. Issues in inquiry under Section 167 (8), Sea Customs Act, 1878 (see now Sections 111 and 113 of the Customs Act, 1968), relate to adjudication of penalty and not proceedings for deciding disputed rights. Hence, the customs are not estopped from proceeding once again to make an inquiry regarding the goods already granted clearance.¹¹

1. B. N. Elias & Co. v. Fifth Industrial Tribunal, A.I.R. 1966 C. 166.
2. Gopal Singh v. State of Rajasthan, A.I.R. 1964 Raj. 270 : 1964 Raj. L.W. 346.
3. University of Delhi v. Ashok Kumar Chopra, A.I.R. 1968 Delhi 131 (140).
4. Jaipur Udhvog Ltd. v. Union of India, I.L.R. (1969) 19 Raj. 6 : 1969 Raj. L.W. 404 : A.I.R. 1969 Raj. 281 (291).
5. Sudesh Kumar v. Mool Chand, I.L.R. (1968) 18 Raj. 540 : 1968 Raj. L.W. 332 : A.I.R. 1969 Raj. 22 (23).
6. State of Rajasthan v. Bundi Electric Supply Co. Ltd., I.L.R. (1969) 19 Raj. 340 : 1969 Raj. L.W. 473 : A.I.R. 1970 Raj. 36 (45).
7. *Ibid* at p. 47 of A.I.R.
8. Moti Lal v. Keshaw Deo, 1970 Rent C.R. 332 (336) : 1970 Raj. L.W. 79.
9. Shiv Singh v. S.T.A. Tribunal, I.L.R. (1968) 1 All. 377 : 1968 A.L.J. 402 : A.I.R. 1969 All. 14 (28, 24).
10. Regional Development Employees State Insurance v. Bata Shoes, 1976 Lab. I.C. 12.
11. Shetti & Co. v. M. Abrol, 70 Bom. L.R. 445 (450).

An assessee who files a return and submits to be assessed to tax is not estopped from preferring an appeal and showing to the appellate authority that the sales are, in fact, not exigible to tax.¹²

The plea of *autrefois acquit* is a legal plea which can be taken even for the first time in appeal.¹³

The requirements of Statutory rules like Rules 28 (1-A) and 57 (2) of the Mineral Concession Rules, 1949, cannot be waived by a State Government.¹⁴

No amount of admission contrary to law will create an estoppel against law.¹⁵

Estoppel cannot be pleaded by a public official to do an act which is *ultra vires* since an *ultra vires* act is a nullity even when it is embodied in an agreement. In this case the Certificate Officer's contention that because the assessee made a consolidated return for several quarters they were estopped from saying that the Assessing Authority had no jurisdiction to make the assessment, was negatived.¹⁶

Clause 12-A of the C. P. and Berar Letting of Houses and Rent Control Order, 1949, prohibits the subletting of premises. Where the landlady gave her oral consent to the tenant to sublet, the subletting is unlawful and the plaintiff-landlady is not estopped from urging that the sub-tenancy was unlawful notwithstanding her consent,¹⁷ for any such contract of subletting is hit by Section 23 of the Contract Act, 1872.¹⁸

If permission is granted at a person's request for transfer of his rights in violation of the mandatory provisions of Section 155 (2) of the M. P. Land Revenue Code, 1954, the person is not estopped from challenging the validity of the transfer, for there can be no estoppel against statute.¹⁹

Because a (liquor) contractor is running liquor shops under a contract with the Government, he is not estopped from challenging the validity of the conditions of the contract.²⁰

An indebted agriculturist is entitled to the relief provided under the Madras Agriculturists Relief Act (4 of 1938), even though the execution

12. Narsepalli Oil Mills v. State of Mysore, 32 Sales Tax Cases, 599.

13. Rajkumar Marisana Singh v. Nam-eirakpam Singh, 1969 Cr. L.J. 844 (847) (Manipur); Emperor v. Menghraj Devidas, A.I.R. 1921 Sind 187; Ali Bux v. Emperor, A.I.R. 1934 All. 877; Jagannath Dani v. Emperor, A.I.R. 1935 Nag. 23; Thadi Narayana v. State of A.P., A.I.R. 1960 A.P. 1 (F.B.).

14. N. Sitharamaiah v. Kotalah Naidu, (1970) 2 S.C.C. 13; 1970 Ind. C. R. 548; A.I.R. 1970 S.C. 1854 (1359).

15. Bar, Das, Dey & Co. v. Sri Sri Ishwar Tarakeshwar, 73 C.W.N. 928; A.I.R. 1969 Cal. 565 (572) (defendants not estopped from challenging plaintiff's right to occupy mine in khas).

16. B.C. Nawan & Bros. (Pvt.) Ltd. v. Certificate Officer, (1969) 24 S. T. C. 25; (1969) 73 C.W.N. 728 (735), following Mathura Prasad v. State of Punjab, (1962) 13 S.T.C. 180; A.I.R. 1962 S.C. 745 (748).

17. Thakurain Dulaiya v. Shivnath Punjabi, 1969 J.L.J. 157; 1968 M.P. L.J. 251; 1968 M.P.W.R. 401; A.I.R. 1969 M.P. 130 (134).

18. Waman Shrinivas v. R. B. & Co., 61 Bom. L.R. 1011; 1959 S.C.J. 635; A.I.R. 1959 S.C. 689.

19. Sukhsen v. Shraavan Kumar, 1972 J.L.J. 193 (200); 1972 M.P.L.J. 349, citing Maritime Electric Co. v. General Dairies Ltd., A.I.R. 1937 P.C. 114.

20. Gappulal v. State, 1971 J.L.J. 192; 1971 M.P.L.J. 547; 1971 R.N. 105.

sought is in respect of a compromise decree for the identity of the debt was not lost though it had been embodied in a fresh document. There can be no estoppel against statute despite the debtor-agriculturist having received benefit under the compromise.²¹

(f) *No estoppel on question of law.* There can be no estoppel on a question of law.²² If a wife offers to get her application dismissed if a doctor certified that her husband is potent, she cannot be estopped from withdrawing her offer because under law she has a statutory right to prove the impotency of her husband.²³ Estoppel cannot be pleaded where statutory requirements are disobeyed with full knowledge by the officers entrusted with the discharge of public duties.²⁴

The Government is entitled to rescind or cancel its earlier order which it had no power or authority to pass. The plea of estoppel cannot arise in such a case for there can be no estoppel against law.²⁵ Government can raise plea of non-compliance of Article 299 of the Constitution even at the stage of revision.¹

An admission by an operator of contents of permit, in ignorance of his legal rights creates no estoppel.² A Government servant seeking voluntary retirement on the completion of 55th year under ignorance of law, cannot be estopped from saying that he should be retired later.³

A person obtaining licences in the past can refuse to take a licence subsequently when he comes to know that licence is not legally required.⁴

A permit-holder is not estopped from contending that a condition imposed in permit is invalid.⁵

(g) *Estoppel on void contracts.* A void contract cannot be ratified at a subsequent stage. There is no question of estoppel also with regard to a contract of this description.⁶ The party obtaining stay order under Section 34, Arbitration Act is not estopped from contending that the arbitration agreement is illegal and the award is not binding.⁷ When the contract containing the arbitration clause is void under the Forward Contract Regulating Act, 1952, a party appearing before the arbitrators cannot be estopped from challenging the award as invalid.⁸ Doctrine of estoppel cannot convert

21. *Sodamma v. Narayana Murty*, (1966) 2 Andh. W.R. 329 : (1966) 2 Andh. L.T. 940 (344, 345).

22. *Mool Chand Moti Lal v. Ram Kishan*, 1933 All. 249 : I.L.R. 55 All. 315 : 143 I.C. 275 : 1933 A.L.J. 222 (F.B.) ; *Raman v. Sewa Singh*, A.I.R. 1972 Punj. 333 ; *A. G. Ramachandran v. Shamsunnissa Bivi*, (1977) 1 M.L.J. 482 : A.I.R. 1977 Mad. 182 : 90 L.W. 98.

23. 1975 Hindu L.R. 22 (Punj).

24. *Shyam Chand Basak v. Chairman, Dacca Municipality*, 1920 Cal. 669 : I.L.R. 47 Cal. 524 : 53 I.C. 741.

25. *Ramanna v. Government of A.P.*, (1972) 1 Andh. W.R. 170 (182) : (1972) 1 Andh. L.T. 92 (108).

1. I.L.R. (1972) 1 Delhi 110.

2. *Shantilal Shiv Kumar v. Transport Appellate Tribunal*, I.L.R. (1966)

16 Raj. 682 : 1967 Raj. L.W. 468 : A.I.R. 1967 Raj 138 (141 and 142).

3. *V. Vaikunthan v. Registrar, Orissa H.C.*, 1972 Lab. I.C. 803.

4. *M/s. Mudaliar & Co. v. Commissioner N. Municipality*, 1972 Tax. L.R. 2485.

5. *M/s. Ambala Goods Carriers (P.) Ltd., Ambala, etc. v. Regional Transport Authority Himachal Pradesh*, I.L.R. 1976 H.P. 752 : A.I.R. 1977 H.P. 46.

6. *Bhikhraj v. State of Bihar*, A.I.R. 1964 Pat. 555.

7. *V. K. Murti v. C. V. Rama Aiyar*, I.L.R. (1974) 2 Cal. 1.

8. *Hira Lal Panna Lal v. Dalhousie Jute Co., Ltd.*, 81 Cal. W.N. 1061 : A.I.R. 1978 Cal. 119.

an agreement not executed according to Article 299 of the Constitution into a valid contract.⁹

(h) *Estoppel in case of void proceedings.* If proceedings are void in law, then decisions given in those proceedings are also invalid. Such decisions cannot operate as *res judicata*, nor can they be relied upon as the basis of any estoppel.¹⁰

(i) *Estoppel, if order without jurisdiction.* There can be no estoppel against an order without jurisdiction.¹¹ If the objection taken is in relation to the jurisdiction of the Court, a party cannot be estopped from raising it if the Court had really no jurisdiction according to the correct legal position.¹² Neither the rule of *res judicata* nor that of estoppel will apply in matters relating to jurisdiction.¹³ Estoppel cannot give a court jurisdiction under an Act which the Act says it is not to have.¹⁴ If a court has no inherent jurisdiction to try a suit, no consent or waiver can give jurisdiction to the Court. The decision of such a court is a nullity and it can be challenged at any stage. A party cannot be estopped from raising objection as to jurisdiction at the appellate stage.¹⁵ Where there is no provision for appeal the Court has no jurisdiction. The parties are not estopped from assailing the order passed in appeal as without jurisdiction though they might have taken part in its hearing.¹⁶

A party who has succeeded on the question of jurisdiction before the Tahsildar under the Andhra Tenancy Act and obtained an adjudication that no petition for fixing of fair rent lies against him on the footing that he is not a person governed by the provisions of that Act cannot be allowed later to question the jurisdiction of the Civil Court to entertain the suit which was filed only in view of the finding given by the Tahsildar in the previous proceedings under the Andhra Tenancy Act.¹⁷

A landlord who filed a suit in the Court of the District Munsif giving the jurisdictional valuation according to Section 8 of the Suits Valuation Act, 1887, taking the chance of succeeding in the original as well as the lower appellate Court, is estopped, after losing the suit, from raising the point that the Court in which the landlord filed the suit had no jurisdiction to try the same.¹⁸

The principle underlying Section 3 of the Limitation Act, 1963, is that it is the duty of the Court to dismiss a suit filed after the period of limitation whether the defence of limitation is raised or not by the defendant.

9. Raj Kumari Soni v. State of Himachal Pradesh, A.I.R. 1972 H.P. 1.
10. Kameshwar v. Deolal, A.I.R. 1964 Pat. 247.
11. Arun Kumar v. Union of India, A.I.R. 1964 Pat. 338; Bhurey v. Pir Bux, 1973 All L.J. 312; 1973 A.W.R. (H.C.) 279; I.L.R. (1973) 1 All. 486.
12. Mathura Prasad v. Dossibhai, (1970) 1 S.C.C. 613; (1970) 2 S.C.J. 685; 1970 R.C.R. 396; See also Kala Singh v. Janendra Chandra Naha, 1972 Assam L.R. 1.

13. Palaniappa Chettiar v. Babu Sahib, 84 L.W. 280; (1971) 2 M.L.J. 22 (26).
14. P. Dasa Muni Reddy v. P. Appa Rao, A.I.R. 1974 S.C. 2089.
15. Kala Singh v. Janendra Chandra Naha, 1972 Assam L.R. 1 (4).
16. 1973 B.B.C.J. 110 (Pat.).
17. A.N. Shah v. Annapurnamma, 1958 Andh. L.T. 684; Parandhamayya v. Samasekharaswamy Temple, (1970) 1 Andh. L.T. 154 (156).
18. Tata Iron & Steel Co. Ltd. v. Arun Chandra Bose, A.I.R. 1967 Pat. 246 (248).

On that principle no question of the defendant being estopped from raising the ground of limitation can arise.¹⁹

(j) *Estoppel of party taking the aid of law from questioning its validity.* Where a party takes the aid of a certain legal provision and obtains relief on its basis, he is subsequently estopped from questioning the validity of that law.²⁰

(k) *Estoppel by election.* The doctrine of approbation and reprobation, which is akin to the law of election and estoppel, applies to those cases where a person has elected to take a benefit otherwise than on merits of the claim. Another criterion for the applicability of the doctrine is that the person receiving the benefit must have a choice between two rights and after the exercise of the choice, restitution is impossible or inequitable.²¹ So, where a dividend is due to the result of a winding-up order and but for that order the party could not have drawn the dividend as a matter of right, the acceptance of the dividend precludes him from getting the winding-up order set aside, when the situation is so changed that if the winding-up order is set aside, it would result in injustice.²² Where due to a Supreme Court authority the landlord thought that the order for eviction passed on consent of tenant was nullity and he filed a second petition for eviction without prejudice to his right on basis of order in first petition but later realised that the order in first petition was valid and executable, it was held that there is no estoppel against the decree-holder in executing the first order, because it cannot be said that he abandoned his right to execute the order passed on the first petition. This is not a case where two inconsistent courses were open and one has been elected by the decree-holder.²³ See also under the same heading, post.

(l) *Estoppel against estoppel.* It has been said by Lord Coke²⁴ that "Estoppel against estoppel doth put the matter at large".²⁵ This principle has been applied in India.¹ It applies equally to the case of admission so that admission against admission puts the matter at large.²

(m) *Estoppel against one of several plaintiffs.* Where the plea of estoppel affects only one of several plaintiffs, it does not deprive the other plaintiffs of their right to plead what their co-plaintiff is estopped from pleading.³

(n) *Admission, Estoppel by.* An admission can operate as estoppel, only if the case falls under this section.⁴ Thus, it cannot act as an estoppel,

19. Ram Mehar v. Ragubir Singh, (1969) 71 P.L.R. (D.) 171 (175).

20. Gulabchandra v. State of M.P., A.I.R. 1963 M.P. 301 : 1963 M.P.L.J. 489.

21. Bhaw Ram v. Baij Nath Singh, (1962) 1 S.C.R. 358 : A.I.R. 1962 S.C. 1476 : 1962 J.L.J. 678.

22. Prafulla Chandra v. Chotanagpur Banking Association, A.I.R. 1965 Pat. 502 : 1965 B.L.J.R. 558.

23. Smt. Azra Abdulla v. Sifton Hotel, A.I.R. 1975 Kar. 225.

24. Co. Litt. 352b.

25. 2 Smith L. C., 13th Ed., 664 ; Dixon v. Kennaway & Co.,

(1900) 1 Ch. 833 at 840 ; Jethibai v. Chabildas Doongarsi, 1935 Sind 142 ; Ram Udit v. Ram Samujh, 1931 Oudh 263 : 134 I.C. 465 : 8 O.W.N. 809 ; Halsbury's Laws of England, 3rd Ed., Vol. 15, p. 211.

1. Gita Rau Nanaji v. Jevana Rau, (1864) 2 M.H.C.R. 31 (33).

2. Manraj v. Rameshwar, 1969 Raj. L.W. 507 (512).

3. Jethibai, v. Chabildas Doongarsi, 1935 Sind 142.

4. Abdul Hameed Khan v. Commissioner of Income-tax, A.I.R. 1967 A.P. 211 : 1967 Andh. W.R. 42.

so as to do away with the necessity for a registered deed of transfer, where the statute expressly requires it.⁵ Estoppel, like acquiescence, is not a question of fact but of legal inference from the facts found.⁶

A party, having clearly admitted in a writ petition before the Supreme Court that certain lands in his possession were pasture lands, cannot turn round and say that the admission is not correct.⁷

An admission by a party in the pleading of a previous suit is binding on that party in the subsequent suit.⁸

Where on defendant's plea that he was a tenant of plaintiff and not a trespasser the plaint was sent to Revenue Court, the defendant is estopped from pleading in Revenue Court that he is not tenant.⁹ Where a person gave a certificate of full satisfaction of all claims in order to obtain quick payment, he is estopped from contending that the certificate given by him may not be relied upon.¹⁰

If a contractor has admitted the claim of Government in respect of extra expenditure, he is not estopped from taking the matter before arbitrator under the arbitration clause.¹¹

When admission has been made *in terrorem* it loses much of its weight and the plea of estoppel cannot be successfully founded on it.¹²

When the claim of the defendant over certain property was admitted by plaintiff and mutation was effected on that basis the plaintiff is estopped from claiming title in it.¹³

Admission on a point of law is not an admission of a 'thing' so as to make the admission a matter of estoppel within the meaning of the present section.¹⁴ It is open to a party to explain that the admission on a point of law was incorrect.¹⁵

(o) *Estoppel mixed question of fact and law.* "The question of estoppel is a mixed question of fact and law.¹⁶ Though Section 80 of the Civil Procedure Code (Act V of 1908), is imperative, the State can waive the notice

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| <p>5. Maung Po Yin v. Maung Tet Tu, 1925 Rang. 68 : I.L.R. 2 Rang. 459 : 86 I.C. 205, following Dharam Chand v. Manji Sahu, (1913) 16 C.L.J. 436 : 16 I.C. 440 (ii) ; Mathura Mohan v. Ram Kumar, I.L.R. 43 Cal. 790 : 35 I.C. 305.</p> <p>6. Nursing Das v. Rahimanbhai, (1904) 6 Bom. L.R. 440 : I.L.R. 28 B. 440.</p> <p>7. Gulabbhai v. Collector of Daman, A.I.R. 1970 Goa. 59 (71).</p> <p>8. Basant Singh v. Janki Singh, 1967 A.L.J. 1 : 1967 B.L.J.R. 27 : A.I.R. 1967 S.C. 341 ; Luxmi Narayan Arjundas v. State Bank of India, A.I.R. 1969 Pat. 385 (390).</p> <p>9. Makhan Lal v. Harphul, 1972 Punj. L.J. 286 : 1972 Rev. L.R. 245.</p> <p>10. Hindustan Steel Ltd. v. M/s. Ram Dayal Das & Company, 1972 M.P. W.R. 184 : 1972 P.J. 520 : 1972 M.P. L.J. 46.</p> | <p>11. Glaxo Laboratories v. Industrial Tribunal Calicut, A.I.R. 1973 Delhi 15.</p> <p>12. Syed Mohammed Satra v. Mohammad Haneefa, A.I.R. 1976 S.C. 1569.</p> <p>13. Ujagar Singh v. Shiv Singh, A.I.R. 1979 P. & H. 12.</p> <p>14. Jagwant Singh v. Silam Singh, I.L.R. (1899) 21 All. 285 (287).</p> <p>15. Jatindra Mohan Tagore v. Ganendra Mohan Tagore, (1872), (L.R.) I.A. Supp. Vol. 47 : 9 Beng. L.R. 377 (P.C.) ; Income-tax Officer v. Shamboo Dayal Om Prakash & Co., I.L.R. (1967) 1 All. 387 : A.I.R. 1968 All. 203 (204).</p> <p>16. Nagindas Harjivandas v. Kara Jesang, (1904) 6 Bom. L.R. 603 ; Associated Publishers v. K. Bashyam, 1961 Mad. 114 : I.L.R. 1961 M. 114 ; I.L.R. (1970) Guj. 784.</p> |
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nd, in that case, it will be estopped by conduct from pleading the want of notice at a later stage of the proceedings.¹⁷

And a man may be estopped from alleging a legal incapacity; a foreigner or a British subject domiciled abroad, who, being in England, contracts in due form, according to the laws of England, a marriage with a person, domiciled in England is not permitted to assert that he was under the burden of an incapacity imposed by the law of the foreign domicile to do that which he, in fact, did voluntarily and in due form according to the law of England, and he cannot repudiate the marriage on the ground of such personal incapacity.¹⁸

(p) *Estoppel must be pleaded.* Estoppel is eminently a matter of pleading, and if it is not set up in the pleadings or in the issues, it cannot be availed of later.¹⁹ It is not open to any party to raise the plea of estoppel for the first time in second appeal.²⁰ Plea of estoppel, if not raised in written statement cannot be raised in revision.²¹ The onus of establishing the facts from which estoppel arises rests upon the person pleading it.²² The circumstances giving rise to an estoppel may be proved by evidence of any kind, even if it is inadmissible under Section 92, *ante*.²³ It makes no difference whether the person against whom the estoppel is urged happens to be a defendant or a plaintiff.²⁴ In *Commissioner of Income-tax v. The Canara Bank, Ltd.*²⁵ the original statement of the case and the supplementary statement of the case were agreed statements. Before the High Court also, the findings of the Appellate Tribunal were not challenged and it was conceded in the High Court that there was no evidence on the question of fact involved. Under these circumstances, it was held that it was not permissible for the appellant to go behind the two statements of the case and to challenge the findings of fact contained therein. In *Subba Rao v. Jagannadha Rao*,¹ it was ruled that a compromise decree is not based on a decision of the Court. It is merely the acceptance by the Court of something to which the parties had agreed. It merely sets the seal of the Court on the agreement of the parties. It cannot be said that a decision of the Court was implicit in it. Only a decision of the Court can operate as *res judicata*, whether statutory under Section 11 of the Code of Civil Procedure, or constructive

17. *Bhola Nath Roy v. Secretary of State for India*, (1912) 40 C. 503 : 16 I.C. 849 : 17 C.W.N. 64 ; *Manindra Chandra Nandi v. Secretary of State*, I.L.R. 34 Cal. 257 : 5 C.L.J. 148.
18. *Chetti v. Chetti*, 1909 P. 67 : *Law Quarterly Review*, April 1909, p. 202.
19. *Pappammal v. Alamelu Ammal*, 1929 M. 467 : 119 I.C. 152 ; *Godaru Guptan v. Ittian*, 1953 T.C. 177 ; *Gopal v. Mohan Lal*, A.I.R. 1960 Punj 226.
20. *A.L. Goel v. P.S. Agarwal*, 1972 All. L.J. 912 : 1974 Rent Case 186 : A.I.R. 1973 All. 89 ; *Indra Jit Singh v. Ran Dhir Singh*, A.I.R. 1978 P & H. 260 : (1978) 1 Ren. C.J. 628 : (1978) 80 Punj. L.R. 434 : (1978) 1 Ren. C.R. 811.
21. *Bansilal v. Kanshi Ram*, A.I.R. 1975 Him. Pra. 15.

22. *Mitra Sen v. Janki Kuar*, 1924 P. C. 213 : 51 I.A. 326 : I.L.R. 46 All. 728 : 82 I.C. 946 (receipt of rent).
23. *R.M.A.R.L. Chettyar Firm v. Maung Po Kyaw*, 1935 Rang. 279 : 158 I.C. 492.
24. *Tej Bahadur Khan v. Nakko Khan*, 1927 Oudh 97 : 99 I.C. 472 : 3 O. W.N. 998.
25. A.I.R. 1967 S.C. 417 : (1967) 1 S.C.J. 153 : (1967) 1 S.C.R. 859 : (1967) 2 S.C.W.R. 299 : (1967) 1 I.T.J. 110 : (1967) 63 I.T.R. 328 : 10 Law Rep. 221.
1. A.I.R. 1967 S.C. 591 : (1964) 2 S.C.R. 310 : (1964) 2 S.C.J. 518 : (1964) 2 S.C.W.R. 75 : (1964) 2 An. W.R. (S.C.) 112 : (1964) 2 Andh. L.T. 359 : (1964) 2 M.L. J. (S.C.) 112.

as a matter of public policy on which the entire doctrine of estoppel rests. The decree, if based on a decision of the Court, can operate as estoppel by judgment. But not so, a decree passed on a compromise, though it may create an estoppel by conduct between the parties, if the estoppel is pleaded.

(q) *Party not taking up a legal position—if can subsequently take?* When the facts are once ascertained, the presumption arising from conduct cannot establish a right which the facts themselves disprove.² Thus, when a person knows that his parents were both dead at the time when the ceremony of his adoption took place, they have the effect of rendering the adoption altogether devoid of legal force. If, in such a case the adoptive mother by her conduct represents that the boy is the adopted son of her husband, that does not create an estoppel.³ In *Gopee Lall v. Chundraolee Buhoojee*,⁴ where the defendants were said to have been estopped from setting up the facts of the case, or even asserting the law in their favour, inasmuch as they had represented that *L* was the adopted son, their Lordships held that "there is no estoppel in the case. There has been no misrepresentation on the part of *L* or the defendants on any matter of fact. They are alleged to have represented that *L* was adopted. The plaintiff's case is that *L* was, in fact, adopted. So far as the fact is concerned there is no misrepresentation; it comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which... is erroneous; but that creates no estoppel whatever between the parties." If the evidence in a case shows that there was an adoption, and there is nothing to show that a valid adoption, in accordance with law, could not take place, evidence of estoppel which goes to show that the adoption was recognised for a long time would lend support to the inference that the adoption had, in fact, been made. In such circumstances, a person who made representation of fact, relying on which the adopted son relinquished his claim on the family of his natural parents would be estopped from challenging the adoption. But the representation must be as to a matter of fact, and not a matter of law, such as the validity of an adoption.⁵

A party, which has been proceeding on the footing that a certain statutory rule is valid, cannot, at the stage of arguments, question the *vires* of that rule.⁶

(r) *Benefit received under an illegal act or transaction. No estoppel.* Where a transfer is made of a right which is not a legal right, the transferee acquires no right at all. The transfer is void. In such a case, if the transferee receives a benefit, he is not estopped from challenging the validity of transfer.⁷ If in such a case, both the parties think the transfer to be valid, they make a common mistake of law. No question of estoppel can arise as the transfer is illegal.⁸

2. *Tayammal v. Seshachalla*, 10 M.I. A. 429; *Kishorilal v. Chaltibai*, (1959) 1 Supp. S.C.R. 698; 1959 S.C.J. 560; A.I.R. 1959 S.C. 504; *Jamnadas v. Radhabai*, A.I.R. 1963 M.P. 348; 1963 Jab. L. J. 817.

3. *Dhanraj v. Sonibai*, L.R. 52 I.A. 231; A.I.R. 1925 P.C. 118.

4. 19 Suth. W.R. 12 (P.C.) ; I.A. Supp. Vol. 131; 11 B.L.R. 391.

5. *Jamnadas v. Radhabai*, *supra*.

6. *Adarsha Fishery Co-operative Society v. State of Assam*, A.I.R. 1968 Assam 48 (50) [Fisheries Rules (Assam), R. 12].

7. *Sales Tax Officer v. Kanhaiya Lal*, 1959 S.C.R. 1350; A.I.R. 1959 S.C. 135.

8. *Ramkripal v. Municipal Committee*, A.I.R. 1963 M.P. 240; 1963 M. P.L.J. 261.

(s) *Pre-emption cases.* Cases of pre-emption are no exception to the rule of estoppel under this section.⁹ It may be noted that when an order is intended to take effect in its entirety and several parts of it depend upon each other, a person cannot adopt one part and repudiate another. Upon this principle, a person, who takes a benefit under an order *de hors* the claim on merits, cannot repudiate that part of the order which is detrimental to him, because the order is to take effect in its entirety. But this principle can have no application where a party by withdrawing the pre-emption price has not taken a benefit *de hors* the merits. It is not a case where restitution is impossible or inequitable. There being no choice between two rights before the vendee, his act in withdrawing the pre-emption money cannot preclude him from continuing his appeal against a pre-emption decree passed against him.¹⁰

Apart from the procedure laid down in Sections 19 and 20 of the Punjab Pre-emption Act (I of 1913), a pre-emptor can waive his right or by his conduct may be estopped from enforcing his right of pre-emption. If a subsequent sale is made within a reasonable time of the previous offer made to the pre-emptor who has refused to accept that offer, that would amount to waiver.¹¹

Though the right of pre-emption was found to have been exercised by the son of vendor in collusion with him the son was held not estopped.¹² In order to create an estoppel against a pre-emptor it must be established that the vendor had offered to sell to him before concluding sale with vendee.¹³

(t) *Income-tax cases.* The principle of estoppel or *res judicata* has no application in income-tax cases.¹⁴ The doctrine of "approbate and reprobate" is only a species of estoppel. It applies only to the conduct of parties. As indicative of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income Tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law. A particular income is either exigible to tax under the taxing status or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income.¹⁵ The decision in *Amarendra Narayan v. Commissioner of Income-tax*¹⁶ has no bearing in such cases. There the concessional scheme tempted the assessee to disclose voluntarily

9. *Govindas Morotisa v. Ismail*, 1950 Nag. 22 : I.L.R. 1949 Nag. 993 : 1950 N.L.J. 1.

10. *Bhau Ram v. Baij Nath*, A.I.R. 1962 S.C. 1476 : 1962 J.L.J. 678.

11. *Zila Ram v. Jhandu Ganga Ram*, 1966 Cur. L.J. 894 : A.I.R. 1967 Punj. 448 (449). See *Ram Sahal v. Muhammad Tufail*, A.I.R. 1929 Lah. 265 and *Sardar Mohammad v. Khuda Baksh*, A.I.R. 1935 Lah. 884.

12. *Sukhnandan Singh v. Jamiat*, 1971 Punj. L.J. 278 : (1971) 1 S.C.C. 707 : 1971 U.J. (S.C.) 390 : (1971) 2 Civ. A.J. 71 (S.C.) : (1971) 3 S.C.R. 734 : A.I.R. 1971 S.C. 1158.

13. *Rikkhi Ram v. Virse Ram*, (1977)

P.L.J. 273 : A.I.R. 1977 P. & H. 178.

14. *Indra Singh v. Income-tax Commissioner*, 1963 Pat. 169 : I.L.R. 22 Pat. 55 : 206 I.C. 609 ; *Makhan Lal Ram Swarup v. Commissioner of Income-tax*, (1966) 2 I.T.J. 558 : (1966) 61 I.T.R. 214 (All); *Commissioner of Income-tax v. Bharat General Re-Insurance Co. Ltd.*, 1971 Tax. L.R. 883 (Delhi).

15. *Commissioner of Income-tax v. Firm Muar*, (1965) 1 S.C.J. 734 : A.I.R. 1965 S.C. 1216 : (1965) 56 I.T.R. 67 : (1965) 1 I.T.J. 683 : (1965) 1 Andh. W.R. (S.C.) 142 : (1965) 1 M.L.J. (S.C.) 142 : (1965) 1 S.C.R. 815.

16. A.I.R. 1954 C. 271.

his concealed income and he agreed to pay the proper tax upon it. The agreement there related to the quantification of taxable income, as distinguished from what is not taxable income. The assessee in the case of non-taxable income can raise the plea that his income is not taxable under the Act.¹⁷ The doctrine of estoppel is however applicable in respect of the same assessment though not in respect of successive assessments.¹⁸ The doctrine of estoppel is also applicable when individual partners are assured that if they would pay their respect shares of tax due on their firm they will not be required to pay the share of other partners; then if acting on this representation some partners pay their shares, balance of tax due from the firm cannot be realised from them.¹⁹

(u) *Equitable estoppel*. The question of estoppel arises only when, on a representation made by a party, the party to whom the representation is made acts on such representation in such a manner as to change his position, and the question of permitting the party making the representation to resile from such representation is likely to subject the other party to irreparable loss or injury.²⁰ So, where the marks card issued by the University officials did not prejudice the case of the petitioner in any manner so as to render his revision to his original position, inequitable or unjust, and all that had happened was that he started to attend the college but on the very next day he was informed that the marks card produced by him was not correct and that his admission had been cancelled, it was held that the petitioner was not entitled to any relief. The case of the *Registrar v. Sundara Shetty*²¹ was distinguished. For, in that case the Court came to the conclusion that that was a case of legal or equitable estoppel which practically satisfied all the conditions embodied in this section. It was pointed out that, in that case the petitioner had not only passed the next higher examination after the S. L. C. but was also nearing completion of the second year course in the Intermediate examination. Their Lordships, therefore, thought, under the circumstances of the case, that it would be inequitable to cancel the admission of the petitioner as the additional qualification that he had acquired after his admission in the college at considerable expenses could not be rectified. Their Lordships observed that that was an incident where some substantial right was involved and a case of equitable estoppel arose. When a person was admitted to an educational institution and was allowed to pursue his studies for about 4 years out of the total period of 5 years' course, the authorities are estopped from preventing him to complete the course on the ground that on verification it was found that he did not belong to Scheduled Caste. The order of cancellation of admission was quashed on the ground of equitable estoppel.²²

When the University issued notification declaring a person to have passed in the examination and this was confirmed by marks list and provisional certificate given to him and on the strength of these documents he got admission to the Law College after paying necessary fees he is entitled to rely on

17. *Commissioner of Income-tax v. Firm Muar*, (1965) 1 S.C.J. 734 *supra*.
18. *M.K. Mohammad Kunhi v. C.I.K. Kerala*, 1972 Tax L.R. 1229 : I.L.R. (1972) 2 Ker. 91 : 1973 Ker L.J. 143 : (1972) 33 Tax. Rep. 77.
19. *I.I.O. v. Khajan Lal*, (1975) 89 I.T.R. 120 (All).

20. *Manjunath v. University of Bangalore*, A.I.R. 1967 Mys. 119 : (1966) 1 Mys. L.J. 716.
21. I.L.R. 1956 M. 402 : A.I.R. 1956 M. 309.
22. *Inder Prakash v. Deputy Commissioner Delhi*, A.I.R. 1979 Delhi 87.

equitable estoppel and the University authorities are estopped from cancelling the result.²³ Where admission card is obtained by fraud or where candidate is patently ineligible, admission can be cancelled. But when there was only some procedural defect in application form, or eligibility was dependant on interpretation of rules and two interpretations are possible, University is estopped as it will be deemed to have condoned the defect and to have interpreted the rule in favour of the students.²⁴

After cancellation of test due to mass copying without obtaining representation from successful candidates, the University can hold fresh test. There is no estoppel in such a case because it is not shown that any candidate is damnified in any way. Principles of natural justice do not apply to such a situation.²⁵ But those considerations do not arise in cases where the position of the petitioner has not at all been changed. In the latter class of cases, no question of equitable estoppel arises.

In *Nageswara Rao v. Principal, Medical College*,¹ the Government issued a rule for admission to a certain class but a few days after amended that rule. The petitioner came to Court on the allegation that she believed that the selection would be made on the basis of the rules prescribed for that purpose and, therefore, she did not apply to other medical colleges and that the concerned authorities were estopped and precluded from amending the rule. It was held that there was no scope for invoking the doctrine of equitable estoppel, for nothing prevented her from applying to the other medical colleges, and the rule did not create any obstacle in the way of her seeking admission in other college. It was pointed out that no representation was alleged to have been made by the Government which could have induced her to believe that she could be sure of a seat in that college. Further, the Government was invested with authority to amend the rules from time to time.

Where the claims of the petitioner's seeking admission to Medical Colleges is appropriately founded upon the equity which arises in their favour as a result of the representations made on behalf of the Government in the notice issued by the Principal, Medical College, Cuttack as Chairman of the Selection Board for admissions to the Medical Colleges in the State of Orissa and the action taken by the petitioners acting upon the said representation in the belief that the concerned authorities would carry out the representations made by them or on their behalf. On the facts there was no ground for exempting the Government or the authorities concerned from the equity arising out of acts done by the petitioners to their prejudice relying upon the representations. The Government and the authorities concerned are thus estopped from issuing the impugned letter which varied the basis of selection to their detriment and which rules of equity and good conscience prevent them from using them against the petitioners.²

23. *Kamalendu Prasad Padhi v. The Sambalpur University & Others*, A. I.R. 1976 Orissa 134.

24. *Bal Krishna v. Rewa University*, 1978 M.P. 86 (F.B.).

25. *R. Radha Krishnan v. Osmania University*, A.I.R. 1974 Andh. Pra. 283.

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1. A.I.R. 1962 A.P. 212 : (1962) 1 Andh. W.R. 60.

2. *Abodha Kumar Mohapatra v. State of Orissa*, I.L.R. 1968 Orissa 587 : A.I.R. 1969 Orissa 80 (87), but see *Ahmad Thoman Todi v. State of Kerala*, 1970 K.I.R. 22.

Equitable estoppel has no application to cases where there are clear provisions of statutes.³ Thus, if a protected tenant under the Bihar Tenancy Act (VIII of 1855) which expressly prohibits such tenant from transferring land without the Collector's permission, nevertheless transfers land and receives consideration, the tenant is not estopped from challenging the transaction.⁴

Lessees, who intentionally failed to deliver possession of the demised premises in pursuance of the arrangement incorporated in documents, have no equity in their favour. They cannot be allowed to take advantage of their own wrong.⁵

The notification issued by a Public Service Commission is only an invitation to candidates possessing specified qualifications to apply for selection for recruitment to certain posts. The candidate does not get any matter of right by applying for selection, and, perhaps even after selection. The principle of equitable estoppel does not apply to such a case.⁶

The law is clear that surrender by the Government of its legislative powers to be used for the public good cannot avail the Company or operate against the Government as equitable estoppel.⁷ In the last cited case the State Government agreed with the Company that lands purchased by the Company would be immune from acquisition under a proposed legislation for a period of 60 years. It was held that Government was not estopped from reversing that policy in the Act, namely, Private Forests (Vesting and Assignment) Act, 1971 (Kerala Act 26 of 1971).⁸

Where the President of a Municipal Board owed an equitable duty to inform the District Magistrate that no notice of a meeting to pass a no confidence motion had been issued to him and therefore the meeting was not properly convened, but failed to do so and kept the want of notice a secret and knowingly suffered public time and money to be invested in the meeting, the principles of equitable estoppel and want of good faith prevented the President from questioning the resolution for want of notice.⁹

See also cases under note 7 (Promissory Estoppel) to Introduction.

3. "One person". A party may himself make the representation, or it may be made by him through the agency of some other person by whose acts he is bound. In the first case, there is no difficulty except when the representation is made by persons under a disability to contract.¹⁰

3. See *Ariff v. Jadunath Majumdar*, 58 I.A. 91 at p. 104 : 58 Cal. 1235; A.I.R. 1931 P.C. 79.

4. *Madan Bari v. State of Bihar*, 1968 P.L.J.R. 52 : 1968 B.L.J.R. 342 (348).

5. *Kahan Chand v. Municipal Committee*, 1969 Cur. L.J. 723 : 1969 Rev. L.R. 485 : 71 Punj. L.R. 1095 1105.

6. *Ahmad Thonnan Thodi v. State of Kerala*, 1970 K.L.R. 22 (30) but see *Abodha Kumar Mohapatra v. State of Orissa*, I.L.R. 1968 Orissa 587 : A.I.R. 1969 Orissa 80.

7. *Gwalior Rayon Silk Mfg. Co. Ltd. v. State of Kerala*, 1972 K.L.J. 628 : 1972 K.L.T. 628. (639)

(F.B.).

8. *Ibid.*

9. *Dr. B. N. Sarin v. State of U.P.*, A.I.R. 1967 All. 465 (468) (see U.P. Municipalities Act II of 1916, s. 87-A).

10. See Bigelow, op. cit., 6th Ed., 620-629, where the question of the estoppel of parties under disability is discussed. A man cannot set up the incapacity of the party with whom he has contracted in bar of an action by that party for breach of the contract. Legal disability as in the case of an infant is a defence personal to him who is under it and cannot be made use of by another; Bigelow op. cit., 6th Ed., 501, 502.

It may be remembered that apart from the provisions of this section there is no equitable estoppel.¹¹

In *Gobardhan v. Hariram*,¹² a widow and a daughter of the last male holder executed a sale-deed of certain property. The plaintiff, the daughter's son, sued for a declaration that the sale-deed by the widow was not made for legal necessity. The widow died during the pendency of the litigation, and the daughter became the absolute owner of the property. It was held, that the suit was not maintainable, as the daughter, being a co-executant, was estopped from challenging the alienation. It was held, that the widow having parted with her interest in the property, which was in purchaser's possession, the reversioner or the heir of the last male holder was competent to challenge the validity of the alienation, if it was not justified by legal necessity. In this case, the daughter alone was competent to bring the suit and not the plaintiff, and the daughter being a co-executant, although, at the time of execution of the sale-deed, her interest in the property was in the nature of *spes successionis* and nothing more, was *prima facie* bound by the recital as to legal necessity in the sale-deed.

4. Minor not estopped from pleading minority. In some earlier decisions the Bombay¹³ and the Lahore¹⁴ High Courts had held that the word "person" in this section does not exclude a minor and that he may be estopped from pleading minority in a suit on a contract entered into by him representing himself to be of age. But these decisions have been overruled by subsequent Full Bench decisions of the two Courts,¹⁵ and now there is a consensus of opinion that, even where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then, in an action founded on the contract, the infant is not estopped from setting up infancy.¹⁶ The reason is, that law relating to

11. *Maddanappa v. Chandamma*, A. I.R. 1965 S.C. 1812; (1965) 2 S.C.W.R. 644.

12. A.I.R. 1963 Pat. 335.

13. *Ganesh Lal v. Bapu*, (1895) 1 L.R. 21 Bom. 198; *Dadasaheb Dasrathrao v. Bai Nathani*, 1917 Bom. 221; I.L.R. 41 Bom. 480; 41 I.C. 180; 19 Bom. L.R. 561; *Jasraj Bastimal v. Sadasshiv Mahadev Walekar*, 1923 Bom. 169; I.L.R. 46 Bom. 137; 64 I.C. 457; 23 Bom. L.R. 975.

14. *Wasinda Ram v. Sita Ram*, 1921 Lah. 312; I.L.R. 1 Lah. 389; 59 I.C. 393.

15. *Gadigeppa Bhimappa Meti v. Balangowda Bhimangowda*, 1931 Bom. 561; I.L.R. 53 Bom. 741; 135 I.C. 161 (F.B.); *Khan Gul v. Lakha Singh*, 1928 Lah. 609; I.L.R. 9 Lah. 701; 111 I.C. 175 (F.B.).

16. *Mst. Huri v. Roshan Khuda Bux*, 1923 Sind 5; 71 I.C. 161 (F.B.); *Khan Gul v. Lakha Singh*, 1928 Lah. 609 (F.B.); *Gadigeppa Bhimappa Meti v. Balangowda Bhimangowda*, 1931 Bom. 561 (F.B.); I.L.R. 53 Bom. 741; 135 I.C. 161 (F.B.); *Aludhia*

Prasad v. Chandan Lal, 1937 All. 610; I.L.R. 1937 All. 860; 170 I.C. 934 (F.B.); *Jagannath Singh v. Lala Prasad*, I.L.R. 31 All. 21; 1 I.C. 562; 5 A.L.J. 674; *Radha Kishen v. Bhorey Lal*, 1928 All. 626; I.L.R. 50 All. 862; 110 I.C. 373; 26 A.L.J. 837; *Mst. Kundan Bibi v. Magan Lal*, 1932 All. 710; 139 I.C. 718; *Lala Somnath Singh v. Ambika Prasad Dube*, 1950 All. 121; *Brohmdudd v. Dharmodas Ghosh*, (1898) 1 L.R. 26 Cal. 381; 3 C.W.N. 468; *Manmatha Kumar Saha v. Exchange Loan Co. Ltd.*, 1936 Cal. 567; 165 I.C. 363; 41 C.W.N. 115; *Vaikuntarama Pillai v. Authimoolam Chettiar*, 1914 Mad. 641 (2); I.L.R. 38 Mad. 1071; 23 I.C. 799; 26 M.L.J. 612; *Rangarao v. Sait Chowgmal Verdicchand & Co.*, 1934 Mad. 560; 152 I.C. 262; 67 M.L.J. 257; *Ganga Nand Singh v. Rameshwar Singh*, 1927 Pat. 271; I.L.R. 6 Pat. 388; 102 I.C. 449; *Maung Tin v. Ma Lun*, 1927 Rang. 108; 99 I.C. 148.

estoppel must be read together with and subject to the other laws in force, such as those relating to contract and transfer of property, and that where such laws declare an infant to be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel, for an estoppel, cannot alter the law, but in other cases an infant may be estopped. An infant is not liable upon a contract, nor for a wrong arising out of, or immediately connected, with his contract, such as a fraudulent representation, at the time of making the contract, that he is of full age.¹⁷ A person under disability cannot do, by an act *in pais*, what he cannot do by deed.¹⁸ He cannot by his own act enlarge his legal capacity to contract or to convey. He cannot be made liable upon a contract by means of an estoppel under this section, if it be elsewhere declared that he shall not be liable upon a contract. To say that, by acts *in pais* that could be done in effect which could not be done by deed, would be practically to dispense with all the limitations the law has imposed on the capacity to contract.¹⁹ In *Gadigeppa Bhimappa Meti v. Balangowda Bhimangowda*,²⁰ Beaumont, C. J., observed: "Looking at the matter as one of principle, apart from authority, it is in my judgment clear that no person can, by the application of the law of estoppel, or by any rule of procedure, acquire or have assigned to him a status or legal capacity which the substantive law denies to him, and, in my opinion, it makes no difference whether the misrepresentation on which the estoppel is sought to be founded is made fraudulently or innocently." A rule of evidence, such as of estoppel, cannot be allowed to override the provisions of the statutory law that a minor's contract is void. Section 11, Contract Act (1872), being a matter of substantive law, it must prevail over this section which merely lays down a matter of procedure.²¹

5. Infant's fraud, effect of. When a contract has been induced by a false representation made by an infant as to his age, he is liable neither of the contract nor in tort, if the tort is directly connected with the contract and is the means of effecting it, and a part and parcel of the same transaction.²² It is true that infancy does not constitute a valid defence to an action on tort; the tort, which can sustain an action for damages, must be independent of the contract, and must not merely be another name for breach of the contract. No person can evade the law, conferring immunity upon an infant from performing a contractual obligation, by converting the con-

17. Pollock on Contract, 6th Ed., 52, 72 and cases there cited. It is clear that an action cannot be maintained on a contract made with an infant for falsely representing himself to be of age at the time; the representation in such case not operating as an estoppel: Bigelow, op. cit., 6th Ed., 625-627; Johnson v. Pye Sid. 258; Bartlett v. Wells. 1 B.S. 836; The Liverpool Adelphi Loan Association v. Fairhurst, (1854) 9 Ex. 422; see as to infant's statement of account: Hedgley v. Holt. (1829) 4 C. & P. 104; and disproof of allegation that goods supplied were necessities: Barnes & Co. v. Toye, (1884) 1 Q.B. D. 410; Johnstone v. Marks, (1887) 19 Q.B.D. 509; Ryder v. Wombwell, (1868) L.R. 4 Ex. 32 dis-

sented from.

18. Brohmio Dutt v. Dharmodas Ghosh, (1898) 1 I.L.R. 26 C. 381, 394: 3 C.W.N. 468.

19. Bigelow, op. cit., 6th Ed., 621.

20. 1931 Bom. 561 (F.B.): 1 I.L.R. 55 B. 741: 135 I.C. 161 (F.B.).

21. Vaikuntarama Pillai v. Authimoolam Chettiar, 1914 Mad. 641 (2): 1 I.L.R. 38 M. 1071: 23 I.C. 799; Gadigeppa Bhimappa Meti v. Balangowda Bhimangowda, A.I.R. 1931 Bom. 561: 1 I.L.R. 55 B. 741: 135 I.C. 161; See also Khan Gul v. Lakha Singh, 1928 Lah. 609 (F.B.) supra; Chauth Mal v. Magami Lal, 1974 W.L.N. 202.

22. The Liverpool Adelphi Loan Association v. Fairhurst, (1854) 9 Ex. 422: 96 R.R. 778.

tract into a tort for the purpose of charging the infant. As observed by Byles, J., in *Burnard v. Haggie*.²³ "One cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto*." The Court has to look at the substance, and not at the form of the action; and if it finds that the action is in reality an action *ex contractu* but disguised as an action *ex delicto*, it would decline to enforce the claim. Indeed, it has been repeatedly held in England that when an infant has induced a person to contract with him by making a false statement that he was of full age, the infant is not answerable either for the breach of the contract or for damages arising from the tort committed by him.²⁴

But, it has been held that a false representation by an infant that he was of full age gives rise to an equitable liability. The Court, while relieving him from the consequences of the contract, may, in the exercise of its equitable jurisdiction, restore the parties to the position which they occupied before the date of the contract. If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to its former owner.²⁵ The doctrine of restitution finds expression in Section 41 of the Specific Relief Act of 1877, which corresponds to Section 33 of the Specific Relief Act of 1963. Where the minor is the plaintiff and himself seeks relief for cancellation of a document or rescission of a contract, he seeks equity and must do equity. In such cases Courts have always imposed the condition upon him to restore the benefit.¹ The matter becomes debatable, where the minor is the defendant and is sought to be fastened with liability. Section 33 of the Specific Relief Act, 1963, has no application, because in a suit against an infant there is no question of the cancellation of an instrument. In such a case, a distinction must be made between restoring property and refunding money. Where a contract of transfer of property is void, and such property can be traced, the property belongs to the promisee and can be followed. There is every equity in his favour of restoring the property to him. But where the property is not traceable and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor's pecuniary liability under the contract which is void. To pass a decree against a minor enforcing his pecuniary liability would, while holding that the contract is void and unenforceable, at the same time, be passing a decree against him on the footing that he had entered into the contract and has not carried out its terms. There is no rule of equity, justice and good conscience, which entitles a Court to enforce a void contract of a minor against him under the cloak of an equitable doctrine.² Section 65 of the Contract Act has no appli-

23. (1863) 32 L.J.C.P. 189 : 14 C.B. (N.S.) 45 : 8 L.T. 320 : 11 W.R. 644 : 9 Jur. (N.S.) 1525.

24. *Khan Gul v. Lakha Singh*, 1928 Lah. 609 at 615 (F.B.) ; see also *Ajudhia Prasad v. Chandan Lal*, 1937 All. 610 (F.B.).

25. *Khan Gul v. Lakha Singh*, 1928 Lah. 609 (F.B.).

1. *Jagar Nath Singh v. Lalta Prasad*, (1908) I.L.R. 31 All. 21 : 1 I.C. 562 : 5 A.L.J. 674 : *Appasami v. Narayana Swami*, 1930 Mad. 945 : I.L.R. 54 Mad. 112 : 129 I.C. 51 ; see also *Ajudhia Prasad v. Chandan Lal*, 1937 All. 610 (F.B.) ;

Khan Gul v. Lakha Singh, 1928 Lah. 609 (F.B.).

2. *Ajudhia Prasad v. Chandan Lal*, 1937 All. 610 (F.B.) ; *Radhey Shyam v. Bihari Lal*, 1919 All. 453 : I.L.R. 40 All. 558 : 48 I.C. 478 : 16 A.L.J. 592 ; *Lesley, Ltd. v. Shell*, (1914) 3 K.B. 607 : 83 L. 1 K.B. 1145 : 111 L.T. 106 : 58 S.J. 453 : 30 T.L.R. 400, C.A. ; *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*, 1916 P.C. 242 : 43 I.A. 256 : 39 I.C. 401 ; *Hari Kishun Das v. Mohammad Shafi*, Jan. 1924 Oudh 438 : 80 I.C. 800 ; *Tikki Lal v. Komal Chand*, 1940 Nag. 327 : I.

cation to such a case, as that section starts from the basis of there being an agreement or contract between competent parties.³ In the Full Bench case of *Khan Gul v. Lakha Singh*,⁴ it was held that the doctrine of restitution is not confined to the cases covered by Section 41 of the Specific Relief Act (corresponding to Section 33 of the Act of 1963) that the doctrine rests upon the salutary principle that an infant cannot be allowed by a Court of equity to take advantage of his own fraud. There is no warrant either in principle or in equity for the general rule that the relief shall never be granted in a case where the infant happens to be a defendant. The decision is based exclusively on principles of equity but as pointed out by Sulaiman, C. J., in *Ajodhya Prasad v. Chandan Lal*,⁵ "the rules of equity that can be applied are well recognized rules which have been accepted in England. It is hardly open to an Indian Court to invent a new rule of equity for the first time contrary to the principles of the English law. If the law in England is clear and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law." In *Sadiq Ali Khan v. Jai Kishore*,⁶ two minors for whom a certificated guardian Qasim Ali had been appointed had executed a mortgage-deed. It was found that Qasim Ali Khan by concealing the guardianship proceedings from the mortgagee and passing off the minors as majors of 18 or upwards had induced the mortgagee to furnish the money which he then required and had thus committed a fraud on him. In spite of that, their Lordships allowed the appeal and dismissed the plaintiff's suit against the minors holding: "The fact of minority being established at the date of the execution by the mortgagees of the deed founded on is sufficient for the decision of the case, such a deed executed by minors being admittedly a nullity according to Indian law, and incapable of founding a plea of estoppel." As has been pointed out in a case,⁷ a representation made by an infant is not allowed to operate against him as an estoppel, where the estoppel, if allowed, would have the effect of depriving him of the protection against liability on his contract. But "where the representation was made on behalf of the infant by his guardian, or next-friend, or other person legally competent to bind him by such representation, the infant on attaining his majority, or the person so making the representation on his behalf until that event, as the case may be, is liable to be estopped thereby."⁸ "An infant is not estopped by the act of his guardian in receiving money unless acting under authority of law."⁹ So if a person sues an infant upon a contract, such contract having been entered into on the faith of a representation by the infant that he was of full age, the infant will not be estopped from pleading his minority in answer to a claim to fix him with personal liability to a money-decree notwithstanding his fraudulent representation.¹⁰

L.R. 1940 Nag. 632 : 1940 N.L.J. 358 ; but see *Khan Gul v. Lakha Singh*, 1928 Lah. 609 (F.B.) ; *Manmatha Kumar Saha v. Exchange Loan Co. Ltd.*, 1930 Cal. 567.

3. *Mohori Bibee v. Dharmodas Ghosh*, 30 I.A. 114 : I.L.R. 30 Cal. 559 : 7 C.W.N. 441 (P.C.) : 5 Bom. L.R. 421 ; *Ajodhya Prasad v. Chandan Lal*, 1937 All. 610 (F.B.)
4. 1928 Lah. 609 at 617 (F.B.)
5. 1937 All. 610 at 615-616 (F.B.)
6. 1928 P.C. 152 (156) : 109 I.C. 987 : 26 A.L.J. 685.
7. *Somnath Singh v. Ambika Prasad*

1950 All. 121 at 131.

8. See *Bower on Estoppel by Representation*, 1923, p. 162 ; *Gulab Chand v. Chattr Singh*, 1961 M. P.L.J. (Notes) 289 (minor held estopped, compromise by Karta) : A.I.R. 1960 All. 121, relied on.
9. *Blacklow on Estoppel*, 6th Ed., p. 626.
10. *Dhanmul v. Ramchander Ghosh*, (1890) 1 C.W.N. 270, and cases there cited : S.C. 24 C. 265 ; explained in *Sreemutty Mohun Bibee v. Sarat Chunder*, (1897) 2 C.W.N. 18.

Though a decree for personal payment on the contract, express or implied in a mortgage, cannot be made against an infant, however fraudulent he might be, the liability of a fraudulent infant to a decree for sale or foreclosure is, it has been held, a different thing. So where an infant, by fraudulent misrepresentation as to his age, induced the plaintiff to advance him money on the security of a mortgage, it was held that the plaintiff was entitled to a mortgage decree for the amount to be realised only from the mortgaged property.¹¹ In *Thurstan v. Nottingham Permanent Benefit Building Society*,¹² it was pointed out that no question of fraud arose in that case.¹³ And in a case, where an infant by misrepresenting his age obtained a loan on the security of a promissory note, it was held that he was liable in equity on the note since there was an equitable liability resulting from misrepresentation.¹⁴ *But proof of fraud and deceit is essential.* Though it is unquestionably within the power of the Court administering equitable principles to deprive a fraudulent minor of the benefits following from the plea of infancy, one who invokes the aid of that power must come to the Court with clean hands, and must further establish that a fraud was practised on him by the minor, and that he was deceived into action by that fraud.¹⁵ Though in a case of contract or transfer of property a minor cannot be held to be estopped by his conduct within the meaning of this section, yet when he enters into possession of property on a lease obtained on his behalf by his guardian, he cannot be allowed to set up his title to the property as a bar to a suit in ejectment on the expiry of the lease.¹⁶ Although a representation made by a minor would not operate as estoppel, still when a guardian or a person legally competent to bind the minor makes a representation on his behalf as well as of himself, then both he and the minor would be estopped from challenging the representation.¹⁷

This section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel, where the truth of the matter is known to both parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.¹⁸ A party relying upon this section has to establish not only that the opposite party had made a certain declaration but that the said declaration had been believed and had been acted upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing enquiries reasonably and with diligence. Where truth is accessible to a party, the plea

11. *Sreemutty Mohun Bibee v. Sharat Chunder*, (1897) 2 C.W.N. 18 ; in appeal 25 C. 371.

12. (1902) 1 Ch. at p. 12.

13. See appeal to House of Lords, (1903) A.C. 6.

14. *Levene v. Brougham*, (1909) 25 T.L.R. 265.

15. *Dharmodas Ghose v. Brahmo Dutt*, (1898) 2 C.W.N. 330 ; 26 C. 381 and by Privy Council, 30 I.A. 114 ; I.L.R. 30 Cal. 539 ; 5 Bom. L.R. 421 ; 7 C.W.N. 441 (P.C.).

16. *Ponnuswami Pillai v. Subramania Pillai*, 1920 Mad. 895 ; 53 I.C. 412.

17. *Gulab Chand v. Chattan Singh*, 1961 M. P.L.J. (Notes) 287.

18. *Mohori Bibee v. Dharmodas Ghose*, 30 I.A. 114 ; I.L.R. 30 Cal. 539 ; 5 Bom. L.R. 421 ; 7 C.W.N. 441 (P.C.) ; *Mutsaddi Lal v. Union of India*, 1955 Hyd. 61 ; I.L.R. 1955 Hyd. 256 ; *Ram Singh v. Baldeo Prasad*, 1932 All. 643 ; 138 I.C. 552 ; 1932 A.L.J. 605 ; *Gopal Trimbak Bhat v. Kesheosa Vishnoosa*, 1936 Nag. 185 ; I.L.R. 1936 Nag. 65 ; 165 I.C. 350 ; *Union of India v. Jethabhai*, A.I.R. 1960 Pat. 30 ; *Srinivasan v. Sundaramurthi*, (1972) 1 M.T.J. 141 (148).

or estoppel upon representation fails.¹⁹ The party must be deceived.²⁰ In the case cited, the plaintiff sued to obtain a declaration that the sale by her to her deceased husband's brother was not valid as having been executed during her minority, and to recover possession of the property, and the defendant contended that the plaintiff was estopped because she represented herself as being a major when she must have known that she was a minor. The question arose, whether the plaintiff was estopped on account of the representations made by her, as also whether, under Section 41 of the Specific Relief Act corresponding to Section 38 of the Act of 1963, the Court should have directed the plaintiff to restore the consideration money. It was held that the plaintiff was not estopped, there being evidence that the defendant was not deceived by what she told him, inasmuch as he had made enquiries about plaintiff's age from the plaintiff's father and from other sources, and beyond that, being himself the brother of her deceased husband, a fair presumption arose that he must have known what the plaintiff's age was, and secondly, that there was no equity in favour of the defendant to direct the plaintiff to restore the consideration money.²¹

An infant is liable for a tort committed by him. And when an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity to restore any advantage he has obtained by such representations to a person from whom he has obtained it.²² In cases of fraud separate from contract, a person under disability may estop himself to deny the truth of his representation.²³ So far, as an infant, having a right to an estate, permits or encourages a purchaser to buy it of another without asserting any claim to it, the purchaser will be entitled to hold against the person who has the right, although covert or under age.²⁴ As regards suits by a minor, it was held in the undermentioned case²⁵ that a minor, who representing himself to be a major and competent to manage his own affairs, collects rent and gives receipt therefor, is estopped by his conduct from recovering again the money once paid to him by instituting a suit through his guardian. And it was held in the undermentioned case in the Privy Council, where, in a sale for arrears of revenue it had been found that the arrears by the agent of a minor mortgagee had been intentional, with a view to buying the property on his behalf, it was held that he had a duty to perform through his representation which was inconsistent with his conduct in this, and that

19. *Mohamad Shafi v. Mohammad Said*, 1939 All. 847 : I.L.R. 52 All. 248; 122 I.C. 671.

20. *Muhammad Musa v. Qasim Hussain*, 1935 All. 739 : 155 I.C. 1069 : 1935 A.L.J. 964.

21. *Gurindharwami v. Parawa*, 1920 Bom. 269 : I.L.R. 44 Bom. 175 : 55 I.C. 271 : 22 Bom. L.R. 49.

22. See Pollock on Contract, 6th Ed., 73, 76, and cases there cited, in particular *Stikeman v. Dawson*, (1847) 1 De C. & Sm. 90 ; *Jagannath Singh v. Jatta Prasad*, I.L.R. 31 All. 21 : 1 I.C. 562 : 5 A.L.J. 674 ; see also *Dhannul Ramchunder v. Ram Chander Ghose*, (1890) 1 C.W.N. 270 ; *Wharton*, Ev. s. 1151.

23. *Bigelow*, op. cit., 6th Ed., 628.

24. See *Savage v. Foster*, L.C. in Equity ; *Watts v. Crosswell*, 9 Vin. 415 ("If an infant is old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it." Per Lord Cowper) ; and case cited in *Coty v. Gerteken*, 2 Mad. 46, 48-51 ; *Sugden, Vendors*, 743 : 14th Ed. ; *Bigelow*, op. cit., 6th Ed., 627-629, the existence of an estoppel by conduct does not always depend upon the existence of a right of action for deceit ; for while there may be an estoppel without this right of action in some cases, the estoppel always arises where the action of deceit would be maintainable, *ib.*, 6th Ed., 628.

25. *Ram Ratan v. Shew Nandan*, (1901) 29 C. 126 : 6 C.W.N. 152.

his title could not operate to exclude his co-owners.¹ And, in a later case in the Allahabad High Court, it has been held that minority is not a ground of exemption from the operation of Section 48 of the Civil Procedure Code, as to limit of time for execution.² In the case cited, the trustee of a temple who, for his own private purposes, mortgaged land which was afterwards sold in Court auction at the instance of the mortgagee was, it was held, entitled to sue on behalf of the temple to recover the landlord's interest which was dedicated to the temple and was not estopped from setting up a claim against a *bona fide* purchaser for value that it was trust property.³

The acts of guardian by whom a minor is represented in a suit are binding on the minor; the judgment in such suit can be assailed by minor only on the ground of fraud or collusion of the guardian.⁴

6. Corporations. This principle of estoppel by conduct applies to corporations,⁵ as well as to individuals, with this qualification, that if the act undertaken was in and of itself *ultra vires*⁶ of the corporation, no act of the body can have the effect of estopping it from alleging its want of power to do what was undertaken. Just as according to previous observation, an

1. Deo Nandan Prashad v. Janki Singh, 1916 P.C. 227 : 44 I.A. 30 : I.L.R. 44 Cal. 573 : 39 I.C. 346, overruling Doorga Singh v. Sheo Prasad, (1884) 16 C. 194, approving Faizal Rahman v. Maimuna Khatun, 20 I.C. 510 : 18 C.L.J. 111 : 17 C.W.N. 1283.

2. Ram Nath Tiwari v. Chatarpal Man Tiwari, 1915 All. 349 (2) : I.L.R. 37 All. 638 : 30 I.C. 521 : 13 A.L.J. 826, dissenting from Moro Sadashiv v. Visali Raghunath, 16 B. 536 following Jhandu v. Mohan Lal, 2 P.R. 1894 C.I. 480 : Ramana Reddi v. Bahu Reddi, I.L.R. 37 Mad. 186 : 18 I.C. 586 : A.I.R. 1914 M. 526.

3. Yasim Shahib v. Ekambara Aiyar, 1920 Mad. 155 : 54 I.C. 497 : 37 M.L.J. 698 : 10 L.W. 672.

4. Maghar Singh v. Teja Singh, 1975 Cur. L.J. 59 : 1975 Rev. L.R. 540.

5. Bigelow, op. cit., 6th Ed., 497—508, and cases there cited (and see Index, ib.) ; Caspersz, op. cit., 4th Ed., s. 141, p. 149 and cases there cited, where the subject will be found dealt with : (a) as to membership and retirement ; (b) as to the register ; (c) as to the issuing of certificates of share ; (d) as to debentures regularly issued ; (e) estoppel by issue of paid-up shares ; (f) negligence on the part of members of a company ; (g) effect of the company's seal ; see Goodrich v. Venkanna, (1878) 2 M. 104. Estoppels against corporations being of

infrequent occurrence in this country, it has not been here thought necessary to deal with this important subject at length. The Indian cases are scanty. But as the Indian Companies Act (Act VII of 1913 now replaced by Act I of 1956), reproduces the English Acts 25 and 26, Vict., c. 88 : 30 and 31 Vict., c. 131 : 40 and 41 Vict., c. 261, reference may and should be made to the English case-law and the text-books on the subject of the law relating to corporations. In the two following cases, it was held that the estoppel was not established : Rivett Carnac v. New Mofussil Co., (1901) 26 B. 54 : 3 Bom. L.R. 846. (sale of share-voucher by company of title of vendor-pucca receipt issued by Company). See Mahant v. Coimbatore Spinning Co., (1902) 26 M. 79 : 12 M.L.J. 459 (application for rectification of register).

6. Fairtitle v. Gilbert, 2 T.R. 169 : Ex parte Watson, L.R. 21 Q.B.D. 301 : Borrow's case, L.R. 14 Ch. D. 441 ; ("there can be no estoppel in the face of an Act of Parliament," per Bacon, V.C.) ; Bigelow, op. cit., 6th Ed., 504 ; Prasad Rao v. Union of India, (1973) 1 Lab. I. J. 620 : (1973) 2 Serv. L.R. 872 : 45 F.J.R. 214 : (1973) 2 A.P.L.I. 68 : 27 Fac. L.R. 177 : I.L.R. (1973) A.P. 1122 : (1973) 2 Andh. W.R. 197 : (1973) 2 Andh. L.J. 74 : 1973 Lab. I.C. 1310 (F.B.).

infant cannot by his act *in pais* create, in the face of an Act regulating his position, a contractual liability, so the powers of the ordinary corporation being dependent upon the statute which created the body, those powers cannot be enlarged by the body itself, and the act in question being in itself *ultra vires*, the corporation cannot make it otherwise, whether directly or indirectly.

So a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was *ultra vires* for it to make.⁷ Estoppel cannot be pleaded against a Municipal Corporation from recovering rates and charges fixed by the provisions of the statute constituting it.⁸ There is a fundamental distinction between the capacity of a natural person and of an artificial person which has been created by statute or charter. To a natural person, whatever is not expressly forbidden by the law is permitted by the law. He has the capacity to do everything save and except those forbidden by law. In the case of an artificial person, e. g., a corporation, which can be created either by charter or by statute, the rule applicable to a natural person is reversed. Whatever is not permitted expressly, or by necessary implication, by the constituting instrument is prohibited not by any express or implied prohibition of the Legislature but by the doctrine of *ultra vires*.⁹ A municipal committee has no power to grant sanction for building in contravention of its own by-laws a structure projecting into street further than allowed by the by-laws; it would, however, be estopped from withdrawing sanction already given on accepting a penalty and from requiring the owner to demolish the structure.¹⁰ A company is not estopped from not recognising a transfer of shares simply because it knew about the transfer by the shareholder's phone call intimating it, and impliedly accepting the transfer of the shares by not sending any notices of meetings or dividend notices or dividend warrants to the shareholder in respect of the shares.¹¹

In the case of corporations, particularly joint stock companies, the application of the rules sometimes gives rise to difficulty, but such difficulty is met by bearing in mind the distinction between those things which the company can do, if it goes the proper way to work to do them, and those things which by virtue of its constitution the company can under no circumstances do at all.¹²

7. Halsbury's Laws of England, Vol. 16 4th ed. para 1596, citing Minister of Agriculture and Fisheries v. Mathews, (1950) 1 K.B. 148 : (1949) 2 All E.R. 724 and other cases; see also Barkat Ali v. Official Liquidator, 1945 Mad. 111 : 208 I. C. 270 : 55 L.W. 653.

8. Corporation of Calcutta v. Sati Bhusan Mukherjee, 1947 Cal. 273 : 81 C.L.J. 155 : 50 C.W.N. 263, relying on Maritime Electric Co. Ltd. v. General Dairies, Ltd., 1937 P.C. 114 : 1937 A. C. 610 : (1937) 1 All E.R. 748 : 168 I.C. 616 : 46 L.W. 105 : 1937 M.W.N. 663, affirmed in I.P. Appeal in Sati

Bhusan Mukherjee v. Corporation of Calcutta, 1949 Cal. 20.

9. Sati Bhusan Mukherjee v. Corporation of Calcutta, 1949 Cal. 20, *supra*.

10. Fakir Chand v. Municipal Committee Ludhiana, 1934 Lah. 1021 : 36 P.L.R. 124.

11. Bank of Hindustan, Ltd. v. K. Suryanaravana Rao, 1957 Mad. 702 : I.L.R. 1957 M. 1058.

12. Cababe's Estoppel, 125, 126. For estoppel by signature of Managing members of joint family firm, see Kunj Kishore v. W.K. Porter, 1914 All. 238 : I.L.R. 36 All. 416 : 24 I.C. 29 : 12 A.L.J. 763.

7. **The State.** There may be estoppel against the State.¹³ The Government, like any other party, cannot be allowed to approbate and reprobate. When a party, even if it be the Government, to an appeal has induced the Court to pass an order on a certain representation made to the Court, that party cannot later on be heard to say that the order passed by the Court on his request is illegal. Where a suit against the Government has, at the instance of the Government, been dismissed with liberty to bring a fresh suit after complying with the requirement of notice under Section 80, Civil Procedure Code, and a fresh suit is filed after complying with the requirement, it is not open to the Government to contend that the order granting leave to file a fresh suit is illegal, and that the suit is barred by Order 23, Rule 1 of the Civil Procedure Code.¹⁴

A grant is to be construed by its own terms and not by the previous or the subsequent conduct of the parties. A mistaken interpretation made by Government officers of a grant by the State, and their consequent mistaken acts, would not be binding on the State, and would not create an estoppel as against the State.¹⁵

When an estate vests in the Government, it cannot be divested by the alleged acts of waiver, estoppel or acquiescence of the Government or its officers, who are not empowered to divest the State of the property which has vested in it.¹⁶

The fact that Government at one time disclaimed its rights to minerals does not deprive them of their title conclusively.¹⁷ The taking of rent each year may bar by estoppel the Court of Wards from maintaining that the person who paid the rent possessed the property with a liability to account or possess on any other or further terms than on the payment of the rent made and taken, but there estoppel stops, and it can never be reared up into the creation of a *pukhtadari* right of a proprietary, heritable, and transferable character, nor can it ever create a right of possession of the property, for life, under the same terms as some other person had previously possessed it upon. Such foundations of title are unknown and they can never be created in such a manner.¹⁸

Even if the Manager of the Court of Wards has described persons in possession as under-proprietors, or accepted rents from their mortgagees, that

13. *Toolemomy Dasee v. Maria Margery*, (1873) 11 Beng. L.R. 144; *In re Pat Purmanandas Jecwandas*, 7 B. 109, 117; *Secretary of State v. Dattareya Rayaji Pat*, I.L.R. 26 Bom. 271; *Secretary of State v. Tatyasaheb Yeshwantrao*, 1932 Bom. 386; I.L.R. 56 Bom. 501; 140 I.C. 171; see also *Collector of Bombay v. Municipal Corporation of City of Bombay*, 1951 S.C. 469; 1951 S.C.J. 752; 1952 S.C.R. 43; see this question of Estoppel against the State discussed; Bigelow, op. cit.; 6th Ed., 371, 619n. (i); Vijay Kumari v. H.P. Administration, 1961 H.P. 32; *R. Ramanna v. Govt. of A.P.*, (1972) 1 An. L.T. 92.

14. *Kandasamy Nadar v. The Province*

of Madras, 1953 Mad. 391; (1952) 1 M.L.J. 804; 65 L.W. 787.

15. *Secretary of State v. Faredoon Jijibhai Divecha*, 1934 Bom. 434; 154 I.C. 278; 36 Bom. L. R. 761; *Prosunno Coomar Roy v. Secretary of State*, I.L.R. 26 Cal. 692; 3 C.W.N. 695.

16. *State of Bihar v. Manmohan Deo*, A.I.R. 1964 Pat. 387; 1964 B.L.J. R. 152.

17. *Secretary of State v. Srinivasa Chariar*, 1921 P.C. 1; 48 I.A. 56; I.L.R. 44 Mad. 421; 60 I.C. 230.

18. *Mitra Sen Singh v. Mut. Janki Kuer*, 1924 P.G. 213; 51 I.A. 326; I.L.R. 46 All. 728; 82 I.C. 946; see also *Marwanji Munsherji Cama v. Secretary of State*, 1915 P.C. 118; 42 I.A. 185; 30 I.C. 589.

does not create a title as under-proprietors by estoppel in favour of the persons, where no such title really exists.¹⁹ A mistaken entry of lands, liable to pay rents as rent-free lands, does not operate as an estoppel against the Government.²⁰ The fact that in a particular settlement year bazar dues were included in the total income on which revenue was assessed, does not estop the Government from disputing the claim of the *Zamindar* to levy *bazar* dues as being in contravention of the terms of the *wajib-ul-arz*.²¹ Though, if the terms of a Government notification regarding customs duties were clear, the interpretation put upon it by an officer of the rank of an Assistant Collector of Customs would not be binding on the Government so as to estop them from afterwards claiming that the interpretation was wrong, it would certainly be a circumstance which would show that the notification would bear the construction put on it by the trade and in fact should actually bear that interpretation.²² The doctrine of prejudice or detriment does not apply to a Government Department such as Court of Wards in discharging its statutory duties by which it was in no way prejudiced or from which it suffers no harm.²³

There is a distinction between an act done by the Government and by an officer of the Government. The latter does not represent the Government unless he is authorised to do so.²⁴ An order made in mutation proceedings to which Government is not made a party, does not bind the Government and cannot form the basis of a plea of estoppel against it.²⁵ Where a person claims to be the owner of property, and fells trees after obtaining permission of the Government to do so, but he is found not to be the owner, the Government is not estopped from claiming the price of the trees, as that person was also alleging himself to be the owner of the trees. There is no estoppel when both parties are equally acquainted with facts.¹

8. Joint administrators. Apart from agency, the representation of one person may be binding on another, if both are to be regarded in the light of one person. So, it has been held in America that the acts and admissions of one of several administrators which amount to an estoppel against him will work an estoppel against all, it being said that where there are several administrators or executors they must be regarded in the light of an individual person.² But the admission of an executor will not bind another, at any rate if the admission was not made in the character of executor.³ The admissions of an executor are not receivable against an administrator appointed during the absence of the executor.⁴

19. *Jhagoo Singh v. Deputy Commissioner of Partabgarh*, 1927 Oudh 598 : 110 I.C. 803.

20. *Sursingji Dajirai v. Secretary of State*, 1926 Bom. 590 : 99 I.C. 293 : 28 Bom. L.R. 1213.

21. *Ran Shah Babu v. The Government of Central Provinces*, 1949 P.C. 140 : I.L.R. 1949 Nag. 265.

22. *Collector of Customs v. Lala Gopi, Kissen Gokuldas*, 1955 Mad. 187 : 200 : I.L.R. 1955 Mad. 1248 : (1955) 1 M.L.J. 422 : 68 L.W. 56.

23. *Sh. Assudibai Sahijram v. Sh. Haribai*, 1943 Sind. 177 at 180 : I.L.R. 1943 Kar. 227.

24. *Rajinder Singh v. H.P. Administration*, A.I.R. 1964 H.P. 19, relying on *Ran Shah v. Government of C.P.*, I.L.R. 1949 N. 263 : A.I.R. 1949 P.C. 140.

25. *Rajinder Singh v. H.P. Administration*, *supra*.

1. *Ibid*.

2. *Bigelow*, op. cit., 6th Ed., (1880) 621.

3. *Chunder v. Ram Narain*, 8 W.R. 63 ; and see *Tullock v. Dunn*, (1826) Ry. & M. 416 ; *Scholey v. Walton*, (1844) 12 M. & W. 510 ; *Taylor, Ev.*, s. 750 ; *Indian Limitation Act*, 1908, s. 21 ; *Williams on Executors*, 1796, 1813, 1937.

4. *Rush v. Peacock*, 2 M. & R. 162.

9. Principal and agent. A party may be estopped by reason of the representation of some person by whose acts he is bound.⁵ The rule of estoppel between parties covers, of course, the misrepresentations of agents, even agents of corporations, when made in the scope of their employment. When an agency really exists, the principal is estopped from denying the truth of the agent's statements, express or tacit, just as much as if he himself had made them, subject to the same limitations that would prevail in that case. But, an agent or a servant is not himself estopped when acting by direction of his principal, unless his own conduct was such as to estop him.⁶ The doctrine of estoppel by conduct is constantly applied where one person has held out another as his agent to do a certain class of acts, either by allowing him to appear as his agent when he was not so, or as having a greater authority than he in fact had, or by omitting to give notice that his authority had been withdrawn. Whenever, for example, a company, through its directors, holds a person out to the world as its agent for a particular purpose, ratifying his conduct as such, the purpose being one which the constitution of the company enables it to authorise, the company cannot, afterwards, dispute acts done by him within the scope of such countenanced agency.⁷ But there is no estoppel against the company when advance increments granted to employees by Managing Director is not ratified by the Board of Directors who after coming to know of it pass a resolution stopping the increments.⁸ When an agent or servant commits a wrong within the scope of his employment and in the interests, or the supposed interests, of the principal or master, and not for his own private and fraudulent purposes, the principal or master is liable; but only then.⁹ But, it has been held, that the commission of a crime by a servant severs the connection.¹⁰

An estoppel against a principal is dealt with by Section 237 of the Contract Act, which enacts that when an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the latter is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority. In such cases, there is an estoppel.¹¹

5. As to persons claiming through and under others, see *Kali Dayal v. Umesh Prasad*, 1922 Pat. 63; I.L.R. 1 Pat. 174; 65 I.C. 266.

6. *Bigelow*, op. cit., 6th (1880) Ed., 619-620. As to agents of corporations, see *Houldsworth v. City of Glasgow Bank*, L.R. 5 App. Ca. 331. As to the authority of agents, see *Contract Act*, Ss. 186, 187, 188, 189; a wife's representations will not affect the husband either as admissions or estoppels unless he has constituted her his agent. The mere relation creates no agency, *ante*, p. 268; *Bigelow*, op. cit., 6th Ed., 619n (1). There must be a real agency. Thus a widow is not estopped by representations made in her absence by an administrator from selling land of the dower (ib.). As to sub-agents, see *Contract Act*, Ss. 190-195; ratification, ib., Ss. 196-200; revocation of authority, ib., Ss. 201-210; effect of agency on contracts with third person, scope of authority, ib., Ss. 226-238, effect

of misrepresentation or fraud of agent, ib., s. 238.

7. *Halsbury's Laws of England*, 4 Ed. Vol. 16, para 1610.

8. I.L.R. 1972 Cut. 936.

9. *Malcolm Brunner & Co v. Waterhouse and Son*, (1908) 24 T.J.R. 854.

10. *Cheshire v. Baley*, (1905) 1 K.R. 237.

11. See *Ramsden v. Dyson*, (1866) 1 F. & I.A. 129, 158, and the cases cited in *Caspersz.*, op. cit., 150-156; and *Bigelow*, op. cit., 457, 458, 565, 566 where the distinction between agency proper and estoppel is pointed out. A person assuming to act in a contract as principal will afterwards be estopped from saying that he was in fact acting only as agent, ib., 687; *Relgard v. McNeill*, 38 Ill. 400 (Amer.). As to the effect of misrepresentations made by agents in the course of business as also in matters without their authority, see *Contract Act*, s. 238.

Although there may not have been an express agency proved, the law recognises agency by estoppel, that is to say, if a person allows another to transact with third parties on his behalf and makes them believe that that person, who is transacting with third parties, is doing so on his behalf, then such person, who allows third parties to believe that a person was acting on his behalf will be bound by the transactions entered into by the ostensible agent.¹² In the undermentioned case,¹³ the right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority, was nevertheless enforced, where the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him. Where a contractor had been supplying materials to a railway company for several years under contracts entered into by the Manager and the Engineer-in-Chief of the Railway and was always paid and the railway never raised the plea that the Manager was not authorised to enter into the contract, the contractor was held perfectly justified in entering into another contract with the Manager, and the Railway company was held estopped from pleading want of authority in the Manager.¹⁴ But when the contractor knew that the officers giving him assurance of higher rates had no such authority, mere fact that those officers were looking after the work would not estop the Government from not paying increased rates.¹⁵ Where a representation made by the agent of an Insurance company was in fact intended by the company to be communicated to a policy-holder and the agent was the only channel through which the communication took place, it was held that the company was estopped from taking up the position that the agent was not authorized to make such a representation.¹⁶ If a person gives a railway receipt to another person, the inference is that he appoints that other person his agent to take delivery of the goods from the railway company, and the fact that in the rules printed on the railway receipt the railway company states that it will not recognize an agent appointed otherwise than by endorsement, will not prevent the railway company from pleading that the other person was in fact an agent and entitled to receive the goods. The rule, however, may operate as an estoppel if the consignor has acted on the belief that the railway company would not recognize as his agent the person to whom the railway receipt has merely been sent without endorsement.¹⁷ Where a contract was entered into by a Director of a company after the expiry of the period for which he was elected as Director but the making of the agreement was a matter *intra vires* the company and every member of the company assented to the terms of the agreement, it was held that the company was estopped from saying that the agreement was not of the company as the Director was not duly appointed.¹⁸ An agent's acquiescence cannot be pleaded when the other party knows that he has no authority to acquiesce.¹⁹ Under Section 209 of the Indian Contract Act, when an agency is terminated by the principal dying or becoming of

12. *Moosa Bhoj v. Krishtiah*, 1952 Hyd. 79, 80 : I.L.R. 1952 Hyd. 196.

13. *Ram Pertab v. Marshall*, (1898) 20 C. 701 : 3 C.W.N. 313 (P.C.).

14. *Gaekwar Baroda State Railway v. Sheikh Habib Ullah*, 1934 All. 740 : 153 I.C. 824 : 1934 A.L.J. 1093 : 3 A.W.R. 621.

15. *State of Rajasthan v. Moti Ram*, 1973 W.L.N. 132 : 1973 Raj. L.J. W. 339 : A.I.R. 1973 Raj. 223.

16. *Scottish Union and National Insur-*

ance Co. v. Roushan Jahan Begam, 1945 Oudh 152 : I.L.R. 20 Luck.

194 : 1945 A.W.R. (C.C.) 15.

17. *Secretary of State v. Rishi Ram Jagdish Prasad*, 1928 All. 145 : I.L.R. 50 All. 227 : 108 I.C. 457 : 25 A.L.J. 1029.

18. *Charles Joseph v. Kyauktoga Grant Co., Ltd.*, 1935 Rang. 76 : 156 I.C. 196.

19. *Khuda Baksh v. Jai Shankar*, 1929 All. 386 : 115 I.C. 628.

unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interest entrusted to him. So where, after the death of the principal, the agent entered into a contract for the supply of molasses in order to keep his distillery going and the legal representatives of the deceased principal themselves recognized the authority of the agent to represent the estate, it was held that they were estopped from repudiating the contract on the ground of want of authority in the agent.²⁰ Where money has been paid under a mistake to an agent, it can be recovered from the agent only where, before notice of the mistake, the agent has not paid or settled such an account with the principal as amounts to payment of the money to him or done something which has so prejudiced his position that it would be inequitable to require him to refund. Having regard to the peculiar relations of the parties, the person paying the money is estopped from claiming refund of the money from the agent.²¹ There may also arise estoppels against agents in favour of their principals or of third parties.²²

10. Creation of agency by estoppel. (a) *Estoppel by holding out.* *Essentials.* Relationship of principal and agent may arise by implication of law by "holding out or estoppel". This, in fact, is no agency, but relationship is deemed to exist by legal fiction from circumstances, where law will not allow a person to say that he is not an agent or that so and so is not his agent, because it would be unfair to some other person to allow him to do so. So the authority is apparent and not real.²³ Agency by estoppel can be invoked by a third person only by showing that he knew and relied upon the conduct of the principal.²⁴ The agent by estoppel may not be an agent at all and may have none of the rights of an agent, as against his principal, but as against the person who relied on the conduct of the principal, he may not be permitted to deny the agency.²⁵ A person may rely on an agency by estoppel and show that he was led into the belief of agency, in good faith from previous dealings, or representations. If, at the time of dealings, he was unaware of such previous dealings, or representations, the plea of estoppel is not available to him.¹ Agency may arise, where a person by his conduct 'holds out' another as his agent and thereby invests him with apparent or ostensible authority as agent and he thereby becomes liable as principal for the acts of the person held out or apparently authorized to act as agent, whether or not, he actually intended to be bound.² The acts relied upon must be the acts of the principal.³ Where the authority of an agent is limited, and he acts in excess of his authority, the act will not be binding on the principal if the person dealing has or ought to have notice of the fact that the authority was limited, but the principal will be bound, if a third person

20 *Mossajee Ahmad & Co. v. Administrator-General of Bengal*, 1921 Lah. 48 : 60 I.C. 759.

21 *Solomon Jacob v. National Bank of India Ltd.*, 1917 Bom. 119 : I.L.R. 42 Bom. 16 : 42 I.C. 869 : 19 Bom. R. 789.

22 See cases cited in *Caspersz*, op. cit., 4th Ed., (1915), ss. 100-106, pp. 107-112.

23 *Moore v. Sunter*, 239 P. 8741 : *Andrew v. Colard*, 253 N.W. 913.

24 *Bevybell v. Ellet*. (C.C.A. old) 64 F. (2d) 263.

25 *Andrew v. Colard* (supra) : *Ken-*

tucky Penn Oil and Gas Corp. v. Clara, 57 S.W. 65.

1. *Cash v. Taylor*, 8 L.J. O.K.R. 262 : *Hogarth v. Wherley*, 32 L.T. 800.

2 *Birmingham News Co. v. Birmingham Printing Co.*, 96 So. 336 ; *Amonson v. Stone*, 167 P. 1029 ; *Richards v. John Spray Timber Co.*, 48 N.E. 63 ; *Johnson v. Cherleton*, (Ark.) 9 S. Ct. 87 : 128 U.S. 374.

3 *Commonwealth Casualty Insurance Co. v. Kuhrt*, 225 P. 251.

deals with the agent *bona fide* since by giving general authority to an agent, the principal creates an impression on the minds of the persons dealing with him through that agent that such agent has authority to do all acts ordinarily done in the course of agency, and a person having no notice of the special limitation of authority is entitled to assume that there is a general authority, but the person having notice of the limitation of authority, has no such right.⁴ On the other hand, acts done by an agent beyond the ordinary course of business entrusted to him, or besides the apparent scope of his authority, are not binding on the principal, even if the opportunity to do them arose out of the agency and they were purported to be done on the principal's behalf, unless he expressly authorised them or adopted them by taking the benefit arising therefrom or otherwise.⁵ Unless the conduct of the principal is such that he is precluded from denying the existence of authority, in any particular case, no act done on his behalf by any person, having in fact no authority from him, is binding on him.⁶

(b) *What is estoppel by holding out?* Under this section, when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. Estoppel extends not only to one's own acts and declarations but also to those of all persons through whom he claims. The rule is based on equity and good conscience, viz., that it would be most inequitable and unjust to a person, if another, who, by a representation made or by conduct amounting to representation, had induced him to act, as he would not otherwise have done, were allowed to repudiate or deny the effect of his former statement, to the loss or injury of the person who acted on it.⁷ The general principle of estoppel by conduct is very succinctly stated by the Lord Chancellor in *Cairncross v. Lorimer*,⁸ in the following words:

"The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.... I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its being done, and acquiesced in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence."

4. *Hambro v. Burnard*, (1904) 2 K. B. 10, 67; *Union Bank of Canada v. Cole*, (1877) 47 L.J. Q.B. 100; *Balfour v. Ernest*, (1859) 5 C.B. N.S. 601; *Doey v. L. & N.W. Rly.* (1919) 1 K.B. 625; *Hatch v. Scarles*, 24 L.J. Ch. 22; *Hayworth v. Knight*, 55 L.J. C.P. 298.

5. *McGowan & Co. v. Dyer*, (1875) L.R. 8 Q.B. 141; *Re Sawers*,

(1879) 12 Ch. D. 522; *Ruben v. Great Fingall*, 1906 A.C. 439; *Chadburn v. Moore*, (1892) 61 L. J. Ch. 674; *Jacob v. Morris*, (1902) 1 Ch. 816.

6. *Spooner v. Browning*, (1898) 1 Q. B. 528.

7. *Sarat v. Gopal*, 20 C. 296; 19 I. A. 20.

8. (1860) 3 Macq. 827, 11 L.

Applied to agency, it means that when any person, by words or conduct, represents or permits it to be represented, that another person is his agent, he will not be permitted to deny the agency with respect to any third person, dealing on the faith of such representation, with the person so held out as an agent, even if no agency exists in fact. Similarly, when a person, by words or conduct, represents or permits it to be represented that he is an agent of another person, he will not be permitted to deny the agency with respect to any third person dealing with him on the faith of any such representation even if no agency exists in fact.⁹⁻¹⁰

Section 237, Contract Act, which embodies the principle of estoppel lays down: "When an agent has without authority done acts or incurred obligations to third person on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third person to believe that such acts and obligations were within the scope of the agent's authority."

In order that a principal may be liable for the unauthorised acts of his agent, done in the course of his employment, it is not necessary that he should benefit by them. All that is required is, that the agent should hold himself out as having such authority, however unauthorised the act may be, and that his principal by his conduct and dealings should induce the third party to reasonably believe that he is authorised to do the act he does.¹¹

Section 237 is very limited in scope. This section has no application, where the relationship of principal and agent is not proved to exist between the parties. On the other hand, where the relationship of principal and agent exists, the section will apply, whenever the agent acts in excess of authority. Thus, where a licensed auctioneer sells a house by auction to a third person for an amount less than is authorised by the owner of the house, and the owner admits the authority given, which induces the third person to believe that the auction sale is within the scope of the auctioneer's authority, the owner of the house, as principal, is bound by the auction sale and is liable to the third person for the breach of contract, made by committing fraud in selling at a lower price.¹² If an agent borrows money for his principal, who refuses to ratify the loan, the creditor may nevertheless sue the principal, for such portion of the money as was, to the knowledge of the principal, applied to the payment of his legal debts.¹³ A person who deals with an agent whose authority he knows to be limited, does so at his peril, in this sense that should the agent be found to have exceeded his authority, the principal cannot be made responsible. In order that the principle of holding out should apply to an act done by an agent, and relied upon to bind the principal, it must be an act of that particular class of acts which he has general authority on behalf of his principal to do. But, if the agent be held out as having limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority. Where the principal did not by any negligence or improper act allow an agent to be apparently invested with authority, beyond or greater

9-10. Halsbury's Laws of England, 4th ed. Vol. 1, para 725; Pole v. Leask, (1865) 33 L.J. Ch. 155.

11. Nabagopal Das v. The Dacca Co-operative Town Bank, 1 D.R. 99 (97); Dinabandhu Saha v. Abdul

Molla, (1920) I.L.R. 50 Cal. 258. 12. Darbarilal v. Sharif Hussain, 1929 L. 822; 121 I.C. 511.

13. Kasam v. Narayan and others, 1930 Nag. 42; 122 I.C. 414.

than the limited authority which the customer knew him to possess, there, could not be any estoppel as against the principal in respect of any of the steps in a transaction whereby the customer was deceived by an agent acting beyond his authority.¹⁴ The right of a third party against the principal on the contract of his agent, though made in excess of the agent's actual authority, is nevertheless to be enforced, when the evidence shows that the contracting party has been led into an honest belief in the existence of the authority to the extent apparent to him. If the agent acting within the scope of his implied authority commits a fraud for his own benefit, the principal is liable to the party defrauded.¹⁵

The fact that Section 237 is limited in its scope does not make the general doctrine of estoppel and holding out inapplicable to agency in India.

Bower on Estoppel, Section 232, says :

"Where *A*, by words or acts, or by silence or inaction (if there is duty on him to speak or act), represents to *B*, or to the public or a class of which *B* is a member, that *X* is his (*A*'s) agent, or has his authority, either generally, or for the purposes of a particular transaction or type of business, and *B* is induced by such representation to alter his position for the worse, *A* is estopped from afterwards disputing, as against *B*, that *X* was such agent or invested with such authority at the time at which he was so described."¹⁶

(c) *Estoppel to assert agency.* *A* may be actually acting for another, yet, if he professes to act for himself or in his own name, he cannot subsequently be heard to say that he was merely acting as agent for somebody as against any person or persons interested in that transaction.¹⁷ If *A* represents to *B* that *C*, who is really his agent, is jointly interested as a principal in the transaction and *B* entered into the transaction, relying on that statement, then *A* cannot subsequently assert that *C* was his agent and not a co-principal.¹⁸ If *C* has sold goods to *B* and *A* has represented to *B* that the goods belonged to *C* above, *A* cannot subsequently assert that *C* was acting merely as his agent, even though the goods belonged to *A*. If by his conduct or silence, *A* has permitted third persons to deal with *C*, as the owner of property (which in fact is owned by *A*), *A* cannot be allowed to assert agency later on.¹⁹ But if *A* had merely put his goods or property in possession of *C* and done nothing more, this alone will not be enough to estop him from asserting the agency²⁰ but two further things are essential to raise an estoppel in such case: (1) the principal should have knowledge that the agent in possession is representing himself, as owner, and (2) failure on the part of the principal to repudiate, or such conduct, as would have shown either that the principal was responsible for the agent's conduct or at best acquiesced in it.²¹

14. *The Russo-Chinese Bank v. Li Yan Sam*, 14 C.W.N. 381.

15. *Raja Sir Basseeserdas v. Kabulchand*, I.L.R. 1945 Nag. 204 : 221 I.C. 343 : 1945 Nag. 121.

16. See also *Reynell v. Lewis*, (1846) 15 M. & W. 517 ; *Katiar* ; *Law of Agency*, 1961, Law Book Co., Allahabad.

17. *Ballis v. Repp.*, 1 Abb. Dec. (N. Y. 78) ; *Jones v. Parker*, 62 S. E. 261.

18. *East Hadden Bank v. Shailee*, 20 Coms. 18.

19. *Reed v. Vanclove*, 27 N.J. Law 362.

20. *Gussoner v. Hawkes*, 101 N.W. 898.

21. *Civil v. Bond*, 27 So. 577.

(d) *Estoppel to deny agency.* This may be either on the part of the agent himself, or on the part of the principal, or on the part of third parties.²²

(e) *Estoppel of agent to deny agency.* A person who professes to act as agent may be interested in denying the agency, on the one side to the principal or the person for whom he professed to act as agent, and on the other side to third parties whom he induced to enter into the contract or transaction.²³ In *Harris v. Clayton*,²⁴ firm A employed a salesman, B, to represent the firm in certain territory. B introduced himself to a buyer, C, as the representative of the firm, corresponded with C on the firm's stationery, made invoices and submitted statements on the firm's forms. B assigned his rights to X. X in a suit against C for goods sold and delivered is not estopped from claiming that B was carrying the claim against C on his own account or at least in his own name as a trustee for the firm A, but X would be estopped from claiming that the goods were sold to the buyer by the salesman on his own account, if any fraud on the buyer or disadvantage or damage to him were shown.²⁵

(f) *Estoppel of principal to deny agency as against the agent.* The agent has to rely on estoppel of his principal, when the principal wants to hold the agent liable for damages for unauthorised acts. Where the principal is informed fully of the unauthorised act or transaction and he does not promptly repudiate it, he may be estopped to deny agent's authority.¹ He is also estopped where he receives the benefit of such an act with knowledge of the act or transaction.² The principal is not however estopped from denying liability to a sub-agent unless, in addition to the knowledge of the transaction, he is shown to have knowledge of the terms of the agreement between the agent and the sub-agent.³

(g) *Estoppel of principal to any agency as against third parties.* We have seen how agency may sometimes be deemed to exist between two persons *qua* third parties, when, in fact, it does not exist between them.⁴ There may even be cases where, as between two persons, it is agreed that they do not stand to each other as principal and agent, and yet as against a third party, none may be held to be an agent of the other, one of them be made liable as principal.⁵ In such cases liability arises for the acts of the so-called agent, not because there is in fact the relationship of agency but because the principal cannot be permitted to deny the agency.⁶ If a person knowingly causes or permitted another, by acts or conduct, to appear as his agent and someone deals with the apparent agent, in good faith, and in exercise of reasonable prudence and suffers a loss by so acting, the person will be estopped to deny the agency.⁷ To make the person, who is not really a principal,

22. Katlar: Law of Agency, 1961, Law Book Co., Allahabad.

23. *Rose City Mercantile Co. v. Mills*, 286 S.W. 1019; *Stewart Bros. v. Cock*, 101 S.E. 304.

24. 190 P. 776.

25. Katlar: Law of Agency, 1961, Law Book Co., Allahabad.

1. *St. Louis Ginning Advance Co. v. Wanamaker*, 96 S.W. 287, 115 Mo. App. 270.

2. *Miles v. Briggs*, Tax Clv. App. 185 S.W. (2d) 1858.

3. *Hicks Rubber Co. v. Columbia Tire and Rubber Co.*, Tax Clv. App.

252 S.W. 216.

4. *Smith v. St. Louis Public Service Co.*, Mo. App. S.W. (2d) 161; *Bloxom v. Rose*, 144 S.E. 642.

5. *Harding v. Howe Inv. & Co., Serv.* 296 p. 929.

6. *Harbison Accident & Indemnity Co. v. Butter Valley Bank* (S.D.) 257 N.W. 642.

7. *Beers v. ...*, 100 Fed. C.C., A. Old 61 F. (2d) 253; *Hall v. Un. Ind. Co.*, (C.C.A.M.) 61 F. (2d) 85; *Herndon v. S. Shattons*, 128 So. 18; *Doran & Co. v. Gilchrist*, 31 So. 94.

liable, on the ground of estoppel, all the elements of estoppel must be present, namely :

- (i) conduct calculated to mislead ;
- (ii) circumstances showing that the alleged principal expected it to be relied and acted upon ;
- (iii) it must have been acted upon in good faith to the injury of the innocent party.⁸

If these elements are present, it makes no difference that no consideration was received by the alleged principal.⁹ This rule also applies to legal representatives or successors of the principal's alleged right to the subject-matter of the apparent agency¹⁰ and to voluntary assignees.¹¹ It applies equally to individuals and corporations.¹² But it applies in favour of transferee or representative of the third person with whom the alleged agent deals only, if he has relied on the apparent agency to his injury.¹³

(h) *Implied agency distinguished from agency by estoppel.* There is a vital distinction between implied agency and agency by estoppel or ostensible agency, which is often overlooked.¹⁴ Implied agency is real or actual authority, to be inferred upon facts and circumstances, for which the principal is in fact responsible, while agency, by estoppel, is not real but only apparent authority.¹⁵ As between the principal and the agent, the implied agency exists and creates mutual rights and liabilities, but agency by estoppel does not exist and creates no legal transaction between them.¹⁶ But as between principal and third parties, the third party can hold the principal liable for the acts of an ostensible agent only when he can show that he knew and relied upon the conduct of the principal, which induced and was sufficient in law to induce in his mind the belief that the ostensible agent was an agent (though in fact he was not) and it is not necessary to prove any such conduct or knowledge thereof in the case of implied agency.¹⁷ The implied agent is a real and not a mere ostensible agent and the principal is liable for his acts, even where the third party did not know or believe him to be an agent at the time of the contract.¹⁸

11. Partners. Two cases of estoppel in the case of partners (a branch of the law of principal and agent)¹⁹ have been dealt with in Section 28 of the Indian Partnership Act (Act IX of 1932), which has replaced Sections 245 and 246 of the Contract Act. When a man holds himself out as a partner or allows others to use his name, he is estopped from denying

8. Potainger v. Alpona Cedar Co., 144 N.W. 535; Clerk v. Dalsam, 66 N.W. 570.

9. Booth v. Willey, 102 Ill. 84.

10. Ibid.

11. Philad Trust, etc. v. Phil. Seventh Nat. Banks, (D.C.P. & C.) 6 F. 114.

12. American Disinf. Co. v. Police Jury of Grant Parish, 120 So. 135.

13. McCella v. American etc. Mfg. Co., 15 S.E. 687; 90 Ga. 113; Katiar : Law of Agency 1961, Law Book Co., Allahabad.

14. Andrew v. Kalbow (Iowa), 253 N.

W. 913; Kentucky Pennsylvania Oil and Gas Corporation v. Clark, 57 S.W. (2d) 65.

15. Moor v. Switzer, 299 P. 874.

16. Kentucky Pennsylvania Oil and Gas Corporation v. Clark, 57 S.W. (2d) 65.

17. Kentucky Pennsylvania Oil and Gas Corporation v. Clark, 57 S.W. (2d) 65.

18. Katiar : Law of Agency, 1961, Law Book Co., Allahabad.

19. Chundee Churn v. Eduljee Covasjee, (1882) 8 C. 678, 684.

his assumed character upon the faith of which creditors may be presumed to have acted, and becomes a partner by estoppel.²⁰ Where the working partner of a firm mortgaged firm's property and a sleeping partner himself attested it at the instance of the mortgagee, fully knowing its contents and raising no objection, it was held that the sleeping partner was estopped from setting up his title against the mortgagee.²¹ Under Section 19, Partnership Act, one partner has no implied authority to submit a dispute relating to the business of the firm to arbitration. But, where one of the partners has referred a dispute to arbitration and the other partners who are aware of the arbitration proceeding do not come forward to object to the proceeding till the passing of the award, they must be taken to have ratified the act of the partner and are estopped from challenging the award on the ground of want of authority of the partner.²² Where property was purchased in the name of one partner and he alone used to deal with it as the exclusive owner another partner is estopped from denying the right of that partner to mortgage the property.²³ In the absence of a notice of dissolution, express or constructive, persons dealing with the firm are entitled to assume that the partnership still continues.²⁴ But where the firm has ceased to be a going concern, and *quondam* partner of the defunct firm raises a new loan, wrongly describing himself as the representative of the firm, the presumption of implied agency, which is applicable to the case of a going concern, does not arise, and another partner who had long before retired from the business is not liable for the debts contracted.²⁵ A partner is not estopped from repudiating a receipt given by the Manager of the firm if it is not given in the course of the business of the firm.¹ Where one person bids in an auction sale and another person, representing himself to be a partner with the first, joins him in making the initial deposit, the second person becomes a co-contractor or co-lessee and is estopped from denying his liability thereunder.²

12. Estoppel of partners. (a) *General.* Section 28, Partnership Act, which embodies the doctrine of holding out as applied to partners, runs as follows:

(1) Anyone who by words spoken or written or by conduct represents himself or knowingly permits himself to be represented to be a partner in a firm, is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person repre-

20. *Mollwo March v. Court of Wards*, (1872) L.R. 4 P.C. 419, 435; see *Lindlay's Partnership*, 5th Ed., 40-47; *Pollock's Partnership*, 26-29; *Caspersz, op. cit.*, 162-166; *Bigelow, op. cit.*, 6th Ed., 611, 612; as to evidence necessary to establish liability as partner by estoppel: see *Porter v. Ince*, 10 C. W.N. 313.

21. *Firm Jankiram v. Chota Nagpur Banking Association* 1937 Pat. 169; I.L.R. 15 Pat. 721; 165 I.C. 98.

22. *Parmeshwar Lal & Co. v. Jai Narain*, 1952 Punj. 373; see also *Hanuman Chambers of Commerce Ltd. v. Jessaram*, 1949 E. Punj. 46; 50 P.L.R. 181; *Rai Dwarka Nath v.*

Haji Mohammad Akbar, 1911 P.C. 33; 24 I.C. 307; 17 Bom. I.R. 5.

23. *Punjab & Sind Bank Ltd. v. Rustomjee*, 1935 Lah. 821.

24. *Mahadeva Iyer v. Rama Krishna Reddiar*, 1926 Mad. 114; 92 I.C. 653.

25. *Harbhajan Singh v. Sri Gopal*, 1933 Lah. 417; I.L.R. 14 Lah. 188; 143 I.C. 589.

1. *Dava Kishen v. Frank B. Pool*, 1914 Lah. 51; 27 I.C. 252; 247 P.E.R. 1914.

2. *Municipal Council, Tiruvavur v. Kannuswami Pillai*, 1950 Mad. 600; I.I.R. 53 Mad. 352; 127 I.C. 120.

senting himself or represented to be a partner does or does not know that representation has reached the person so giving credit.

(2) Where after a partner's death, the business is continued, in the old firm's name, the continued use of that name or the deceased partner's name is a part thereof shall not of itself make his legal representative or his estate liable for any act of his firm done after his death

Ordinarily, a person becomes liable for the debts and obligations of a firm only if he is a partner in the firm. But a person, who is not a partner, may also become liable as if he was a partner to a person whom he has led to believe that he is a partner and to act on such belief. This is based on the doctrine of holding out. Its object is to prevent frauds to which creditors of a firm would be otherwise exposed. Eargro, C. J., in *Waugh v. Carver*,³ observed: "Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A is to contribute neither labour nor money and to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principle of general policy, to prevent the fraud to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or more persons, whether in fact they lent to only two of them, to whom without the others, they would have lent nothing." To establish a case of holding out, the evidence must be clear and unambiguous.⁴ The mere use of a man's name in the firm-name is not tantamount to holding out.⁵ In India, names are indiscriminately used by the firms on account of more sonorous sound, or to give greater dignity to the firm. It is usual to use two names and often the name of the son is used. This will not make the son a partner.⁶ The representation by a person that he contemplates or is willing to become a partner is not enough to burden him with liability. It was the duty of the person giving credit to make inquiries and satisfy himself that he has subsequently in fact become a partner.⁷ On the other hand, a person may hold himself out or permit himself to be held out as a partner and yet conceal his name.⁸ A person cannot be held liable on a contract on the ground of holding out, unless he actually held himself out to be a partner before the contract was entered into.⁹ A person may be held out to be a partner by being identified by description even though his name is not disclosed.¹⁰ If a person is represented as a partner without his knowledge or consent, he is not liable.¹¹ But if a person signs a prospectus or allows his name to be put on it, or is a party to a resolution or has stated that he is a partner, he may be said to have held himself out.¹² A man who describes himself as a partner with another in one kind of business, cannot be said to have held himself out in any other

³ (1793) 3 H.B. 235.

⁴ *Aba v. Sonubai*, 3 Bom. L.R. 832.

⁵ *Tulsi Das Amanmal v. Messrs. Lyon Lord & Co.*, 86 I.C. 934 : 1925 Sind 225 ; *Nemchand v. Gur Dayal*, 1925 Oudh 451 : 88 I.C. 584 ; *Maurice Mayadas v. Morley*, 1925 Cal. 937 : 87 I.C. 508.

⁶ *Tulsi Das Amanmal v. Messrs. Lyon Lord & Co.*, 1925 Sind 225 : 86 I.C. 934.

⁷ *Hindusthan Co-operative Insurance*

Society, Ltd. v. Secretary of State, 1930 C. 290 : I.L.R. 56 C. 989 : 121 I.C. 737.

⁸ *Martyn v. Gray*, (1863) 14 C.B. (N.S.) 824.

⁹ *Baird v. Planque*, (1856) 1 F. & F. 344, N.P.

¹⁰ *Martyn, v. Gray*, (1863) 14 C.B. (N.S.) 824.

(N.S.) 387.

¹¹ *Fox v. Clifton*, (1890) 6 Bing 776.

¹² *Collingwood v. Berkley*, 15 C.B.

kind of business.¹³ If directors, members of committees, managers of clubs or any other person not in partnership, pass resolutions that work shall be done, or goods supplied, they authorise whatever may be done in pursuance of such resolutions and they are the persons naturally looked to and *prima facie* liable to pay for what may be done.¹⁴ A servant by taking active part in the management of the business and by signing for the firm may make himself liable as partner.¹⁵ If a partner has retired but omits to take proper steps to notify his retirement, he may be liable by estoppel for debts of the firm, subsequent to his retirement to persons who knew him to be a partner [Section 32 (3), Indian Partnership Act]. But he will not be liable to creditors who did not know him to be a partner while he was such in fact and therefore cannot be supposed to have dealt with the firm on the faith of having his credit to look to. In other words, "a dormant partner may retire from a firm without giving notice to the world."¹⁶ But so far as torts or civil injuries are concerned, only actual members can be held liable. No one can be held responsible for the torts of another, simply because that other person held himself out to be his partner.¹⁷ Liability by 'holding out' does not apply to cases independent of contract.¹⁸ The position of legal representatives of a deceased partner differs from that of a retiring partner, for they will not be bound by the subsequent acts of the firm, though no notice of the partner's death was given to customers of the firm.¹⁹

Section 32, sub-section (3), Partnership Act, lays down that—

"Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third persons for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement: Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner."

Retirement of a partner does, as between the partners themselves, determine the partnership and also the implied agency which flows from the relationship, but so far as third persons are concerned, the mere fact of a partner's retirement is not by itself sufficient to absolve him from liability to them for subsequent acts of the firm, if they give credit to the firm on the footing of the continuance of the firm as originally constituted.²⁰ A partner who has retired without notice is liable even for torts committed by his co-partners after his retirement.²¹

Section 45, Partnership Act, applies the rule of estoppel to cases of dissolution of firm. It runs:

"Notwithstanding the dissolution of a firm, partners continue to be liable as such to third parties for any act done by any of them which would have

13. *De Berkomp v. Smith*, (1793) 1 Esp. 29.

14. *Lindley on Partnership*, P. 72; *Walter v. Ashton*, (1902) Ch. 224.

15. *Harnamdas v. Mayadas*, 1925 Sind 310 : 87 I.C. 905.

16. *Amar Singh v. Chandumal*, 137 P. L.R. 1925; *Bichhia Lal v. Munshi Ram*, 1922 Lah. 466 : 68 I.C. 932; *Heath v. Samson*, (1892) 4 B. & Ad. 172.

17. *Smith v. Bailey*, (1891) 2 Q.B. 405; *Harnamdas v. Mayadas*, *supra*.

18. *Pollock on Partnership*, p. 52.

19. Section 45, Partnership Act.

20. *Freeman v. Cooke*, (1848) 2 Ex. 654; *Firm Ratanji Bhagwanji Co. v. Premshanker*, 1938 All. 619 : 178 I.C. 578.

21. *Stables v. Flev*, (1825) 1 C. & P. 616.

been an act of the firm if done before the dissolution, until public notice is given of the dissolution. Provided that the estate of a partner who dies, or who is adjudicated insolvent, or of a partner, who not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.”²²

(b) *Modes of conduct or holding out.* Thus the modes of conduct from which estoppel may arise are :

- (i) Principal himself holding out to the public that a person is possessed of authority or power which he is asserting.
- (ii) Principal permitting the agent to hold himself out as possessing authority.
- (iii) Principal by negligent conduct creating an impression that the assumed agent has authority.
- (iv) Principal negligently failing to correct wrong impression created by the assumed agent, when he knows or ought to have known that such impression was apt to mislead someone.

(c) *Estoppel of third person to deny agency.* Where a person represents to another that he is an agent and that other begins to deal with him as such that third person cannot be permitted to say as against the supposed principal that he was dealing with an agent.²³ Such third person may also be estopped from denying the agency as against the assumed agent,²⁴ or even against other interested parties.²⁵ But if the third person withdraws from the contract made with the assumed agent, because the principal or the agent or any other person has not then suffered any loss, he is not.¹

An undisclosed principal having no knowledge of a transaction will not be estopped as he never made any representation to a third person which influenced the mind of the third party, and the third party did not even know of his existence.²

13. Trustees. The misrepresentation of a trustee, in respect of the trust estate to one having notice that it is such, will not work as estoppel upon an innocent *cestui que trust*.³ And while a trustee, committing a breach of trust, is estopped against a *bona fide* purchaser for value without notice of the breach, an innocent *cestui que trust* is not affected.⁴ If a trustee takes upon himself to answer the inquiries of a stranger about to deal with the *cestui que trust*, he is not under any legal obligation to do more than to give honest answers to the best of his actual knowledge and belief; he is not bound to make inquiries himself; provided he answers honestly, he incurs no liability to the enquirer, unless he binds himself by a statement amounting to a warranty or so expresses himself as to be estopped from afterwards

22. Katiar : Law of Agency, (1961), Law Book Co., Allahabad.

23. Silbortfield v. Solomon, 202 P. 113.

24. Black v. Cason Life Insurance Co., 264 Ill. App. 568.

25. Wece Bridge Co. v. Waco, 20 S. W. 137.

1. Albert Stemfed & Co. v. Brochome, 211 P. 475.

2. Hodge Tobacco Co. v. Section, 179

S.W. 36; Katiar : Law of Agency, (1961), Law Book Co., Allahabad.

3. Bigelow, op. cit., 6th Ed., 619-621; Keate v. Phillips, (1881) 18 Ch. D. 560, 577; as to the estoppel against a trustee see Newsome v. Flower, (1861) 30 Beav. 461, 470.

4. Sidhu Sahu v. Gopi Charan Dass, (1913) 17 C.L.J. 235; 18 I.C. 969.

denying the truth of what he has said.⁵ The estoppel against a trustee in favour of a *cestui que trust* has been likened to that between landlord and tenant. A trustee cannot set up as against his *cestui que trust*, the adverse title or third parties. "It is a common principle of law that a tenant who has paid rent to his landlord cannot say 'you are not the owner of the property'; the fact of having paid rent prevents his doing it. The same thing occurs where persons are made trustees for the owner of property; if they acknowledge the trust for a considerable time, they cannot say that any other person is their *cestui que trust*, or 'we will turn you out of the property'. This is an analogous case."⁶ A creditor does not lose his right to sue the executors, and to recover from them by mere laches. But if the creditor misleads the executors, so that they are thereby induced to part with the assets in a manner which would be a *devastavit*, then the creditor cannot complain of the *devastavit*.⁷ So, if a *cestui que trust* concurs in a breach of trust, he is estopped from proceeding against the trustee for the consequences of the act, and a *fortiori*, a *cestui que trust* who is also a trustee cannot hold his co-trustee responsible for any act in which they both joined.⁸ A party cannot be allowed to approbate and reprobate. Where a person had full knowledge of the facts and in unmistakable terms admitted the *wakf* nature of a house, it was held that he could not subsequently be allowed to resile from that position.⁹ Where a person enters into possession of property as a trustee and administers the trust for some time, he is estopped from subsequently disputing the validity of the trust.¹⁰ No person who has accepted the position of trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself.¹¹ A person purporting to act as trustee cannot be allowed to say for his own benefit that he had no right to act as trustee and is estopped from taking advantage of the lapse of time.¹² So, a person who has acted as a trustee, as evinced by his own admissions and conduct, cannot subsequently turn round and

5. *Low v. Bouverie*, (1891) 1 L.R. 3 Ch. 82; *Burrowes v. Lock*, (1805) 10 Ves. 470.

6. *Newsome v. Flowers*, (1861) 30 Beav. 461, 470, per Sir John Romilly, M.R., nor can he assert against the trust any title (paramount and adverse to the trust), which he may himself have; *Attorney-General v. Munro*, (1848) 2 De G. & Sm. 122, 133. A trustee may not set up any title adverse to that of the *cestui que trust*. *Bigelow*, *Estoppel* 6th Ed., 589, 590; Act II of 1882, S. 14.

7. *In re Birch*, (1853) L.R. 27 Ch. D. 622, 627.

8. *Lewin, Trusts*, 8th Ed., 918; *ib.* 12th Ed., 1195; see *Griffith v. Hughes*, (1892) L.R. 3 Ch. 105; Act II of 1882, ss. 23, 62, 68.

9. *Jai Dayal v. Ram Saran Das*, 1938 Lah. 686; 1 I.L.R. 1938 Lah. 704; 181 I.C. 493; 40 P.L.R. 954; *Mst. Bibi Kundo v. Onkar Nath*, 1939 Lah. 63; 183 I.C. 645; 41 P. L.

R. 342; see also *Lakshmana Goundan v. Subramania Ayyar*, 1924 P.C. 44; 81 I.C. 518; 22 A.L.J. 169; 29 C.W.N. 112 (P. C.).

10. *Khatoun Jannat Bibi v. Syed Wali U'llah*, 1949 All. 310; 1 L. R. 1948 All. 406; 1948 A.L.J. 566; *Pichai Pillai v. Lingam Iyer*, 1928 Mad. 268; 108 I.C. 199.

11. *Srinivasa Moorthy v. Venkata Varada Aivangar*, (1911) 38 I.A. 129; 1 I.L.R. 34 Mad. 257 at 265; 11 I.C. 417 (P. C.); *Asa Ram v. Ludheshwar*, 1938 Nag. 335; 177 I.C. 6 (F. B.); *Muhammad Kazim v. Abi Saghir*, 1932 Pat. 33; 1 I.L.R. 11 Pat. 288; 136 I.C. 417; 12 P.L.T. 217.

12. *Pattaikara Manakkal Kuppen v. Choorakkapatti Mundekottil*, 1911 Mad. 477; 1 I.L.R. 37 Mad. 373; 14 I.C. 168; see also *Lyell v. Kennedy* (1889) 14 A.C. 437; 59 I. J. Q. B. 268; 62 I.T. 77; 38 W.R. 353, 11 L.

claim the properties as his own absolute properties.¹³ And a person who has acted as-trustee cannot unsettle the position by saying that the trust was invalid from its inception.¹⁴

Where a trustee asks the Board of Commissioners for Hindu Religious Endowments to interfere with the management of an institution on the ground that it is a *math*, another person is not estopped from asserting that it is not a *math*. Estoppel cannot confer on the Board a power which it did not otherwise possess under the Act. Any other person is not estopped by any act or conduct of a trustee from contending that it is not a *math*.¹⁵ A *mutawalli*, executing a *supurdnama* representing that he was competent to do so, is estopped from denying the validity of the *supurdnama*.¹⁶ An estoppel may be personal to a *mutawalli* and inoperative against the endowment.¹⁷ A Muhammadan who has acquired land for the construction thereon of school buildings, who has constructed those buildings, and who has over a period of several years caused everyone concerned to believe that he was doing this on behalf of a certain school, and to take certain action in that belief, is not entitled to change his mind and dedicate the property for another object, namely, an orphanage. His conduct creates an estoppel against him and anyone claiming in his right.¹⁸ A trustee, alleging that the trust property, consisting of land, was his own property, mortgaged it. The mortgagee took the mortgage in good faith for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties.¹⁹ It was held that the plaintiff was estopped by his conduct from recovering possession of the land.²⁰ But, in a later case, it was held, that though the representatives of a mortgagee cannot as such question the validity of a mortgage, it may be open to those as *mutawallis* to plead that the property was *wakf* and the mortgage void.²¹ It may well be that a succeeding trustee should not be allowed to impeach a former trustee's act when it is one of that character, i.e., when "it is considered to be a proper and reasonable exercise of the office as trustee", without its following as a logical consequence, that where the trustee

13. Venkata Ramana v. Rama Mandiram, A.I.R. 1966 A.P. 197 : (1964) 2 Andh. W.R. 457.

14. Balkishen Dass v. Parmeshri Dass, A.I.R. 1963 Punj. 187 : I.L.R. (1963) 1 Punj. 320 : 65 P.L.R. 236, relying on Fazlhussein v. Mahomedally, I.L.R. 1943 B. 495 : A.I.R. 1943 B. 366.

15. State of Madras v. Melamattam, A.I.R. 1965 S.C. 1570.

16. Afzal Husain v. Chhedi Lal, 1935 All. 792 : I.L.R. 57 All. 727 : 155 I.C. 791.

17. Zainuddin Hossain v. Mohammad Akbar Rahim, 1933 Cal. 102 : 140 I.C. 799 : 58 C.L.J. 259 : 36 C.W. N. 972.

18. Muhammad Imdad Ullah v. Mst.

Bismillah, 1946 All. 468 : 227 I.C. 50 : 1947 A.L.J. 65 : 1946 A.W.R. (H.C.) 230 : see also In re Union Indian Sugar Mills Co., Ltd., 1930 All. 330 : 127 I.C. 428 : 1930 A.L.J. 305.

19. The Court observed : "We make no remark with regard to the beneficiaries under the trust, as they, having made no effort to figure in the suit, do not appear to be interesting themselves in the matter."

20. Gulzar Ali v. Fida Ali, (1883) 6 A. 24.

21. Nandan Singh v. Jumman, (1912) 34 A. 640 : 17 I.C. 632 : 10 A.L.J. 278, distinguishing Gulzar Ali v. Fida Ali, (1883) 6 A. 24.

avowedly acts in breach or repudiation of the trust such acts should be binding by estoppel upon his successors in the trust.²²

14. Executors and legatees. An executor under a will, who has accepted the office of executor and acted as such, is estopped thereby from setting up an adverse title to property disposed of by the will. The fact that he has not taken out probate (at any rate where the law does not require him to do so) is immaterial.²³ Where property purchased in the name of a woman with her *stridhan* was treated by her husband as his absolute property and he executed a will in respect of it appointing the woman as his executrix and the woman approbated the will and accepted the office of the executor thereby waiving any right which she might have in the property, it was held that she and her heir were estopped from claiming the property as her *stridhan*.²⁴ But, if a person, who has not been appointed executor of a will, describes himself as an executor under a mistake about his legal position, this does not make him an executor or raise an estoppel against him.²⁵ "One who obtains or accepts, or retains possession of property under a will and who neither has, nor professes to have, any title thereto except under the will, is estopped, as against any remainderman or other person claiming under the same will from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and, generally, from setting up any title to the property in himself which is independent of, and adverse to, the will, or any interest of a different kind from that which he would have taken if the property had passed by the will as it was impliedly represented by him to have passed. The above formula, it will be observed, is confined to cases where the party not only professes to have, but actually has, no title to the property except under the will."¹ But the doctrine of estoppel is not applicable as between a donor and donee in all cases. The heir-at-law of a *raiya* testator is not estopped from questioning the transfer of his holding made by a will.² In the undermentioned case, the plaintiff was held bound by the conduct of his father, even though technically he succeeded as reversioner in his own right.³

As to the estoppels of tenants, licensees, bailees, and acceptors of bills of exchange, see Sections 116 and 117, post and notes thereto.

15. "Declaration, act or omission". A representation to form the basis of an estoppel may be made either by statement or by conduct; and conduct includes negligence.⁴ In the words of this section, there must be some "declaration, act or omission" on the part of the person against whom

22. *Shri Ganesh v. Keshavray Govind*, (1890) 13 B. 625, 636, 637.

23. *Munisami Chetti v. Maruthamunal*, I.L.R. 34 Mad. 211 : 7 I.C. 176; *Srinivasa Moothy v. Venkata Varada Iyengar*, 38 I.A. 120 : I.L.R. 34 Mad. 257 (P.C.); *Namberumal Chetti v. Veeraperumal Pillai*, 1930 Mad. 956 : 128 I.C. 689 : 59 M. L.J. 596.

24. *R. Lakshmiddevamma v. G. Kesavarao*, 1935 Mad. 1066 : 159 I.C. 943.

25. *Atisukhlal Bhaidas v. Natvar Lal Ichharam*, 1939 P.C. 238 : I.L.R. 1939 Kar. 391 : 183 I.C. 885 : 1939 O.I.R. 586 (P.C.).

1. *Spencer Bower on Estoppel by Representative*, para. 374 : see *Ganga Din v. Ram Prasad*, 1927 All. 642 : 106 I.C. 20 : 26 A.L.J. 62 ; *B. Lakshamma v. V. Sreeramulu*, 1927 Mad. 1066 : 104 I.C. 650 ; *Mohammad Ali Khan v. Nisar Ali Khan*, 1928 Oudh 67 : 109 I.C. 835.

2. *Amulva Katan Sarkar v. Tarini Nath Dey*, 1915 Cal. 43 : I.L.R. 42 Cal. 234 : 27 I.C. 235 : 21 C.L.J. 187 : 18 C.W.N. 1290.

3. *Vinayak v. Govind*, (1900) 2 Bom. L.R. 820.

4. *Halsbury's Laws of England*, 3rd (Simond's) Ed., Vol. 25, p. 224.

estoppel is sought to be applied, which intentionally caused or permitted the person aggrieved to believe that statement and to act upon such belief.⁵ There can be no estoppel when there has been no representation.⁶ When no representation was made by the Government that the appellant possessed the necessary educational qualifications but on the other hand the appellant obtained an employment on a wrong representation that he was holding the B. Sc. (Hons.) Degree, the appellant did not suffer any detriment on account of any representation of the Government and the Government is not estopped by the principle of equitable estoppel from cancelling the appointment, more so when the appointment was purely temporary.⁷ As already observed, the form of the representation is immaterial. The representation may be express or implied; for whatever word, action or conduct conveys a clear impression as of a fact is embraced in that term. There is no necessity for an express verbal statement or indeed any verbal statement whatsoever. An act may involve and amount to a distinct declaration which will found an estoppel. So, if a man takes an active part in carrying out a mortgage on behalf of another as by signing the deed and receiving the consideration money, his acts may amount to a declaration of the validity of the mortgage as against any claim of his own, and his acting as the attorney of that other in the matter of the mortgage may amount to a declaration that that other is the owner in possession of the property covered thereby.⁸ In a case in the Madras High Court, it was held that where a person attests a sale-deed with the knowledge that it contains a recital that the lands which it purports to convey are in the executant's possession as owner, he is thereby estopped from afterwards setting up a title to them.⁹ In this case, it was said, that having regard to the usual course of business in the Madras Presidency, attestation by a person, who may have claims to the property affected, must be regarded *prima facie* as a representation that the recitals of title are true and will not be disputed by the attesting witness against the transferee. But, as a general rule, attestation does not affect the witness with knowledge or notice of the contents of a deed, and whether it imports concurrence is a question of fact.¹⁰ If an attesting witness is pre-

5. Kali Prasad v. Sant Lal, 1957 Pat. 442 : I.L.R. 36 Pat. 381.
6. Mst. Rajana v. Musaheb Ali, 1935 Oudh 387 : 155 I.C. 23; Supdt. of Taxes v. O.N. Trust A.I.R. 1975 S.C. 2065.
7. S.C. Desai v. The Director of Education, (1978) M.L.J. 517.
8. Sarat Chunder v. Gopal Chunder, 19 I.A. 203, 212, 213; see also for similar cases Kebul Kristo v. Ram Coomar, (1868) 9 W.R. 571; Sia Dasi v. Gur Sahai, (1880) 3 A. 562; Ram Chunder v. Hari Das, (1882) 9 C. 463; Rai Seeta v. Kishun Dass, (1868) H.C.R.N.W.F. 402; Salamat Ali v. Budh Singh, (1876) 1 All. 303, and see Kanshi Ram v. Badda, (1906) 23 P.L.R. 23.
9. Kandasami Pillai v. Nagalinga Pillai, (1912) 36 M. 564 (obiter per Sundara Ayyar, J., no actual or verbal representation is necessary for an estoppel).
10. Lakhpati v. Rambodh Singh, (1915) 37 A. 350 : 29 I.C. 218 : A.I.R. 1915 A. 255; Raj Lukhee Debia v.

Gokul Chundra Chowdry, (1869) 13 M.I.A. 209; Deno Nath Das v. Koliswar Bhattacharya, (1913) 21 I.C. 367; Mewa Singh v. Bhagwant Singh, (1909) 5 I.C. 252; Banga Chandra Dhur Biswas v. Jagat Kishore, 1916 P.C. 110 : 43 I.A. 249 : I.L.R. 44 Cal. 186 : 36 I.C. 420; Hari Kishan Bhagat v. Kashi Pershad, 1914 P.C. 90 : 42 I.A. 64 : I.L.R. 42 Cal. 876 : 27 I.C. 674; Pandurang Krishnaji v. Markendeya Tukaram, 1922 P.C. 20 : 49 I.A. 16 : I.L.R. 49 C. 334 : 65 I.C. 954; Bhagwan Singh v. Ujagar Singh, 1928 PC 20 : 107 I.C. 20 : 26 A.L.J. 533; Rai Bhan Laxmanji v. Namdeo Punjaji, 1932 Nag. 96 : 1932 N.L.J. 76; Mst. Sunder Kuer v. Shal. Uday Ram, 1944 All. 42 : 212 I.C. 168 : 1944 A.L.J. 19 : 1944 A.W.R. (H.C.) 8; Redhey Shivan v. Official Receiver, 1949 All. 461; Krishna Govindan v. Chinnamma, 1959 Ker. 237.

sent at the transaction and attests the deed having heard its contents, he is estopped from challenging the right of the transferee.¹¹ This principle, however, has no application where the executant himself could not be estopped from urging the real nature of the transaction.¹²

Maps not annexed to sale-deeds cannot be said to convey any representation.¹³ The education rules of the State of Madras and the text book committee rules cannot be said to give any assurance to the publishers that there will be no change in books once prescribed.¹⁴ When after attaining majority no representation was made by A that sale-deeds executed during his minority were valid, there is no estoppel against him.¹⁵ In inviting tenders for construction of works the Government does not make any representation that work will be given to one of the tenderers, and the giving of work to some one else after rejecting all tenders could not be called in question by the tenderers.¹⁶ When no representation was ever made by Railway to employee to occupy a quarter free of rent, there is no estoppel against Railway from recovering rent.¹⁷

A mere omission may involve a representation. Thus silence, where one is bound to speak, is ordinarily equivalent to an admission of the fact.¹⁸ So, if a person stands by and allows another to advance or expend money on property on which he has a charge or encumbrance, he may be estopped by his conduct of acquiescence.¹⁹ So, where a lessor, being either ignorant of his rights or uncertain of their extent, by his own act or representation, creates or induces in the mind of his tenant a mistaken belief that he has a permanent interest in the land and may build thereon, and the tenant, relying upon the act or representation so made, treats his interest as permanent and incurs expense in building which he would not otherwise have done, the owner is es-

11. *Bhagwat Rai v. Gorakh Rai*, 1984 Pat. 93 : 150 I.C. 765; *Mst. Jasodan Devi v. Jai Gopal*, 1941 Pesh. L. 17 : 193 I.C. 631 : 1941 Pesh. L. J. 17; *Dhanna Lal Brij Lal v. Bhaiya Lal*, 1956 M.B. 16; see also *Banga Chandra Dhur Biswas v. Jagat Kishore Acharya*, 1916 P.C. 110 : 43 I.A. 249 : I.L.R. 44 C. 186 : 36 I.C. 420, *supra*.
12. *Jaggarnath Singh v. Batto Kristo Ray*, 1947 Pat. 345 : I.L.R. 25 Pat. 666.
13. *Banwari Lal v. Sukhdarshan, A.I.R.* 1973 S.C. 814.
14. *State of Tamil Nadu v. S. K. Krishna Murthy*, (1972) 1 S.C.W.R. 324 : (1972) 1 S.C.C. 492 : (1972) 3 Civil App. J. 188 : 1972 U.J. (S.C.) 571 : (1972) 2 U.M. N.P. 301 : (1972) 3 S.C.R. 104 : (1974) 1 S.C.J. 295 : (1974) 1 Mad. L.J. (S.C.) 82 : (1974) 1 Andh. W.R. (S.C.) 82 : A.I.R. 1972 S.C. 1126.
15. *Varghese v. Iype Kunapose*, 1973 Ker. L.J. 944 : A.I.R. 1973 Ker. 267.
16. *Indersons Construction v. State of Orissa*, (1975) 41 Cut. L.T. 859.

17. *Union of India v. Tek Chand*, 1973 W.L.N. 774 : 1974 Ser. L.J. 466 : 1974 Raj. L.W. 13 : 1974 Lab. I. C. 604.
18. *Bigelow*, op. cit., 6th Ed., 644-662. In *M. Raghawayya v. M. Subbayya*, 1919 Mad. 1129 : 43 I.C. 903 : 7 I.L.W. 121, silence was held not to be a misrepresentation.
19. *Ramsden v. Dyson*, (1866) L.R. 1 H.L. 139, 140; *Ex parte Ford*, L.R. 1 Ch. D. 521, 523; *Nundo Kumar v. Banomall Gayan*, (1902) 29 C. 871 (Assuming that acquiescence amounts to a representation, it must be found that it was intended that a party should believe or act upon it or that in point of fact he did act upon it); *Ralli v. Forbes*, 1922 Pat. 258 : I.L.R. 1 Pat. 717 : 67 I.C. 744 : 3 P.L.T. 467; *Forbes v. Ralli*, 1925 P.C. 146 : 52 I.A. 178 : I.L.R. 4 Pat. 707 : 87 I.C. 318; *Ananta v. Ganu*, 1921 Bom. 417 : I.L.R. 45 Bom. 80; in *Kuverji v. Municipality of Lonavala*, 1921 Bom. 198 : I.L.R. (1921) 45 Bom. 164, it was held there was no estoppel; here expenditure was before act relied on as estoppel.

topped from denying the truth of that which he represented.²⁰ But a duty to speak, which is the ground of liability, arises only where silence can be considered as having an active part, that of misleading.²¹ And conduct by negligence or omission, where there is a duty to disclose the truth, may often have the same effect.²²

There is no estoppel, however, if any of the essential ingredients mentioned in the section are wanting. Any act done under misapprehension of legal rights does not create estoppel, nor does the absence of knowledge of the parties about their correct position.²³ The Supreme Court has held, that although the correct rule of estoppel applicable in the case of adoption is that it does not confer status, and it only shuts out the mouth of certain persons if they try to deny the adoption, yet where both parties are equally conversant with the true state of facts, the doctrine of estoppel has no application.²⁴ No doubt admissions, under certain circumstances, bind persons who make them, but they are not conclusive proof of the matters admitted, though they may operate as estoppels, if they fulfil the conditions relating to estoppel. But an admission, in ignorance of the legal rights of a party, creates no estoppel.²⁵

Where 75 per cent of estimated compensation was paid in advance to a claimant in Land Acquisition proceedings, the claimant did not by any "declaration, act or omission" cause or permit the Government to believe that the advance represented 75 per cent of the actual compensation payable and to act on that belief; the claimant is not estopped from claiming enhanced compensation.¹ A landlord accepting compensation in respect of food crops and khas jungles without raising any objection is not estopped from claiming fair compensation of his property acquired by Government.²

16. Representation must be clear and unambiguous. But whatever the form in which the representation be made, it must, in order to justify a prudent man in acting upon it, be not doubtful or matter of questionable inference, certainty being an essential condition of all estoppels, which must be clear and unambiguous.³ A litigant cannot be permitted to assume in-

20. *Sir L. E. Ralli v. A. H. Forbes*, 1922 Pat. 258, supra on app. *A. H. Forbes v. Sir L. E. Ralli*, 1925 P.C. 146.

21. *Freeman v. Cooke*, 2 Ex. 654; v. post. Besides fraud, there may be an estoppel by negligence and by circumstances; *Vinayak v. Govind*, (1900) 2 Bom. L.R. 820, 829, 830; and see as to negligence, *Longman v. Bath Electric Tramways*, (1905) 1 Ch. 646, 663.

22. *Joy Chandra Banerjee v. Sreenath Chatterjee*, 32 Cal. 357; 1 C.L.J. 23.

23. *Shanker Lal v. Narendra Bahadur*, A.I.R. 1967 A. 405; *Asiff v. Jadunath*, L.R. 58 I.A. 91; A.I.R. 1934 P.C. 79; *Man Mohan Das v. Janki Prasad*, L.R. 72 I.A. 59; A.I.R. 1945 P.C. 23; *Kartar Singh v. Daval Das*, I.L.R. 1939 Kar. P.C. 350; A.I.R. 1939 P.C. 201.

24. *Kishori Lal v. Chaltibai*,—A.I.R.

1959 S.C. 504; 1959 S.C.J. 560; see also *Gundicha v. Eswara*, A.I.R. 1965 Orissa 96; 31 Cut. L.T. 272; *Fullamoni Dei v. Netrananda*, A.I.R. 1967 Orissa 103.

25. *Shantilal v. Transport Appellate Tribunal*, A.I.R. 1967 Raj. 138.

1. *Assistant Commissioner and L. A. Officer v. Bharat Oils, Ltd.*, (1969) 18 Law Rep. 467 (471, 472).

2. *Union of India v. N. K. Sen*, (1971) 75 Cal. W.N. 580.

3. *Rani Mewa v. Rani Hulas*, (1874) 13 B.L.R. 512; 1 I.A. 161 (the nature of an estoppel being to exclude an inquiry by evidence into the truth, those who rely upon a statement as an estoppel must clearly establish that it does amount to that which they assert); *Rivett Carnac v. New Mofussil Co.*, (1901) 26 B. 54; 3 Bom L.R. 846 (certainty is essential to all estoppels); *Co. Litt.*, 352, b. (Every estoppel

consistent positions to the detriment of his opponent. If he takes a particular position at one stage of a litigation, he cannot turn round and resile from that position. Pleadings contrary to the earlier ones are prohibited. Speaking generally, before applying the principle of estoppel against a person, his declaration, act or omission must be clear, unambiguous and of an unequivocal character. Estoppel can arise only from a clear and positive statement.⁴ This does not mean that either the language or the conduct must be such that it cannot possibly be open to different constructions, but only that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed.⁵ A question of estoppel must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities. The whole case of estoppel fails, if the statement is not sufficiently clear and unqualified.⁶ In the case cited, Bank C advanced loans to a merchant on the pledge of railway receipts. Following the usual practice, the railway receipts were handed over back to the merchant for the specific purpose of clearing goods represented by the railway receipts from the Port Trust and storing them in the Bank's godowns. The Bank did not put its stamps on the railway receipts. The merchant fraudulently pledged the same railway receipts to Bank M and obtained a second advance. Thereupon Bank C brought against Bank M an action for conversion. Bank M raised a plea of estoppel against Bank C. It was held that the railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was, at the best an ambiguous document. Its possession no more conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument; the possession of the railway receipt is no more significant for this purpose than the possession of the goods would have been. It is clear that no plea of estoppel could be raised in the cases where the merchants pledge the goods themselves after having obtained

because it concludeth the man to acknowledge the truth must be certain to every intent, and not to be taken by argument or inference); *Low v. Bouverie*, L.R. (1891) 3 Ch. 82, 119; *Freeman v. Cooke*, 2 Ex. 654; *Heath v. Crealock*, (1874) L.R. 10 Ch. App. 22; *Rigelow*, op. cit., 6th Ed., 578. An estoppel to have any judicial value must be clear and unambiguous; it must also be free, voluntary and without any artifice; *Mowji v. National Bank*, (1900) 2 Bom. L.R. 1041; *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha*, 1935 P.C. 79; 62 I.A. 100; I.L.R. 13 Rang. 256; 155 I.C. 1; *Govinda Marotisa v. Ismail*, 1950 Nag. 22; I.L.R. 1949 Nag. 933; 1950 N.L.J. 1; *Mst. Gaura Dei v. Md. Yasin Ali Khan*, 1935 Oudh 121; I.L.R. 10 Luck. 361; 153 I.C. 585. When an estoppel is pleaded against a party, the facts

relied upon as leading to it should be precise and unambiguous; *Aba v. Sonabai*, (1901) 3 Bom. L.R. 892; *Cajanan v. Nilo*, (1904) 6 Bom. L.R. 864, 867; *Ernakulam Mills Ltd. v. State of Kerala*, 1971 Kerala L.T. 318.

4. *State of Bihar v. B. L. Agarwalla*, A.I.R. 1966 Pat. 410.
5. *Low v. Bouverie*, L.R. (1891) 3 Ch. 106 (113). "If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning he cannot afterwards say he is not bound, if another so understanding it has acted upon it." *Cornish v. Abington*, (1859) 4 H. & N. 549, 555.
6. *Canada and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships, Ltd.*, 1947 P.C. 40; 228 I.C. 611; 13 B.R. 299.

delivery under the railway receipt.⁷ On the other hand, a plain representation cannot be cut down from its natural and proper import in the particular situation or transaction. This import may be technical and peculiar or popular according to the business concerned, modified, of course, by an actual understanding of both parties. A person, who has made a representation, cannot escape the consequences by showing that in a literal sense it is true, if in its natural sense it is untrue. A half-truth too, is generally a whole lie in effect: if the part suppressed would make the part stated false, there is a false representation; that is, the representation is taken to consist of the part stated and a denial of anything to the contrary.⁸ This assumes, of course, that the stated part is a clear positive statement of fact. Thus, a representation that shares of stock are "paid-up" must be understood reasonably, and so must be held to mean that they are paid up in cash.⁹ In like manner, however definite the representation, it cannot be enlarged or acted upon otherwise than according to its terms or natural import and clear meaning; and the whole representation (as is indeed the rule with regard to all admissions)¹⁰ must be taken together. A bill of lading must be construed as a whole, like any other commercial documents.¹¹ One part though sufficient alone to create an estoppel, cannot be separated from another part connected with it, which takes away its effect, though only by the other part uncertain.¹² The section does not apply to a case in which a belief otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised.¹³

17. Representation must be of an existing fact. The representation must be of a nature to lead naturally, that is, to lead a man of prudence to the action taken, hence it must be of fact and material, having reference to a present or past state of things. Representations of law, opinion or intention are generally insufficient.¹⁴ In order to found an estoppel, the representation must be of existing facts and not of mere intentions.¹⁵ The reason of the doctrine of estoppel wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement

7. *Morcentilha Bank of India Ltd. v. Central Bank of India Ltd.*, 1938 P. C. 52 at 58 : 65 I.A. 75 : I.L.R. 1938 Mad. 360 : 172 I.C. 745.

8. *Bigelow*, op. cit., 6th Ed., 642-643, citing *Peck v. Garney*, (1873) 6 H.L. 377, 403 : *Central Ry. v. Kisch*, (1867) 2 H.L. 99, 113 : *Corbett v. Brown*, (1831) 8 Bing. 33, though none of the cases cited are cases of estoppel, that learned author submits that there can be no doubt that they are applicable to the present subject.

9. *Butkinshaw v. Nelhol*, (1878) 3 App. Cas 1004, 1021

10. v. ante. pp. 545-547 and cases there cited.

11. *Canada and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships, Ltd.*, 1917 P. C. 10

12. *Bigelow*, op. cit., 6th Ed., 645, 646 : as to enlargement of the representation, see *Nurul Hossein v. Sheo Sahai*, (1892) 19 I.A. 221, 226, 227 : I.L.R. 20 Cal. 1.

13. *Joy Chandra v. Sreenath Chatterjee*, (1904) 32 C. 357 : 1 C.L.J. 23.

14. *Ibid.* (P.C.)—(2) at 362.

15. *State of Madras v. Madras Electric Tramways, Ltd.*, 1957 Mad. 169, relying on *Jorden v. James William Rayley Moner* (1854) 5 H.L.C. 185 : 10 E.R. 868 : *Dawson's Bank, Ltd. v. Nippon Menkwa Kabushiki Kaisha*, 1935 P.C. 79 : 62 I.A. 100 : 155 I.C. 1, supra : *Mst. Gaura v. Mohammad Yasin Ali Khan*, 1935 Oudh 121 : I.L.R. 10 Luck. 361 : 153 I.C. 585 : *Hindustan Co-operative Insurance Society, Ltd. v. Secretary of State*, 1930 : Cal 230 I.L.R. 56 Cal. 980 : 121 I.C. 737.

upon which a party could reasonably adopt any fixed and permanent course of action.¹⁶

A promise *de futuro* cannot operate as estoppel.¹⁷ A representation of an existing fact amounts to estoppel under this section if someone relying upon it changes his position. But a representation that something may be done in future and acting thereupon raises an equity and obliges the person making the representation to make good his promise.¹⁸ Where a person imported goods on the faith of the import licence the public authority granting the license was bound to permit him to import goods as described in the licence.¹⁹ But if a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created and encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation.²⁰ The State too comes within the range of this equity. This equity differs essentially from the doctrine embodied in this section, which is not a rule of equity but is a rule of evidence that was formulated and applied in Courts of law, whereas the former takes its origin from the jurisdiction assumed by the Court of Equity, to intervene in the case of, or to prevent, fraud.²¹ In the case cited, a lease was granted by a ryot who represented himself to be a tenure-holder or ryot at fixed rate. It was held that the grantee, in such a case when his title as permanent lessee is challenged by his grantor, may invoke the aid of the doctrine of estoppel and plead that the grantor cannot be permitted to prove the falsity of the recitals in the document, on the faith of which he took the lease, so as to enable him to derogate from his grant.²²

16. *Langdon v. Doud*, 10 Allen, 433 (Amer.), per Bigelow, C.J., v. Post.

17. *Dhyan Singh v. Jugal Kishore*, 1952 S.C. 145 : I.L.R. (1953) 1 All. 225 : 1952 S.C.A. 417 : 1952 S.C. J. 142 : 1952 S.C.R. 478 : 1952 A.L.J. 324 : 90 C.L.J. 206 : 1952 M.W.N. 528 ; *George Whitechurch, Ltd. v. Cavanagh*, 50 W.R. 218 : 71 L.J.K.B. 400 : (1902) A.C. 117 at p. 130 ; *Jethabhai v. Nathabhai*, 28 B. 399 at p. 407 : 6 Bom.L.R. 428 ; *Devibai v. Daya Bhoj Motilal*, 1926 Sind 42 : 89 I.C. 164 ; *Totaram Jawaharlal v. Haris Chandra Hari-Krishan Raju*, 1937 Nag. 402 ; *Parshotam Jethalal Soni v. Secretary of State*, 1938 Bom. 148 : 174 I.C. 67 : 39 Bom. I.R. 1257 : see also with regard to representation as to the future ; *Rivein Carnac v. New Mofussil Co.*, (1910) 26 B. 54 at p. 69 and *Dhordo v. Keshava*, 7 Bom. I.L.R. 179 : I.L.R. (1975) 1 Delhi 1081.

18. *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council*, 1970 S.C.D. 321 :

(1970) 2 S.C.J. 689 : 1971 M.P. L.J. 16 : 1971 Mah. L.J. 81 : (1970) 1 S.C.C. 582 : 75 Bom. L.R. 510 : (1970) 1 S.C.W.R. 797 : (1971) 1 S.C.A. 615 : (1970) 3 S.C.R. 854 : A.I.R. 1971 S.C. 1021.

19. *Khunnoo Lal v. Union of India*, A.I.R. 1974 All. 170.

20. *Ram-den v. Dyson*, (1866) L.R. 1 H.L. 129 : 12 Jm. (N.S.) 506, per Lord Kingsdown ; see also *Ahmad Yar Khan v. The Secretary of State for India*, (1901) 28 I.A. 211 : 1 I.L.R. 28 Cal. 693 ; *A.H. Forbes v. Sir J.E. Ralli*, 1925 P.C. 146 : 52 I.A. 178, I.L.R. 4 Pat. 707 : 87 I.C. 318.

21. *Municipal Corporation of Bombay v. Secretary of State*, 29 B. 580 : 7 Bom. L.R. 27. See also the note under the heading "Promissory Estoppel" in the Introduction to this Chapter.

22. *Chandya Kanta Nath v. Amjad Ali Hazi*, 1921 Cal. 451 : I.L.R. 48 Cal. 783 : 61 I.C. 466 : 25 C.W.N. 4.

18. No estoppel on point of law. See also Note 2 (f), ante. There can be no estoppel on a point of law. Estoppel consists, not in putting forward a particular view of a matter, e. g., of a lease, so as to enable him to derogate from his grant.²³ An admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel.²⁴ So for instance, where the State in its reply filed before the District Judge, admits that the reference is within limitation, it is open to it subsequently to raise objections that the reference is made on a time-barred application, provided the fact on the basis of which the application for reference was alleged to be within limitation were not pleaded by the applicant. If those facts had been pleaded and they had been admitted, then it would not have been open to the State to resile from them. There can be no estoppel on a question of law. Therefore, the State can urge before the District Judge that the reference was made on a time-barred application.²⁵ No estoppel can arise from ignorance of the law which both parties are supposed to know.¹ Where in a suit parties agreed that Sections 65 and 70 of Contract Act would be applicable as the agreement is void and adduced evidence about the quantum of compensation, the State is not estopped from objecting that relief under Section 65 cannot be granted as it was not claimed in plaint or notice under Section 80, C. P. C.² Though at the time of appointment to railway service and even thereafter, a person was regarded as a member of Scheduled Tribe, the Railway Administration is not estopped from correcting the mistake subsequently.³

There is no estoppel against illegality or legal enforceability.⁴ If duty has been paid in excess of what is due under mistake of law, the excess amount can be recovered.⁵ It does not apply to an erroneous admission on a point of law.⁶ It does not override Section 17 of the Registration Act.⁷ There can be no estoppel where the representations are made by a party under the influence of an erroneous view of his legal rights, which error was

23. *Baba Kartar Singh v. Dayal Das*, 1939 P.C. 201 : I.L.R. 1939 Kar. 350 : 182 I.C. 733 ; *M. Sumitramma v. M. Subbadu*, 1943 Mad. 22 : 207 I.C. 115 : (1942) 2 M.L.J. 97 ; 55 I.W. 396 ; *Tika Sao v. Hari Lal*, 1941 Pat. 276 : 195 I.C. 428 : 7 B.R. 924 ; *Ma Mo E. v. Ma Kun Hlaing*, 1941 Rang. 234 : 197 I.C. 20 : (1941) 2 R.L.R. 309 ; *Abdul Qavi v. Mahboob Ali*, 1931 Oudh 133 : I.L.R. 6 Luck. 382 : 129 I.C. 163 ; *Bal Krishna Gopal v. Ranganath Hanmant*, 1951 Nag. 171 : I.L.R. 1950 Nag. 618 : 1951 N.L.J. 188 ; *Rajambal v. Shanmuga Mudaliar*, 1923 Mad. 11 : 70 I.C. 653 : 1922 M.W.N. 481 ; *Ram Singh v. Imperial Bank of India*, 1928 Lah. 802 (point of law going to the jurisdiction of the Court) ; *Nainsukhdas Sheonarayan v. Gobardhan Das Bindrabhan Das*, 1948 Nag. 110 : I.L.R. 1947 Nag. 510 (question as to the validity of unregistered deed) ; *Jagat Narain Singh v. Salik Ram Singh*, 1938 Oudh 110 : 173 I.C. 991 ; *Mohini Mohan Mitra*

v. Radha Sundari Dasi, 1935 Cal. 481 : 99 C.W.N. 1014.

24. *Bimalabala Sinha v. Deb Kinkar Ghosh*, 1932 Pat. 267 : 140 I.C. 687.

25. *Lakshminarayan v. The State*, I.L.R. 1965 Raj. 1192 : A.I.R. 1966 Raj. 118 : 1965 Raj. I.W. 495.

1. *Gurulingaswami v. Ramalakshammamma*, I.L.R. 18 Mad. 53 ; *Ma Ma Gvi v. U. Ghit Pe*, 1926 Rang. 131 : 95 I.C. 879 ; *M. S. Chettyar Firm v. Kallamma*, 1935 Rang. 423.

2. *State v. A. S. T. Kota Ltd.*, A.I.R. 1971 Rajasthan 128.

3. *W. L. Wandanwar v. Union of India*, 1974 Lab. I.C. 141 : 1973 Mah. L. J. 994 : I.L.R. 1975 Bom 512.

4. *Enforcement Directorate v. Saroj Kumar*, A.I.R. 1978 Cal. 65.

5. *Orissa Mining Corporation Ltd. v. Joint Secretary*, (1977) 1 C.W.R. 440.

6. *Chinto v. Narinjan Singh*, A.I.R. 1957 Punj. 317.

7. *Guravaya v. Kotayya*, 1956 Andh. W.R. 547.

common to both parties.⁸ There is no estoppel where an admission of tenancy was made under an erroneous impression about the right of inheritance of a deceased statutory tenant.⁹ Where the representation is made on a matter of law and the facts are known to all parties, the conduct, for instance, of widow treating an adoption as valid cannot operate as estoppel against the widow. Where the facts are known, the presumption arising from conduct, etc., cannot establish a right which the facts themselves disprove. Therefore, any statement by the widow, or her conduct whereby she treated the adoption as valid; cannot operate as an estoppel against the widow from challenging the validity of the adoption as that would amount to a representation on a point of law relating to the validity of adoption by the widow. An estoppel, which is a mere rule of evidence, cannot render an invalid adoption valid.¹⁰ Where law prohibits giving of evidence about improper reception of votes in favour of the defeated candidate who claims the seat for himself, unless the successful candidate had complied with Section 47 of Representation of People Act, no question of estoppel arises.¹¹ An Income-tax Officer is not estopped from correcting the mistake committed by him in the procedure although the assessee had raised no objection against the wrong procedure.¹² There is no estoppel in maintaining proceedings for ejectment under proviso to Section 14 (1) of Delhi Rent Control Act.¹³ A person, from whom licence fee is demanded by a reconstituted municipality, can assail the Constitution of Municipality even though at earlier stage when the Government had declared an intention to constitute the Municipality and had invited objections he had not filed any objection.¹⁴ A representation made by a disqualified proprietor as to his competency to transfer his property would be no more than the putting forward by him of a certain view of the law and cannot operate as an estoppel.¹⁵ An erroneous statement made by counsel in the course of argument cannot estop the client from taking up the correct legal position afterwards.¹⁶ But if in order to come to a decision on the point of law it is necessary to ascertain facts, admission by counsel will estop the client.¹⁷

A mistake of law can be corrected.¹⁸ No party can be estopped because of a legal argument put forward by his pleader.¹⁹ An admission or concession on the part of a pleader, on a pure question of law, does not estop the party from questioning it at a later stage of the same proceeding, or in

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| <p>8. Sankaran Nambi v. Nangeeli Anna, 1935 Mad. 1062 : 42 L.A.V. 725 : 1935 M.W.N. 1265 ; Sales Tax Officer, Banarus v. Kanhaiya Lal, A.I.R. 1959 S.C. 135</p> <p>9. Mrs. Bibha Roy v. Harendra Chandra, 1975 Ren. C.R. 201 : 1975 Pat. L.J.R. 280.</p> <p>10. Jannadas v. Radhabai, A.I.R. 1963 M.P. 348 : 1963 Jab. L.J. 817.</p> <p>11. P. Malai Chami v. M. Audi Ambalam, (1973) 2 S.C.C. 170 : (1974) 1 S.C.J. 341 : (1974) 1 Mad. L.J. (S. C.) 113 : (1973) 5 S.C.R. 1016 : A.I.R. 1973 S.C. 2077.</p> <p>12. R B J R. Fatch Chand v. C.I.T., U. P., 81 I.T.R. 109.</p> | <p>13. Ram Ratan v. Faqir Chand, 1972 Ren. C.R. 362 (Delhi).</p> <p>14. 1974 (1) Cut W.R. 562.</p> <p>15. Hari Kishan Das v. Mohammad Safi Jan, 1924 Oudh 438 : 80 I.C. 800.</p> <p>16. Allahabad Bank. Ltd. v. Punjab National Bank Ltd., 1939 Lah. 303 ; Dushishyam Das v. Satyabdi Sahu, (1972) 2 Cut. W.R. 1252 : I.L.R. 1972 Cut. 706.</p> <p>17. 1971 Punj. L.J. 298.</p> <p>18. Gopal Singh v. State, A.I.R. 1964 Raj. 270 : 1964 Raj. L.W. 346.</p> <p>19. K. Bala Lingavva v. S. Nallavva, 1944 Mad. 62 : 215 I.C. 130 : (1943) 2 M.L.J. 508 : 1943 M.W.N. 830.</p> |
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appeal or revision.²⁰ Admission of a counsel on the point of jurisdiction which is a question of law cannot estop his client from saying to the contrary.²¹ Belief in the validity of a custom is not such a belief as is referred to in this section, that is to say, a belief in the truth of a "thing", which means a belief in a fact.²² The question of the proper construction to be placed on a deed is a question of law.²³ A representation may be a representation of fact although it involves and includes that which is also a matter of law.²⁴ While a true statement of facts, accompanied by an erroneous inference of law, will not estop the person who made it from afterwards denying the correctness of that inference, it has been held that a representation as to the legal effect of a document will create an estoppel, if there is no qualification in the representation suggesting that the document, and not its effect as represented is to govern the relationship of the parties. One, who has, by a fraudulent statement of the legal effect of an instrument, obtained some advantage, will not be allowed to retain it, although it would appear that a mere misrepresentation of a matter of legal inference from facts which are known to both parties is not a ground of estoppel.²⁵ Where there is a concession with regard to a point of law, there cannot be any question of estoppel from such admission. It is settled that when the facts are fully set out and admitted, a party's opinion about the legal effect of those facts is of no consequence in construing it. No estoppel arises by reason of admission of the party as to such effect and a counsel's admission on a point of law cannot be binding upon a Court and the Court is not precluded from deciding the rights of the parties on a true view of the law. In the undernoted case, where the High Court understood the counsel to have admitted the legal effect of a certain document which was a question of construction, the Judicial Committee held that such admission, if correctly understood, was erroneous in point of law and did not preclude the counsel from claiming his client's legal rights, in spite of such admission.¹ Since there can be no estoppel against law, if an adoption is invalid, no conduct can estop an interested person from challenging its validity. Even participation in the ceremony of adoption cannot estop a person from challenging its validity, unless there is consent to the adoption or acts leading to the adoption.² A tenant who agreed that the need of the landlord was *bona fide* and allowed the Court to pass order of eviction on that basis, is estopped from subsequently alleging that the eviction decree is inexecutable.³ Although in the draft rule it was not indicated that Government intended to prescribe maximum moisture content and consequently there was no occasion for a person to raise objection to the draft rule, yet he cannot have any grievance when he started manufacture of cornflakes after the publication of

20. S. K. M. Sivasubramania Nadar v. S. S. K. Subramania Nadar, 1932 Mad. 409 : 138 I.C. 88 : 35 L.W. 393 ; State v. Chikkavenkatappa, A. I.R. 1965 Mys. 253.

21. 1974 Punj. L.J. 1.

22. Ramji Das v. Jai Gopal, 1923 Lah. 244 : 69 I.C. 431.

23. Sarsuti Prasad v. Ehtisham Ali, 1923 Oudh 123 : 77 I.C. 310 : 25 O.C. 349 ; Abdul Qavi v. Mahboob Ali, 1931 Oudh 133 : I.L.R. 6 Luck. 382 : 129 I.C. 163.

24. Algar v. Middlesex County Council, (1945) 2 All E.R. 243 (D.C.) at p. 251 ; Lyle-McIler v. A. Lewis (West-

minster) Ltd., (1956) 1 All E.R. 247 (C.A.) at p. 253.

25. Halsbury's Laws of England, 4th Ed., Vol. 16, para 1594.

1. Maharani Beni Pershad v. Dudh Nath, L.R. 26 I.A. 216, 221 : 1. I.R. 26 C. 156 ; Societe Belge De Banque v. Girdharilal, I.L.R. 1940 Kar. P.C. 208 : A.I.R. 1940 P.C. 90 ; Kalidas v. State of Bombay, A. I.R. 1955 S.C. 62.

2. Babu Ram v. Kishen Dei, A.I.R. 1963 A. 509 : I.L.R. (1963) 2 A. 102.

3. R. Raja Koner v. Andal Ammal, A.I.R. 1973 Mad. 47.

final rule in the Gazette prescribing maximum moisture content.⁴ Against a plea that suit is bad for partial partition there is no estoppel.⁵

19. Intention and motive immaterial. Assuming that there has been a representation in the sense mentioned, and that representation is clear and unambiguous, and the other party has been induced to act thereon, it is immaterial what the intention, motive or state of knowledge of the party making the representation was,⁶ or that it was made by mistake or innocently.⁷ It is not necessary that the representation should be false to the knowledge of the party making it, provided that (1) it is intended to be acted upon in the manner in which it was acted upon, or (2) the person who makes it so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it in that manner.⁸ Where a deliberately false statement is acted on, there is usually little difficulty in inferring the intention that it should be, and where the intention is made out, and the intended result follows, the person who made the representation is not permitted to question that it contributed to the result.⁹ A man must be taken to intend what a reasonable person would understand him to intend.¹⁰ But, though the intention is immaterial so far as the creation of the estoppel is concerned, representations may be, and have been, classified with reference to the intention with which they may be made. A person may be estopped, if he has made either a fraudulent misrepresentation, or made a false statement without fraud but negligently, or has made a false representation without fraud or negligence.¹¹

20. Modes in which estoppel by representation may arise. In the case of *Carr v. London and N. W. Railway Company*,¹² a leading decision upon this subject, the following recognised propositions of an estoppel *in pais* or modes in which it may arise were laid down¹³:

[a] *Fraudulent representation by 'declaration' or 'act'.* (1) "One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things, which the first knows to be false and if the second believes in such a state of things and acts upon his

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| <p>4. <i>State of M. P. v. Murat Singh</i>, 1971 Cri. L.J. 1605 (Delhi).</p> <p>5. <i>Amar Nath v. Ganeshi Ram</i>, A.I. R. 1971 Punj. 241.</p> <p>6. <i>Sarat Chunder v. Gopal Chunder</i>, 19 I.A. 209, 215 : I.L.R. 20 Cal. 296.</p> <p>7. <i>Jagariben v. Ram Khilawan</i>, A.I. R. 1976 M.P. 106.</p> <p>8. <i>Halsbury's Laws of England</i>, 4th Ed. Vol. 16, para 1599, citing <i>Carr v. London and North-Western Railway Co.</i>, (1875) 10 C.P. 307 and other cases.</p> <p>9. <i>Smith v. Kay</i>, (1859) 7 H.L. Cas. 750 at pp. 759, 770 followed in <i>Gorder v. Street</i>, (1899) 2 Q.B. 611 (C.A.) at p. 646.</p> <p>10. <i>Sidney Bolson Investment Trust, Ltd. v. E. Karmios & Co. (London), Ltd.</i>, (1956) 1 All E.R. 536 (C.A.) at p. 539.</p> | <p>11. <i>Seton v. Lafone</i>, L.R. 19 Q.B.D. 68, 70.</p> <p>12. 1875 L.R. 10 C.P. 307.</p> <p>13. These propositions were approved in <i>Coventry v. Great Eastern Railway Co.</i> 11 Q.B.D. 776 and in <i>Seton v. Lafone</i>, L.R. 19 Q.B.D. 68. "Estoppels may arise on various grounds, all of which the judgment in <i>Carr v. The London & N.W. Ry. Co.</i>, endeavours to state and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others," per Brett. M.R., in <i>Seton v. Lafone</i>, (1881) L.R. 19 & B.D. 68, 70. Both these cases were cited and approved by the Privy Council in <i>Sarat Chunder v. Gopal Shunder</i>, (1892) 19 I.A. 203, 217 : I.L.R. 20 Cal. 296.</p> |
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belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."¹⁴

This proposition deals with fraudulent representation.¹⁵ When persons with knowledge of illegality participate in the election proceedings, they are estopped from assailing the validity of election.¹⁶

[b] *Representation without fraud by 'declaration' or 'act'.* (2) "Another recognised proposition seems to be that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

This proposition deals with representations made without fraud.¹⁷ Even innocent or mistaken representation may operate as estoppel against the party making the representation.¹⁸

[c] *Representation by 'act or conduct'.* (3) "And another proposition is, that if a man, whatever his real meaning may be, so acts or conducts himself that a reasonable man would take his act or conduct to mean a certain representation of facts and that it was a true representation, and that the latter was induced to act upon it in a particular way and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were represented."¹⁹

Where in proceedings for the consolidation of holdings B did not take an inferior land despite its larger area and he knowingly allowed S to make improvements in land allotted to S on B's representation that no complaint or appeal shall be made in future against the consent order passed by the

14. See for examples of representations of this character giving rise to estoppels, *McCance v. London & N.W. Ry. Co.*, 7 H. & N. 477. (A person having wilfully made a false statement as to the value of certain horses in order to induce a railway company to carry them at lower rate of freight was held to be thereby estopped from proving their real and greater value in an action against the company for their loss); *Cherry v. Colonial Bank of Australasia*, (1869) L.R. 3 P.C. 24; *Munoo Lal v. Lalla Choone Lal*, (1873) 1 I.A. 144; 21 W.R. 21; *Baboo Radha Kissen v. Mst. Shureet-unissa*, 1864 W.R. 11.

15. See as to fraudulent misrepresentations, *Peck v. Derry*, (1889) L.R. 14 App. Cas. 337.

16. *Gurudeo Das v. State of Bihar*, A.I.R. 1972 Patna 283; *D. Yadav v. State of Bihar*, A.I.R. 1972 Pat 499.

17. *Howard v. Hudson*, 2 E. & B. 1, where Crompton, J., says: "The rule, as explained in *Freeman v.*

Cooke, takes in all the important commercial cases, in which a representation is made not wilfully in any bad sense of the word, not male animo, or with intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way;" see *Madhub Chunder v. Law* (1874) 13 Beng. L.R. 394; *Sh. Assudibai Sahipant v. Sh. Haribal*, 1943 Sind 177; 1 I.R. 1943 Kar. 277 (to invoke the defence of estoppel it is not necessary that the representation should be fraudulent).

18. *Smt. Jagariben v. Ram Khilawan*, A.I.R. 1976 M.P. 106.

19. The case of *Surat Chunder v. Gopal Chunder*, 19 I.A. 203; (1892) 20 G. 296 is an example of this proposition. In a case in the same volume somewhat resembling the former in its facts there was held to be no estoppel; *Syed Nurul Hossein v. Sheo Sahai*, (1892) 19 I.A. 221.

Consolidation Authority, on general principles B is estopped from subsequently questioning the allotment.²⁰

In a case the parties among themselves came to an agreement and in accordance with that agreement the Court proceeded to make an order: the parties, by representation and an undertaking procured that and were therefore estopped from acting contrary to the deliberate representation and undertaking.²¹ A compromise entered into by Counsel for management duly instructed cannot be challenged by management later on.²²

A person, who did not dispute liability to pay certain taxes, cannot subsequently turn round and challenge the demand on the ground of lack of liability on his part.²³

An assessee is estopped from contending that some other year be adopted as previous year when he has already chosen and adopted a particular year as previous year for filing return.²⁴

School authorities receiving grant from Government for paying rent of school building are estopped from contending that rent is not payable.²⁵ When the University showed that an examinee had succeeded in previous examination it is estopped from restraining that person from appearing in Final examination on the ground that in fact he had not passed the previous examination.¹

A plaintiff is not barred by the law of estoppel from showing the true value of the property on the date of suit when it is not shown how the defendants altered their position to their prejudice in view of the representation made by the plaintiff regarding the valuation of the properties in the plaint.² Having once stated the market value of property in plaint, the plaintiff is estopped from contending that the market value is different.³

Where the plaintiff was not a party to a former title suit against her son but was only a witness supporting the gift in favour of her sons executed by her mother, there was no representation by conduct as would estop her from claiming in a subsequent suit in her own right as being the heir of her deceased father.⁴

If a person grants an easement upon the representation that he has a title to do so and he has not the title at the time of the grant but subse-

20. *Gurdial Singh v. State of Punjab*, 1967 *Cr. L.J.* 602 : 69 *P.L.R.* 689 : *A.I.R.* 1968 *Punj.* 267 (272) (F.B.).

21. *Bahindas Chakrabarti & Nobin Chandra Pat. & C.W.N.* 121 : *Re Pratt, Ex parte Pratt*, (1884) 12 *Q.B.D.* 334 ; *Sita Ram Sawhney v. Kundanlal Sahni*, (1967) 71 *C.W.N.* 1062 (1072) (insolvency proceedings—by consent payment of debt in monthly instalments ordered).

22. *Co-operative P & P Society Ltd. v. Ramalingam*, (1975) 2 *Lab. L.J.* 508.

23. *Bhalbhum Trades & Industries, Ltd. v. Commissioner, Jugsalai Notified Area Committee*, 1969 *B.L.J.R.* 283 (287).

24. *P. V. C. Raju v. Commissioner, Expenditure Tax*, 1971 *Tax L.R.* 520 (A.P.).

25. *Management Committee T. K. Ghosh's Academy v. T.C. Palit*, 1974 *U.J. (S.C.)* 310 : (1974) 2 *S.C.C.* 354 : 1974 *Rent. Cas.* 227 : 1974 *B.B.C.J.* 583 : 1975 *Pat. L.J.R.* 49 : (1974) 3 *S.C.R.* 872 : *A.I.R.* 1974 *S.C.* 1495.

1. *Anil Kumar v. University of Allahabad*, *A.I.R.* 1973 *All.* 442.

2. *Srinivas Krishnarao v. Narayana Devji*, (1971) 1 *Mys. L.J.* 154 (156).

3. *Amar Kaur v. Prakash Chand*, 1971 *Cur. L.J.* 71.

4. *Langa Manjai v. Jaba Majhain*, 1970 *P.L.J.R.* 573 (575).

quently acquires it, the easement so granted attaches itself to the newly acquired property and the conveyance operates by way of estoppel against the denial of the right.⁵

The first two propositions deal with both "declaration" and "act"; this deals with "act" or "conduct", and the inferences which may be drawn from act or conduct.⁶

[d] *Representation by omission or negligence.* (4) "There is yet another proposition as to estoppel. If, in the transaction itself which is in dispute, one has led another into belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause⁷ of leading, and has led the other to act by mistake upon such belief, to his prejudice, the second⁸ cannot be heard afterwards as against the first⁹ to show that the state of facts referred to did not exist."¹⁰

Failure to object at the time of scrutiny that a candidate has ceased to belong to Scheduled Caste would amount to estoppel.¹¹ But where at that time it was not known that the candidate did not belong to Scheduled Tribe there is no estoppel against taking such objection in election petition.¹² Where a person though not joining in an application for reference to arbitration gave consent otherwise and took part in the proceedings before arbitrator without raising any protest he is estopped from saying that reference is invalid.¹³ Where the application for setting aside abatement was dismissed, it is not open to say that the appeal did not abate as other respondents represented the deceased respondent.¹⁴

5. *Assebnar Haji v. Kunhi Kannan*, 1907 K.L.J. 105 (106); *Rowbotham v. Wilson*, (1857) 8 E. & B. 125 at p. 145.

6. *Cornish v. Abington*, (1850) 4 H. & N. 549, 555. (Where a person has conducted himself so as to mislead another he cannot gainsay the reasonable inference to be drawn from his conduct); see *Khadar v. Subramanva*, (1887) 11 M. 12.

7. In the subsequent case of *Seton v. Lafone*, L.R. 19 O.B.D. 68, Brett M.R. (with him Lones, L.J., concurring) stated that he would prefer to insert in the proposition the word "real" instead of the word "proximate" (*ib.*, 70, 71). Fry, L.J., however, said "I will not attempt to give any paraphrase of the word 'proximate', the doctrine of causation involves as much difficulty in philosophy as in law; and I do not feel sure that the term 'real' is any more free from difficulty than the term 'proximate' (*ib.*, 74)"; see *Swan v. North British Australasian Co.*, (1863) 2 H. & C. 175 ("Proximate cause" means "direct and immediate cause"); *Coventry v. Great Eastern Ry. Co.*, (1883) 11 Q.B.D. 776, 780. In the case of *Longnan*

v. Bath Electric Tramways Ltd., (1905) 1 Ch. 466 at p. 663 it was held that mere negligence will not raise an estoppel. There must be negligence which is the real and immediate cause of the damage done.

8. Quære "first": the person referred to is the party guilty of negligence.

9. Quære "second": see last note.

10. For illustration of the estoppel by culpable negligence, see *Carr v. London & N.W. Ry. Co.*, (1875) L.R. 10 C.P. 307; *Coventry v. The Great Eastern Ry. Co.*, L.R. (1883) 11 Q.B.D. 776; *Seton v. Lafone*, L.R. 19 Q.B.D. 68; *Swan v. N. B. Australasian Co.*, (1863) 2 H. & C. 175 and cases referred to in these reports and in *Maclaren Morrison v. Verschoyle*, (1901) 6 C.W.N. 229.

11. *Gannat v. Presiding Officer*, A.I.R. 1975 S.C. 420.

12. *Gaio v. Ram Chand*, (1968) 39 Ele. L.R. 99 (Delhi).

13. *State of W.B. v. A.K. Ghosh*, 59 Cal. W.N. 349; A.I.R. 1975 Cal. 227.

14. *H. P. Chowkhani v. Devendra Chandra*, A.I.R. 1972 Gauhati 77.

Not challenging the Electoral rolls before election despite defect therein does not operate as estoppel.¹⁵

[e] *Neglect of duty to the other party.* "This proposition deals primarily with what the section refers to as "omission". Not only must the neglect be in the transaction itself and be the proximate cause of leading the party into mistake, but it also must be the neglect of some duty,¹⁶ that is, owing to the person led into belief, and not merely neglect of what would be prudent in respect to the party himself, or even to some duty owing to third persons with whom those seeking to set up the estoppel are not privy.¹⁷ In court auction the doctrine of *caveat emptor* applies. Hence inaction of the plaintiff in informing the execution court about the pending litigation would not debar him by the principle of estoppel or under Section 41 of Transfer of Property Act from claiming title against the defendant auction-purchaser on the ground that the judgment-debtor had no saleable interest."¹⁸

With reference to these propositions, the Privy Council, in the case of *Sarat Chunder Dey v. Gopal Chunder Laha*,¹⁹ point out that there may be statements made which have induced another party to do that from which otherwise he would have abstained, and which cannot properly be characterised as "misrepresentations", as for example, what occurred in that case in which the inference to be drawn from the conduct of the party estopped was either that the conveyance in favour of his mother was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid. It has been held that no representations can be relied on as estoppels, if they have been induced by the concealment of any material fact on the part of those who seek to use them as such, and if the person, to whom they are made, knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel.²⁰

[f] *Representation by Government.* Even though a case does not fall within the terms of the section, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitu-

15. *Ram Gulam v. Collector Guna*, A. I.R. 1975 M.P. 145.

16. "There can be no negligence unless there be a duty" per Brett M. R., in *Coventry v. Great Eastern Railway Co.*, (1883) 11 Q.B.D. 776, 780.

17. *Swan v. N.B. Australasian Co.*, (1863) 2 H. & C. 175, per Blackburn, J. A party on whom there is no duty to disclose a fact, may of course by his misrepresentation estop himself under the preceding propositions; *Munoo Lal v. Lalla Choo-*

nee Lall, (1873) 1 Ind. App. 144, 156; *Smt. Parbati Devi v. K. L. Sharma* 1959 Cal. 69.

18. *Bhoa Isher v. Govindi*, 1974 W.L.N. 123; 1974 Raj. L.W. 220; A. I.R. 1975-Raj. 45.

19. (1892) 19 I.A. 206, 217.

20. *Porter v. Moore* (1904) 2 Ch. 367; *George Whitechurch, Ltd. v. Gavanagh*, 1902 A.C. 117, 145, per Lord Brampton; *Doey v. London and North-Western Railway Co.*, (1919) 1 K.B. 629.

tion.²¹ This principle was applied in *Gopu Lal Munni Lal v. State of U. P.*²² In the last cited case it was held that the State Government, in exercise of delegated powers, under different taxing statutes, may decide to exempt a taxpayer or a class of taxpayers, liable to be taxed simultaneously under more than one statute, from tax liability under one Act and to subject such taxpayer or class of taxpayers to taxation at a higher rate under another Act in lieu thereof. If the State Government makes such an announcement and gives effect to it, thereby realizing tax at enhanced rates under the Act and inducing the persons concerned also to pay larger sums on some other but collateral head of revenue, it cannot be contended that even though the State Government subsequently seeks to levy tax under that Act under which exemption was granted, no plea of estoppel can be raised against it by the person or persons adversely affected.

21. Estoppel by negligence. To constitute estoppel by negligence, (1) a party must owe a duty to another, (2) there must be some relationship of contract or agency, and (3) there must be some reason to think that an act would be done or would not be done. There can be no estoppel, if there is no duty or of anything amounting to a neglect of the usual precautions, or any representation about something. In *Mercantile Bank of India v. Central Bank of India*,²³ a firm of merchants obtained a loan from the Central Bank on the security of goods covered by certain railway receipts, and delivered the receipts to the bank by way of pledge. The bank passed the receipts on to their godown-keeper to enable him to obtain possession of the goods, who handed them back to the firm for clearing the goods and storing them in the bank's godown. The firm, however, fraudulently used the receipts to obtain a second advance from the Mercantile Bank, who were unaware of the pledge. On a claim by the Central Bank against the Mercantile Bank for damages for conversion, it was held that the Central Bank owed no duty to the Mercantile Bank in the matter. There was no relationship of contract or agency. The Central Bank had no reason to think that the receipts would ever be handed to the Mercantile Bank. The Central Bank were not, therefore, estopped by their conduct in returning the receipts to the firm, for the specific purpose of clearing the goods, from denying as against the Mercantile Bank that the firm had the right of pledging the goods as owners, or from setting up their title as against the Mercantile Bank to the goods. It was observed that no authority had been given to the firm to deal with the goods otherwise than by handling them for the limited purpose of storing them in the Central Bank's godown. The Central Bank committed no breach of duty owing to the Mercantile Bank or to anyone else. All that the Central Bank did was to deal with their own property, as pledgees, in the usual course of business. Not only was there an absence of any duty or of anything amounting to a neglect of the usual precaution, but also there was no ground for finding any representation by the Central Bank that the firm had any title to dispose of the goods. The firm could not transfer a better title than they possessed, a title subject to the pledge to the Central Bank.

21. *Union of India v. Anglo-Afghan Agencies*, (1968) 2 S.C.R. 366 : (1968) 2 S.C.A. 31 : (1968) 1 S.C.W.R. 553 : (1968) 2 S.C.J. 889 : A.I.R. 1968 S.C. 718 (727). See also *Century Spinning and Manufacturing Co. Ltd. v. Ullas-*

nagar Municipal Council, (1964) 5 S.C.R. 836 : A.I.R. 1965 S.C. 241.

22. 1971 A.L.J. 796 (F.B.) at pp. 804, 805.

23. I.R. 65 I.A. 75 : A.I.R. 1938 P.C. 52.

In *New Marine Coal Co. v. Union of India*,²⁴ it was said that when a plea of estoppel on the ground of negligence is raised, it must be shown that—

- (1) the party against whom the plea is raised owed a duty to the party who raises the plea, or towards the general public ;
- (2) the negligence, on which the plea is based, should not be indirectly or remotely connected with the misleading effect assigned to it, but must be the proximate or real cause of that result ;
- (3) the negligence must be in the transaction itself, and it should be so connected with the result to which it led that it is impossible to treat the two separately.

In the above case, the intimation card, on the production of which the Union of India used to proceed to issue a cheque against the bills, had been duly posted by it to the appellant. It fell into dishonest hands and was fraudulently used. It was held that it did not create an impediment in the way of the appellant on the ground that the company was negligent and its negligence created an estoppel. When the appellant received the intimation card, it did not owe a duty to the Union of India to keep the card in a locked drawer. Even on the assumption that the company had such a duty, in the absence of any collusion between the company and the person who made fraudulent use of the intimation card, it could not be said that the company did not show the degree of diligence required of it. So, it could not be charged with negligence.

The plea of negligence in defence should be raised in the pleadings and cannot be allowed to be raised for the first time in appeal.²⁵

A student of B. Sc. was selected for admission to M. B. B. S. course but later her admission was cancelled on the ground that in fact she had obtained less marks than other candidates who were not selected. The student suffered heavy loss and it was not possible for her to be readmitted. It was held that the authorities were highly negligent and were estopped from cancelling her admission to M. B. B. S. when she had all the qualifications prescribed for selection.¹

22. Estoppel by conduct. Not much difficulty is usually experienced in determining whether or not there has been representation, fraudulent or not by declaration or fact ; questions however, of difficulty may, and frequently do, arise as to whether or not a person, by his conduct, brought himself within the scope of representation by conduct or negligence. The determination of this question will largely depend upon the facts, which will vary with each particular case. In each case, it will be a question of fact whether the conduct in question is sufficient to justify the inference of estoppel.² Mere execution of the decree of trial court by the decree-holder would not amount to estoppel, when his other conduct clearly manifested that he was

24. (1964) 2 S.C.R. 859 : (1964) 1 S.C.A. 491 : 1964 S.C.D. 595 : A.I.R. 1964 S.C. 152.

25. *New Marine Coal Co. v. Union of India*, (1964) 2 S.C.R. 859 : (1964) 1 S.C.A. 491 : 1964 S.C.D. 595 : A.I.R. 1964 S.C. 152.

1. *Pratima Das v. State of Orissa*, A.I.R. 1975 Orissa 155 : I.L.R.

1974 Cut. 1506 : 41 Cut. I.T. 69.

2. *Maddanappa v. Chandramma*, A.I.R. 1965 S.C. 1812 : (1965) 2 S.C.W.R. 644 ; *Board of Religious Trust v. A. M. Amrit Das*, A.I.R. 1974 Pat. 95 ; *Mahavir Das v. M. N. Patel*, A.I.R. 1971 Pat. 27.

not prepared to accept that decree.³ There will be no estoppel by conduct, if the person concerned knew the true position. He cannot plead that he was induced to hold an erroneous belief by reason of the conduct of his adversary.⁴ A member of an assessment committee, who signs an assessment, is not estopped from challenging that the assessment is illegal.⁵ Some, however, of the obvious and frequently recurring estoppels may be here shortly alluded to.

If the question be whether A has contracted a liability, and being charged with it, he does not demur, but says, "I will send goods towards its discharge", the effect of A's action is not merely to make a representation on which an estoppel may be founded, but it is to afford the strongest possible evidence to establish the alleged liability.⁶ Where, after adjudication, the Receiver took possession of the insolvent's estate, realised it, and declared the final dividend, and, the administration being thereby concluded, the Receiver sent to the District Court all the papers relating to the insolvency which were subsequently destroyed under the rules regarding the destruction of records, it was held that everybody concerned,—the insolvent, the Official Receiver and the creditors—all acted on the footing that the insolvency had closed, and it was no more open to any of them to get behind what must be regarded as a representation made by them and revive the insolvency for the purpose of challenging a sale *bona fide* made in the belief that there was no insolvency, a belief contributed to by all of them.⁷ When the Receiver dealt with certain property as that of Insolvent the real owner who agreed to use it on that basis without raising dispute is estopped from claiming title to that property.⁸ *Nullus commodum capere potest de injuria sua propria*—no man can take advantage of his own wrong. It is therefore a sound principle that "he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned".⁹ Where, therefore, a meeting convened for removing the Managing Director of a company and to elect another could not be held at the registered office of the company at the time fixed as the premises were locked and the meeting was therefore held at another place, it was held that as the Managing Director had made the registered premises unavailable for the meeting to be held, he was precluded from complaining of the invalidity of the meeting actually held at a different place.¹⁰ A shareholder of a company who has himself moved for the adjournment of a meeting cannot be heard to object to it.¹¹ A person taking part in a meeting, is estopped from contesting the validity of the meeting¹² especially if he has accepted dividend declared at that meeting.¹³ He is also estopped from challenging the Constitution of the

3. Srinivas v. Narayan, A.I.R. 1971 S.C. 1238.

4. Madhalingappa v. Chandramma, A.I.R. 1965 S.C. 1812 : (1965) 2 S.C.W.R. 644.

5. Kali Ram v. B.N.A. Committee, 1973 Tax L.R. 2469.

6. Walter Smith v. Ahmed Abdeenbhoy Peerbhoy, 1935 P.C. 154 : 157 I.C. 9 : 69 M.L.J. 341.

7. B. Subbamma v. G. Surappa Company, 1939 Mad. 273 : 183 I.C. 287.

8. Seetha Mahalakshmi v. Gelam Veeraraju, (1970) 1 Andh. L.T. 64.

9. Broom's Legal Maxims, 10th Ed.,

pp. 191, 193.

10. Rathnavelusami v. Manickavelu Chettiar, 1951 Mad. 542 : (1951) 1 M.L.J. 5 : 64 L.W. 172 ; Subramania Aiyar v. United India Life Insurance Co., Ltd., 1928 Mad. 1215 : 55 M.L.J. 385 ; see also the cases cited therein.

11. Viswanathan v. Tiffins Baryt Asbestos and Paints, Ltd., 1953 Mad. 520 : 1 I.L.R. 1953 Mad. 966 : (1953) 1 M.L.J. 356 : 66 L.W. 124.

12. Yugal Kishore Sinha v. B.N. Rastogi, 1958 Pat. 154.

13. I.L.R. (1975) 1 Cal. 207.

body or resolutions passed by that body in such meeting.¹⁴ If a person, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.¹⁵ Where, therefore, the appellant, by his conduct, induced the respondents to believe that they were in lawful possession of the land in question and had, consequently, a right to construct a building thereon, it was held that he could not subsequently question the legality of their possession or their right to construct the building and to remain in possession of it.¹⁶ A landlord who did not object to his residential building being converted by tenant into a non-residential building, is estopped from applying for ejectment of the tenant on the ground of his *bona fide* need for residence.¹⁷ Where the plaintiff allowed defendant to remain in exclusive possession on payment of entire rent, the principle of estoppel by conduct applies. When the plaintiffs failed to object to the recording of a compromise between landlord and defendants ancestors and a compromise decree was passed in their presence, there is an estoppel against the plaintiffs.¹⁸ When the plaintiff admitted the claim of defendant, permitted mutation and did not raise any objection for several years, he is estopped by conduct from taking a different stand subsequently.¹⁹ A compromise decree in a former suit creates an estoppel in the subsequent suit.²⁰ In the case of an agreement for sale of goods of a particular description, the vendor intimated and the vendees knew that the former were holding goods at the mills to the order of the vendees on the footing that they were goods appropriated under the contract. The vendees continued to take delivery of portions of the goods as suited their convenience, some of the goods not answering to the description of the contract. They never told the vendors that they would repudiate the appropriation on this ground and the vendors continued to hold goods to the order of the vendees. It was held that the conduct of the vendees amounted to a representation to the vendors that they would not repudiate the appropriation on the ground that some of the goods did not answer the description in the contract and that they were estopped from subsequently repudiating the appropriation and asserting that the goods were not of the contract description.²¹ A reversioner who elects to stand by or otherwise to ratify a transaction entered into by a Hindu widow would be estopped from

14. *B. P. Sao v. Ravishankar University*, 1973 (2) Lab. L.J. 1: 1973 Jab. L.J. 46: 1973 M.P.W.R. 44: 1973 M.P.L.J. 158: (1973) 1 Serv. 1 R. 374; *Jadunandan Puri v. President. Board of Secondary Education*, A.I.R. 1976 Pat. 58.
15. *R. M. P. A. L. Chettiar Firm v. Ko Maung Gale*, 1935 Rang. 191: I.L.R. 13 Rang. 346: 156 I.C. 707, relying on *Cairncross v. Lormer*, (1860) 3 H.L.C. 829.
16. *Madan Gopal Bagla v. P. V. S. Sundaran*, 1940 Rang. 172: 189 I. C. 735.

17. *P. Verdrajan v. State*, (1975) 2 A. P.L.J. 40: A.I.R. 1979 Andh Pra. 90.
18. *Janki v. Dharam Raj*, 1974 B.L.J.R. 242: I.L.R. (1974) 53 Pat. 428: A.I.R. 1974 Pat. 254.
19. *Sewti Devi v. Kanti Prasad*, A.I.R. 1973 Punj. 126.
20. I.L.R. 1971 Guj. 142.
21. *Paran Lal Bhai Chand v. Maneckji Petit Manufacturing Co. Ltd.*, 1933 Bom. 48: 140 I.C. 610: 34 Bom. L.R. 1252.

subsequently questioning the transaction.²² A Muslim heir who relinquishes his future right of inheritance for consideration is estopped from claiming inheritance.²³ At a partition of certain *mokarrari* and *zamindari* properties, *A* who was entitled to a two-third share was given a little more than two-thirds of *zamindari* property and one-third *mokarrari* property. *B* who was entitled to one-third share received a little more than two-thirds of *mokarrari* property and one-third of *zamindari*. After that *B*, though in possession of only one-third share of *zamindari* property, had paid revenue and cess in respect of it in excess of his share of the liability without any objection or payment on the part of *A*. *A*, who had paid the whole of the *mokarrari* rent, sued *B* for contribution. It was held that, in the circumstances, the plaintiff by his conduct of allowing the defendant to pay revenue and cess in respect of *zamindari* properties in excess of the amount of such demands attributable to the assets of such properties in his possession and having thus led the defendant to act to his disadvantage, was estopped from claiming a refund of the amount paid by him by way of *mokarrari* rent in excess of the amount attributable to the assets of the *mokarrari* property in his possession. The plaintiff was held, therefore, to have no right to claim contribution.²⁴ It is one of the essential elements of estoppel by conduct that the party against whom it is pleaded should have made some representation intended to induce a course of conduct by the party to whom it was made. Where, therefore, on a representation of the owner of certain land, the Registrar of Lands corrected the register accepting the representation, it was held that there was no estoppel by conduct against the Registrar or the Government from asserting its title to the land.²⁵ The acts of the party sought to be estopped, and those of the other who had been led thereby to change his position and who therefore pleads the bar of estoppel against the former, must necessarily be acts performed prior to the commencement of the litigation, so that the conduct of a party in the course of the litigation, while it may affect the question of costs, should be wholly irrelevant for judging those acts.¹ To found a plea of estoppel by conduct, there should be precise pleadings setting up the facts constituting the estoppel.² If a member of a joint Hindu family, by his conduct, induces the belief that he is a partner, he is estopped from subsequently denying the character of a partner which he has assumed and on the faith of which third parties have acted.³ The fact, that the reversioners, or some of them, may have purchased a half share of a village of which the other half was purchased by the same deed by the deceased settlor for settling it on certain deities, does not estop the reversioners from challenging the settlor's dedication to the deities.⁴ A company which allowed

22. *Seetharamayya v. Sarva Chandrayya*, 1955 Andh. 68 : (1954) 2 M.L.J. Andh. 162 ; see also *Pullayya v. Appanna*, 1957 Andh. Pra. 846 ; *P. Venkataravudu v. Penumarthi, A.I.R.* 1973 A.P. 96 ; *K. Das v. Renu-bala Das*, (1974-75) 79 Cal. W.N. 341.
23. *Gulam Abbas v. Haji Kayyan Ali*, (1973) 1 S.C.C. 1 : 1976 Jab. L.J. 1041 ; 1974 Mah. L.J. 22 : 1974 M.P.L.J. 58 : (1973) 2 S.C.R. 300 : (1974) 2 S.C.J. 173 : A.I.R. 1973 S.C. 554.
24. *Anath Nath Bose v. Manmatha Nath Basu*, 1950 Pat. 255.

25. *The Palestine Kupat Am Bank Co-operative Society Ltd. v. Government of Palestine*, 1948 P.C. 207, 209 : 52 C.W.N. 719 : 62 L.W. 21.
1. *Abdul Shakur v. Kotwaleswar*, 1958 All. 54, 58
2. *Godaru Guptan Namboodripad v. Ittian Kochupilla*, 1953 T.C. 447, 449.
3. *Ramaswami Chettiar v. Srinivasa Ayyar*, 1931 Mad. 94 : 162 I.C. 371 : 70 M.L.J. 214.
4. *Bhekdhari Singh v. Sri Ram Chander Ji*, 1931 Pat. 275 : I.L.R. 10 Pat. 388

its manager to encash cheque is estopped from challenging such encashment.⁵

Where on the death of a widow her brother's son recognised the right and title of the widow's adopted son to a certain property and in lieu thereof obtained mutation in his favour in respect of other property which belonged to the widow and to which he was not entitled, it was held that the brother's son was estopped from subsequently denying the title of the adopted son to the property in which he had recognised the title of the adopted son.⁶ But mere consent to the entry of the name of another in the revenue papers does not create an estoppel, because it does not purport to convey any title to that other or to induce him to alter his position on the strength of the mutation proceeding.⁷ There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it, and a mere consent to the entry of the name of another in the revenue papers does not create any such obligation.⁸ In the case of admission made by one of the parties to a suit, the party making the admission is at liberty to prove that such admissions were mistaken or were untrue and is not estopped or concluded by them unless another person has been induced by them to alter his condition.⁹ A coparcener who has ratified a transaction by the manager of the joint Hindu family is estopped from disputing it afterwards.¹⁰

An acknowledgment of a debt beyond limitation does not act as an estoppel against the person making it.¹¹ The mere fact that for previous years a plaintiff claimed mesne profits at a reduced rate does not estop him from claiming them at a higher rate in a subsequent year.¹²

Persons, who voluntarily and with open eyes contract the liability to pay rental by bidding for the privilege of vending liquor, cannot be permitted to challenge the validity of the provisions in the said Abkari Act [(Cochin) Abkari Act 1 of 1077 (as amended in 1964)] under which they got the privilege.¹³

In a case the Works Manager of a firm was permitted to appear on its behalf and took part in conciliation proceedings. He held out that he was entitled to represent the firm for all purposes and he signed the agreement as representing the firm. The workman might well have consented to the agreement labouring under the belief that the Works Manager represented the firm for all purposes. The firm cannot be permitted to resile from the re-

5. *Bhuteria Trading Co. v. Allahabad Bank Ltd.*, A.I.R. 1977 Cal. 363.

6. *Har Sarup v. Anand Sarup*, 1942 All. 410; I.L.R. 1942 All. 624.

7. *Kali Prasad v. Mst. Thakur Dei*, 1914 Oudh 343; 25 I.C. 965; see also *Muhammad Imam Ali Khan v. Husain Khan*, I.L.R. 26 Cal. 81; 25 I.A. 161; 2 C.W.N. 737 (P.C.).

8. *Jangi Nath v. Janki Nath*, 2 A.L.J. 25; *Chokhey Singh v. Jote Singh*, 36 I.A. 38; I.L.R. 51 All. 73; 1 I.C. 166 (P.C.).

9. *Chandra Kunwar v. Narpat Singh*, 34 I.A. 27; I.L.R. 29 All. 184; *D. Veeraraghava Reddi v. D. Ka-*

malamma, 1951 Mad. 403; (1950) 2 M.L.J. 575; see also *Chote Lal v. Mangali*, 1957 All. 135.

10. *Narayana Aiyar v. Rama Aiyar*, I.L.R. 38 Mad. 396; 20 I.C. 625; *Sheo Den Singh v. Habibullah Khan* 1924 All. 721; 75 I.C. 872.

11. *Tuka Ram Ramji v. Madho Rao Manaji Bhangre*, 1948 Nag. 293; I.L.R. 1947 Nag. 710; 1947 N.L.J. 405.

12. *Jagannath Prasad v. Badiul Mulk Khan*, 1954 Pat. 447.

13. *Madhavan v. Asst. Excise Commissioner*, I.L.R. (1969) 2 Ker. 71; 1969 K.L.J. 289 (299).

presentation after the workman has altered his position and attempted to go behind the agreement: it is a case of estoppel by conduct.¹⁴

Villagers who subscribed to a mazahar preceding grant of gomal land for purposes other than pasturage in which they had expressed their consent to the proposed grant, cannot assail the grant at a subsequent point of time.¹⁵

When a Government servant exercises his option to retire before reaching the age of compulsory retirement, and is granted leave preparatory to retirement, he cannot later revoke the offer to retire: in other words he cannot approbate and reprobate.¹⁶ But if he sought voluntary retirement on completing 55 years in ignorance of law he is not estopped from claiming to be retired later.¹⁷

If the parties themselves allow certain evidence to be placed on record as part of their evidence, it is not open to them to urge later either in the same court or in a court of appeal that the evidence produced was inadmissible.¹⁸

A party may be estopped from seeking to contest an award either by any express affirmation or acceptance subsequently made or by subsequent conduct, which would clearly show that the award had been acted upon.¹⁹

A person who himself filed nomination papers after the last date was extended could not on being unsuccessful object that the date was wrongly extended.²⁰ When a suit for setting aside sale of land was got dismissed by the plaintiff on the condition that the purchaser would not claim costs of the suit he is estopped in subsequent consolidation proceedings from claiming any right in the land.²¹ A tenant vacated an accommodation governed by Rent Control Act and occupied a new building of that very landlord which was not within the purview of Rent Control Act on the assurance of the landlord that the tenant could occupy it indefinitely. Having thus changed his position to his detriment, the tenant could not be ejected from the new accommodation.²²

Where a decree-holder entered into an agreement by which the judgment-debtor was to pay the decretal amount in eight instalments, he (the decree-holder) was lured into the agreement because he could recover the decretal amount in a shorter period than that prescribed under the Agriculturists' Debt Relief Act 31 of 1958. There is no estoppel and the judgment-debtor is not barred from claiming the benefits under the said Act.²³

14. *Natarajan Engineering Works v. Govindaswami Naicker*, (1969) 2 M.L.J. 211 (213): 82 M.L.W 491: 1970 Lab. I.C. 334.

15. *Neelajiah v. Mysore Revenue Appellate Tribunal*, (1969) 2 Mys. L.J. 449 (450).

16. *Balmukund Oriya v. State*, 1970 Lab. I.C. 1004: 1970 Serv. L.R. 760: A.I.R. 1970 Orissa 130 (see Constitution of India, Art. 311).

17. *V. Vaikunthan v. Registrar, Orissa High Court*, 1972 Lab. I.C. 803.

18. *Hukum Singh v. Udham Kaur*, (1969) 71 Punj. L.R. 908 (911).

19. *Mohammed Zackariah Sahib v. Chinnappan*, 82 L.W. 416; 1974 Co-op. L.J. 123 (A.P.); *Kehar Das v. Tarak Singh*, A.I.R. 1974 Punj. 135; 1971 Car. L.J. 604.

20. *R. K. Jain v. Bar Council*, A.I.R. 1975 All. 190.

21. *Ibrahim v. Deputy Director Consolidation*, A.I.R. 1973 All. 378.

22. *B. P. Sinha v. Som Nath*, A.I.R. 1971 All. 297: I.I.R. (1971) I All. 81.

23. *Isac v. Kunji Poulo*, 1972 K.I.R. 715 (719).

The judgment-debtor who instead of raising objection applies for time to make payment is not estopped from showing that the amount claimed is excessive.²⁴

When the order of fixation of fair rent on the basis of compromise is itself void, there is no estoppel in maintaining subsequent proceeding for determination of fair rent.²⁵ Where an appeal to District Court was dismissed for non-deposit of process-fee the appellant was not estopped in appeal in High Court from contending that under Section 17 of Payment of Wages Act, the District Court had no jurisdiction to hear the appeal.¹ When the earlier order passed by Collector was superseded by his later order, an appeal could be filed only against the later order and the appellant cannot be held estopped from challenging the later order in appeal on the ground that he did not challenge the earlier order.² When house was let out in contravention of C. P. & Bihar Rent Control Act and the landlord filed suit for arrears of rent and proceedings under this Act but later withdrew these proceedings and brought title suit on the ground that tenancy was void, there is no estoppel.³

(a) *Estoppel by pleading.* In order that it may be open to a counsel to raise a question of fact, it is essential that the party must make any such case himself. Where no such case is made by the party in his pleading, even in the alternative, the party cannot be allowed to raise it in appeal.⁴ In the above-noted case, the defence of the employee was that no enquiry was held at all. There was no alternative case that the enquiry held was improper because he had not been allowed to cross-examine witnesses or to adduce evidence. The employee was, therefore, not permitted before the Supreme Court to argue that even if the enquiry had been held, it was not shown that the employee had an opportunity of cross-examining the witnesses or adducing evidence of his own. In view of the stand taken by the employee that no enquiry was held at all, the alternative plea, on the assumption that enquiry was held but was vitiated for want of failure to give opportunity to cross-examine witness, was not allowed to be raised.

When the plaintiffs made applications to the Tahsildar under Section 30 of the Mysore Tenancy Act, 1952, the defendants successfully contended that what was payable by them was land revenue and not rent. But when the plaintiffs filed suits in the Civil Court, the defendants reversed the position which they took before the Tahsildar and contended that Section 30 of the Tenancy Act was a bar to the institution of a suit in the Civil Court. The defendants are clearly precluded from so doing.⁵

21. Roopchand v. Bhagchand, 1973 W.L.N. 804.

25. Surjit Singh v. Pritam Singh, A.I.R. 1975 H.P. 43.

1. S. K. Misra v. Lal Ram Singhasan, Ial 1974 B.L.J.R. 239; 1974 B.C.J. 123; (1975) 2 Lab. I.W. 63; 47 F.J.R. 145.

2. M/s. Sardar Finance Corporation v. State of U.P., 1978 A.L.J. 118; 1978 A.G.R. 150; 1978 A.W.

G. 816.

3. Kakubhai & Company v. Nathmal Kishan Lal, 1979 Mah. L.J. 450.

4. Provincial Transport Services v. State Industrial Court, A.I.R. 1963 S.C. 114; (1963) 2 S.C.J. 412; Modi Sugar Mills, Ltd. v. Union of India, 1978 Tax L.R. 675 (All).

5. Feanna v. Bheemanna, (1968) 1 Mys. L.J. 188.

Where the parties agreed to refer their disputes for arbitration by seven named arbitrators but only five arbitrators took part in the proceedings and signed the award, the party, which itself took part in the proceedings, is estopped from challenging the award on the ground that all the arbitrators had not taken part in the proceedings.⁶

Under Order XXIII, Rule 1, C. P. C., when a suit for a different relief is filed, it cannot be said to be a suit for the same subject-matter. On the withdrawal of a suit for judicial separation, in a subsequent suit for divorce the reliefs being different, the plaintiff is not estopped from acts of cruelty and/or constructive desertion alleged in the previous suit.⁷

In a suit for damages for loss of goods in transit by fire suffered by plaintiff 1, plaintiff 2 was the insurer who was the subrogee of plaintiff having paid the claim of plaintiff 1. At the stage of pleadings the defendants denied the fact of subrogation and refused to recognise plaintiff 2 as authorised to file a suit. The suit ended in a decree in favour of plaintiff 1. On appeal, the defendants cannot turn round and utilise the allegations of the plaintiffs regarding subrogation to non-suit them.⁸

In a case the description of suit-land by the plaintiff in a prior partition suit as raiyati land or prajadakhali (tenanted land) is immaterial and irrelevant for the relief of partition. There was no evidence that the defendant acted on that representation to his prejudice. The plaintiff was, therefore, not estopped from claiming the land as tenanted land.⁹

A defendant, who has by his conduct intimated that he had no objections to a dispute being decided by an Arbitration Tribunal although it could not do so lawfully and thereby induced the plaintiff to prosecute his case before that Tribunal without objection, is estopped from challenging the jurisdiction of the Tribunal.¹⁰

The plea of estoppel involves questions of facts. Where there is no pleading in the petition under Section 155, Companies Act, 1956, nor again in the reply and in fact no issue was raised on estoppel, the applicant cannot be allowed to raise the plea of estoppel.¹¹ In the case last cited, the applicant herself proceeded on the basis that three persons were originally the recorded owners in her petition for share certificate. The order for succession certificate also clearly indicated that the court proceeded on the basis that the names of three persons appeared as owners of these shares. Hence there was no question of the applicant being misled by the representation in the share certificate. An employee whose plea is that no inquiry was held by the Factory Manager cannot take the alternative plea that the inquiry was vitiated for failure to give opportunity to cross-examine witnesses.¹²

6. *Tisco Orissa C. C. Society, Ltd. v. Biabun Charan Mahanty*, 1968 P.L.J.R. 218.

7. *Dinshaw Merchant v. Dinshaw Ardeshir Merchant*, I.L.R. 1969 Bom. 1045 : 72 Bom. L.R. 41 : 1970 Mah. L.J. 286 : A.I.R. 1970 Bom. 341 (347, 348).

8. *Union of India v. Kalinga Textiles (Pvt.) Ltd. Company*, I.L.R. 1969 Bom. 864 : 71 Bom. L.R. 214 : 1968 Mah. L.J. 797 : A.I.R. 1968 Bom. 401 (407).

9. *Kanhu Charan v. Lakshmi Dhar Tripathy*, 36 Cut. L.T. 33 : A.I.R. 1970 Orissa 87 (88).

10. *Rajpat Rai Agarwal v. Arya Samaj Shiksha Sabha*, 1969 Raj. L.W. 430.

11. *New Monkoshi Tea Co., Ltd., In re*, A.I.R. 1967 Cal. 196 (199).

12. *Factory Manager Model Mills v. State Industrial Court*, I.L.R. 1966 Bom. 1067 : 68 Bom. L.R. 749 : 1966 Mah. L.J. 1017 : (1967) 2 Lab. L.J. 375 : 32 F.J.R. 81 : A.I.R. 1967 Bom. 147 (153).

No party can succeed on a point inconsistent with his own pleadings.¹² The Court can consider how far an admission is binding on the party making it.¹⁴ When in the reference, amount of compensation of land is claimed 'atleast at the rate of Rs. 5,000 an acre', the claimant is not estopped from saying that the value of land is more.¹⁵

(b) *No estoppel where party has no special knowledge.* The doctrine of estoppel has no application, in cases, where the party sought to be estopped had no special knowledge of the fact in question. So, where, in a case for recovery of mesne profits, the party claiming mesne profits had no special means of knowing the exact income from the property during the relevant period, it was held that he was not estopped from claiming a larger sum as mesne profits than what was claimed by him in the suit.¹⁶

(c) *No estoppel where act or conduct founded on a mistake of facts.* No person can be estopped by attornment pleading or other act or conduct, where the act or conduct constituting the estoppel is founded on a mistake of facts.¹⁷ Where due to some mistake of law a Government servant thought that retirement age is 55 years and applied for retirement on completion of 55th year, it will not estop him from claiming his right if under the rules the retirement age is higher.¹⁸ In certain circumstances, however, a representation made by mistake may amount to estoppel.¹⁹ Thus when a student coming from outside the jurisdiction of Board was admitted to class XI by mistake but there was no total ban on admission of such students in the regulations, estoppel was held to apply.²⁰

(d) *Mistake of officers cannot operate as estoppel against Government.* Although as regards proprietary interest, there may be estoppel by conduct, any conduct of a Government servant, in violation of his duty, cannot operate as estoppel against the Government. Thus, a mistake by the officers of a taxing department, either due to negligence or due to collusion, cannot operate as estoppel against the Government. But, if a person, in good faith, is prevented from paying tax on the assertion of an officer that no tax is payable, there may be an estoppel so far as realisation of penalty or interest from him for the tax be concerned. But it does not affect his liability to pay the tax. The reason is that levying of penalty or charging of interest is a matter of discretion with the taxing authority, but the levy of taxation is a statutory duty.²¹

(e) *Parties acting under common misapprehension.* Where the parties are acting under a common misapprehension, there cannot be any estoppel until the misapprehension is cleared up.²²

13. *Paras Ram v. Naraini Debi*, A.I.R. 1972 All. 351; 1972 All. W.R. (H.C.) 171; 1972 All. L.J. 351.
14. *Jwala Singh v. Prem Singh*, 1972 Delhi 221.
15. *A. D'Silva v. State*, A.I.R. 1971 Kerala 51.
16. *Gauri Prosad v. Byjnath*, I.L.R. 9 C. 112; *Kota Reddy v. Chandrasekhra*, A.I.R. 1963 A.P. 42; (1962) 2 Andh. W.R. 18.
17. *Nanda Rani v. Badi Bala*, A.I.R. 1964 C. 496; 68 C.W.N. 585.
18. *S. Valiathan v. Registrar Orissa*

High Court, I.L.R. 1972 Cut. 44; 1972 Lab. I.C. 805.

19. *Geeta Misra v. Utkal University*, I.L.R. 1971 Cut. 292; A.I.R. 1971 Orissa 276.
20. 1975 W.L.N. (U.C.) 328.
21. *Nowranglal v. State of Orissa*, I.L.R. 1964 Cut. 575; A.I.R. 1965 Orissa 44.
22. *Stewart & Co., Ltd. v. Mackertich*, A.I.R. 1963 C. 198; *Naba Kishore v. Utkal University*, A.I.R. 1978 Orissa 65.

(f) *Parties labouring under mistake of law.* Where no alteration of position to the detriment of any party as a consequence of representation as to a state of facts has occurred, no estoppel can arise when both parties are labouring under a mistake of law in regard to the true nature of the transaction.²³

23. Estoppel by omission. Silence. A representation may arise not only by way of concealment of part of the truth in regard to a whole fact, but also from total but misleading silence (that is, silence where there is a duty to speak)²⁴ with knowledge, or passive conduct joined with a duty to speak; an estoppel will arise. The case must be such that it would be fair to interpret the silence into a declaration of the party that he has, e.g., no interest in the subject of the transaction. Indeed, silence, when resulting in an estoppel, may not improperly be said to have left something like a representation upon the mind.²⁵ But there is no estoppel, if the silence does not prejudice the other party.¹ Wife's omission to plead in reply to husband's notice that she had been divorced by her first husband and that she was minor at that time would not estop her from taking that stand when the second husband had himself adduced evidence to prove these facts.² According to a succinct expression which has been often quoted. "Where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent."³ In *DeBussche v. Alt*,⁴ the doctrine of estoppel is enunciated as follows: "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act". The existence of a duty is essential, and this is peculiarly so in

23. *Babu Hari Singh v. Ratanlal*, 1969 M.P.W.R. 946 (948).

24. Of course there can be no duty to speak without a knowledge of the existence of one's own rights or of the action about to be taken. *Bigelow*, op. cit., 595; *Chintaman Ramchandra v. Dareppa*, (1890) 14 B. 506 (silence, when there is a duty to speak, is as expressive as speech); *Story Eq. Jur. 1. s. 585* cited in *Gherean v. Kunj Behari*, (1887) 9 A. 413 (as to mere quiescence distinguished from a breach of duty to speak); see *Baswantapa v. Ranu*, (1884) 9 B. 86; *Shiddeshwar v. Ram Chandrarav*, (1882) 6 B. 463; see *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*, 1919, Mad. 1129; 43 I.C. 908; 7 L.W. 124; *Pandurang v. Narayan Rao*, 1918 Nag. 99; 44 I.C. 547 (is an instance of legal duty to speak).

25. *Bigelow*, op. cit., 6th Ed.; 646-647. (the subject of silence is illustrated

by the cases of *Pickard v. Sears*, (1837) 6 A. & E. 469 and *Gregg v. Wells*, (1839) 10 A. & E. 90, in the latter of which cases Lord Denman said: "A party who negligently [see *Coventry v. Great Eastern Ry. Co.*, (1883) 11 Q.B. D. 776; *Carr v. London and North Western Rail. Co.* (1875) L.R. 10 C. P. 307] or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving".

1. *Imperial Bank of Canada v. Mary Victoria Begley*, 1936 P.C. 193; 163 I.C. 295; 1936 A.L.J. 944.
2. *Sodha v. Mansha Ram*, 1971 Sim. L.J. (H.P.) 216; A.I.R. 1971 H.P. 27.
3. *Per Thomason, J.* in *Niven v. Belknap*, 2 Johns, 573 (Amer.).
4. (1878) 3 Ch. D. 286; 47 L.J. Ch. 281; 38 L.T. 370.

the case of an omission.⁶ The law relating to estoppel draws a distinction between representations and omissions; an omission to speak out furnishes a basis for estoppel only when circumstances are such as to throw upon a party the duty to speak out the truth.⁶ Further, an admission by silence of a representation made by the party claiming the estoppel may sometimes raise an estoppel.⁷ And, where, in answer to an enquiry, a person gives an evasive misleading answer, it will estop even though it may not have been intended to deceive, if its effect was in fact to deceive the inquirer.⁸ Mere standing by in silence will not bar a man from asserting a title of record in the public registry or other like office, so long as no act is done to mislead the other party, for there is no duty to speak in such a case. Thus, a patentee is not bound to warn others whom he may see buying an article which is an infringement of his patent.⁹ But, if there be any misleading, either by express declaration,¹⁰ or by conduct,¹¹ there will arise an estoppel, notwithstanding registration of the title. There is no duty to speak by the mere fact that a man is aware that someone may act as to his prejudice, if the true state of things is not disclosed. So long as he is not brought into contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out or to stop a transaction which is not due to his own conduct, as the natural and obvious result of it.¹²

Mere silence may not operate as estoppel, but silence, in the face of the duty to speak, may create an erroneous impression inducing another to act on it to his prejudice. Lord Macnaghten said in *Chadwick v. Manning*¹³ that silence is innocent and safe where there is no duty to speak.¹⁴ So, it is well settled that it is essentially necessary that there should be some obligation on the party sought to be made liable to make the discovery, so as to bring his silence within some definition of fraud. In order to create an estoppel, there must be a duty to speak or to act.¹⁵ No general rule can, however, be formulated as to when silence may operate as an estoppel. The presence of the silent party, when the transaction takes place, makes out a more

5. *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* 1938 P.C. 52 at 58: 65 I.A. 75: I.L.R. 1938 Mad. 360; 172 I.C. 745; see also *Nand Kishore v. Damodar Balaji*, 1942 Nag. 59: I.L.R. 1942 Nag. 232: 199 I.C. 731.

6. *R. I. Narayan Nambi v. Sankaran Nambi*, 1937 Mad. 158: 166 I.C. 842: 44 I.W. 859; see also *Jov Chandra v. Sreenath*, I.L.R. 32 Cal. 387: 1 C.L.J. 23; *Umaram v. Paruk Chand*, 1925 Cal. 993: 85 I.C. 540; *Ally Meah v. Maymyo Municipality*, 1940 Rang. 187: 190 I.C. 488.

7. *Bigelow*, op. cit. 6th Ed., p. 653.

8. *McConnel v. Mayor*, (1870) 2 N. W.P., H.C.R. 315, where it was said that when inquiry was expressly made of the person, he was bound, under the circumstances to have given definite and full information.

9. *Bigelow*, op. cit., 6th Ed. pp. 660,

661; *Proctor v. Bennis*, 36 Ch. D. 740. And see as to registration being notice of title, *Chintaman Ramchandra v. Doreppa*, (1890) 14 B. 506; *Agarchand Gumanchand v. Rakhma Hanumant*, (1888) 12 B. 678; Act IV of 1882, S. 3 (Transfer of Property).

10. *Munoo Lal v. Lalla Choonee Lal*, (1878) 1 Ind. App. 153, 156.

11. *Dullab Sircar v. Krishan Kumar Bakshi*, (1869) 3 B.L.R. 407, 408; in this last and kindred cases there was a duty to speak.

12. *Bigelow* op. cit., 6th Ed.; pp. 661, 662.

13. (1896) A.C. 231.

14. *Nihar v. Shahadhar*, 58 Cal. 358: 134 I.C. 567: A.I.R. 1931 C. 485 (2).

15. *Umaram Gogai v. Puruk Chand*, A. I.R. 1923 Cal. 993: 85 I.C. 540: *Ally Meah v. Maymyo Municipality*, A.I.R. 1940 Rang. 187: 190 I.C. 488.

emphatic case of estoppel than when he is absent. A man is bound to speak out in certain cases, and his very silence becomes as expressive as if he had openly consented to what it said or done and had become a party to the transaction. A duty to speak arises, whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or his dealing with or acquiring an interest in property in ignorance of his title. This silence, however, must be a true cause of the change of position in the other party. In considering the effect of silence, it has to be seen whether there was any occasion for speaking and any reasonable explanation of the silence. This section also does not apply to a case in which a belief otherwise caused has been allowed only to continue by reason of any omission on the part of the person against whom estoppel is sought to be proved.¹⁶

To conclude once again in the incomparable language of the famous American classic: *Silence or inaction*—An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by "standing by" and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence, where there are a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim "one who is silent when he ought to speak will not be heard to speak when he ought to be silent."

There are cases, where the mere silence of the estopped party and his failure to assert the right later claimed will be construed as a representation that he does not have the rights which he later attempts to assert, but it is apparent from the language of the maxim just quoted that mere innocent silence or inaction will not work an estoppel. There must be some element of turpitude or negligence, connected with the silence or inaction, by which the other party is misled to his injury. In other words, to give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak and, in addition, an obligation or duty to do so.

The mere fact that another may act to his prejudice, if the true state of things is not disclosed, does not render silence culpable, or make it operate as an estoppel against one who owes no duty of active diligence to protect the other party from injury. Likewise, the fact that a party on other occasions omitted to enforce his clear legal rights as to some property, affords no reason why he should be defeated as to legal claims upon other property, when he does finally assert them. Clearly, there can be no duty to disclose or assert facts or rights of which one is excusably ignorant and, therefore, as has already been pointed out, a knowledge of these matters is an essential element to an estoppel by silence or inaction. Likewise, there is no obligation to disclose matters of which the other party has actual or constructive knowledge, or as to which the information or means of acquiring information of the two parties is equal. In general, a person is required to speak only when common honesty and fair dealing demand that he does so, and in order that a party may be estopped by silence, there must be on his part an intent to mislead, or at least a willingness that others should be deceived, together with knowledge or reason to suppose that someone is relying on

16. Joy v. Sreenath, 92 Cal. 957

such silence or inaction and in consequence thereof is acting or is about to act as he would not act otherwise.

Silence, when there is a duty to speak, is deemed equivalent to concealment, or it may amount to the adoption of, or acquiescence in, the statement of another, as where a part owner of personality makes no objection to his co-owner's statements with reference to the interest of a third person in the property, although he is present when such statements are made and hears and understands them. On the other hand, the rule has been laid down that no estoppel arises from silence where the assumption of acquiescence is without legal justification, and that, to justify such an assumption from mere silence, it must appear that the statement or charge made was such that, if wrong, it would so naturally, or with such great probability, have brought contradiction that absence of contradiction gives assurance of truth. It has been suggested that the fact that the silence relied on as the basis of an estoppel was a failure to answer letters has an important bearing on the question of the effect to be given it, since such evidence is of a lighter character than silence when the facts are directly stated to the party because men use the tongue much more readily than the pen.¹⁷

An estoppel may arise from silence as well as words. To constitute such an estoppel, it must appear that the party to be estopped must be bound in equity and good conscience to speak and that the party claiming estoppel relied upon such silence or acquiescence and was misled thereby to change his position to his prejudice.¹⁸

24. Acquiescence. The commonest instance of inference from conduct arises in the case of conduct of acquiescence; for acquiescence, under such circumstances, that assent may be reasonably inferred from it, is no more than an instance of the law of estoppel by words or conduct. If a person, having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.¹⁹ Generally speaking, if a party, having an interest to prevent an act being done, has full notice of its having been done and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had, if it had been done with his previous licence.²⁰ Mere acquiescence is not equivalent to consent: consent, however, need not be by word and may be by act, and if consent can be intimated by conduct as well as by act, it is clear that acquiescence may, under certain circumstances, be taken to amount to consent.²¹ Where in response to notices under Sections 148 and 143 (2) of Income Tax Act, the assessee files returns and his books of accounts and also gives other evidence, he

17. 19 Am. Jur.

18. *University of Delhi v. Ashok Kumar Chopra*, A I.R. 1968 Delhi 151 (141).

19. *Duke of Leeds v. Earl of Amherst*, 2 Ph. 117, 125; *De Busche v. Alt*, L.R. (1878) 8 Ch. D. 286, 314, (for a case of acquiescence, see

Rungama v. Atchama, (1846) 4 Moo. T.A. 1; Bigelow, 6th Ed., pp. 493 and 675.

20. *Umaram Gogoi v. Puruk Chand*, 1925 Cal. 993; 85 I.C. 540.

21. *Bhimappa v. Basawa*, I I.R. 20 Bom 460; 7 Bom I.R. 405.

cannot challenge the notices.²² But there cannot be acquiescence to a position which is patently against law.²³

Mere silence or mere inaction cannot be construed to be representation. In order to support a case of acquiescence, there must be something more than mere silence or inaction. Inaction or silence, in circumstances which requires a duty to speak, is the foundation of the doctrine. When inaction or silence would amount to fraud or deception, then and then only would the doctrine of standing by or acquiescence be applied.²⁴ It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel, at best. "*An estoppel is certain, being a legal inference or conclusion arising from acts or conduct, while acquiescence and ratification, like waiver, are but matters of fact might have been found otherwise. Besides, the most that acquiescence or ratification can do, and this either may under certain circumstances do, is to supply an element necessary to the estoppel and otherwise wanting, e. g., knowledge of the facts at the time of making a misrepresentation. But each stands upon its own grounds, and must be made out in its own way, not in the way required by the ordinary estoppel by conduct.*"²⁵ In enunciating the principle of acquiescence, the Act indicates the lines upon which an estoppel of any kind should proceed.¹ *A case may be founded on the equitable doctrine of acquiescence or the legal doctrine of estoppel by conduct.² Acquiescence proper is nothing more than absolute or positive waiver.³ Acquiescence in itself is not sufficient to raise a plea of waiver. There must be knowledge of "all" the facts.⁴*

It is well established that parties cannot be said to acquiesce in the claim of others unless they are fully cognizant of their right to dispute them, and that, where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. Recognition, like waiver, must be an intentional act with knowledge.⁵ Mere acts of acquiescence will not constitute an estoppel when the plaintiff has not acted on the strength of any representation, but on an error common to himself and the opposite party.⁶ The essentials of the doctrine of acquiescence require *inter alia* that the person, who wants to plead that doctrine, must have been under a mistaken belief

22. Shyam Lal Ghosal v. I. T. O., (1972) 1 Cal. 455.

23. M/s. Ambala Goods Carriers Private Ltd. v. Regional Transport Authority, I.L.R. 1976 H.P. 752; A.I.R. 1977 H.P. 46.

24. Abdul Kader Chaudhry v. Upendra Lal Barua, 1956 Cal. 711; 40 C.W.N. 1370; see also P. J. Joseph v. Asstt. Excise Commissioner, Ernakulam, 1955 T.C. 146; I.L.R. 1952 T.C. 900.

25. Bigelow on Estoppel cited in Sheo Narayan v. Jugeshwar Ruer, 1950 Pat. 9 at 12; I.L.R. 28 Pat. 519.

1. Bishekar v. Muirhead, (1892) 14 All. 302, 304.

2. Proctor v. Bennis, (1887) 36 Ch.D. 740 per Fry, L.J.

3. Govindas Marotia v. (mail, 1950 Nag. 22; I.L.R. 1949 Nag. 953;

1950 N.L.J. 1, per Hidayatullah J. 1950 N.L.J. 1, per Hidayatullah J. 1952 Nag. 40; Kuwari Madhoo v. Bhume Lal Ajitmal, 1939 Nag. 163; I.L.R. 1941 Nag. 337; 182 I.C. 627; 1939 N.L.J. 186.

5. Bhoonu Lal v. W.A. Vincent, 1922 Pat. 619 at 635; 65 I.C. 882; 3 P.L.T. 653. per Das, J. "The doctrine of recognition is merely the application of the rules of acquiescence or waiver, preventing a party who has acquiesced in a state of things from turning round and alleging a different state of things."

6. John Augustine Vertaanee v. James Golder Robinson, 1927 P.C. 151; 54 I.A. 276; I.L.R. 5 Rang. 427; 102 I.C. 630; 25 A.L.J. 715; Shan-karan Nambi v. Nangeeli Anma, 1935 Mad. 1062; 42 L.W. 725.

about his rights and the person against whom the doctrine is sought to be invoked should be aware of this mistaken belief.⁷ 'Acquiescence' means assent after the party has come to know of his right.⁸ *No estoppel can arise from acquiescence of a party ignorant of his own rights.*⁹ When the party pleading acquiescence was himself aware of his limited rights, it is not enough for him to show abstinence from interference by the lessor, but he should show something more, viz., that by implication the lessor granted the superior right claimed by him.¹⁰ Where a tenant commits breach of a condition of lease about user of the premises and the landlord does not object to the changed user it cannot be inferred that he gave sanction to changed user for all times to come.¹¹ *There can be no estoppel by acquiescence where the truth of the matter is known to both the parties.*¹² Where a person buys land from another who has no title to it, and builds superstructures thereon, the real owner who knows of all these transactions will not be estopped from bringing a suit for possession. His conduct in the circumstances would not amount to acquiescence.¹³ Where both the parties to a suit are all along fully aware of the true nature of the transaction of sale between them and their respective stand in regard to the land, the subject of sale, then, in such a case, the principle of estoppel by acquiescence does not apply.¹⁴ A case may be founded on the *equitable doctrine of acquiescence or the legal doctrine of estoppel by conduct.*¹⁵ When founded upon the first doctrine, it has been said that *the conduct relied on should be conduct with knowledge of legal rights and amounting to fraud.*¹⁶ When, however, the doctrine of estoppel is alone invoked, there may be an estoppel by conduct of acquiescence where there is no fraud and where the person estopped has acted *bona fide* and unaware of his legal rights.¹⁷ *Where there is fraud, there is no room for the doctrine of acquiescence to operate.*¹⁸ An agent's

7. Lalta Prasad v. Brahmanand, 1953 All. 449 : 1953 A.W.R. 77.
8. Chattanya Das v. Ranjeet Pal, 1938 Cal. 263 : I.L.R. (1938) 1 Cal. 512 : 67 C.L.J. 16.
9. M. S. Chettyar Firm v. Kaliamma, 1935 Rang. 423 ; Mahmuddul Haq Khan v. Waqful Aulad, 1934 Oudh 178 : I.L.R. 9 Luck. 538 : 148 I.C. 186.
10. Nand Kishore v. Damodar Balaji, 1942 Nag. 59 : I.L.R. 1942 Nag. 232 : 199 I.C. 731 : relying on Beni Ram v. Kundan Lal, 26 I.A. 48 : I.L.R. 21 All. 496 (P.C.).
11. K. K. Sarma v. K. V. Raju, A.I.R. 1972 A.P. 335.
12. Ishar Singh v. Gajadhar Prasad Singh, 1957 Pat. 174.
13. Sarjug Devi v. Dulhin, A.I.R. 1960 Pat. 474.
14. Katihar Jute Mills, Ltd. v. Calcutta Match Works (India), Ltd., 1958 Pat. 133.
15. Proctor v. Bemus, (1887) 36 Ch. D. 740, per Fry, L.J.
16. Wilmot v. Barber, L.R. 15 Ch. D. 96, 105 ; Russel v. Watts, L.R. 25 Ch. D. 571, both cases cited and followed in Baswantapa v. Ranu, (1884) 9 B. 86 ; see also Jai Narain v. Jafar Beg, 1926 All. 324 : I.L.R. 48 All. 353 : 92 I.C. 1017 : 24 A.L.J. 355 ; Patma Sah v. United Provinces, 1939 Oudh 196 : 181 I.C. 662 : 1939 O.W.N. 500 ; Mapal v. Rana, 1938 Lah. 88 : I.L.R. 1938 Lah. 296 : 177 I.C. 198 ; Mst. Masooma Bibi v. Mohammad Said Khan, 1942 All. 77 : 198 I.C. 232 : 1941 A.L.J. 706 : 1941 A.W.R. (H.C.) 376 ; Annritya Ram v. Diwan Chand, 1929 Lah. 625 : 114 I.C. 70 ; Dan Bahadur Singh v. Talewand Singh, 1937 Oudh 226 : 166 I.C. 870 : 1937 O.W.N. 330 ; Kanhaiya Lal v. Syed Hamid Ali, 1930 Oudh 285 : 122 I.C. 774 ; Bakharia Dhuria v. Manak Ganga Ram, 1954 Nag. 97 : I.L.R. 1953 Nag. 601.
17. Sarat Chunder v. Gopal Chunder, 19 I.A. 203 : (1892) 20 C. 296.
18. Moolji Sicca & Co. v. Ramjan Ali, 1930 Cal. 678 : 129 I.C. 612.

acquiescence cannot be pleaded when the other party knows that he has no authority to acquiesce.¹⁹

The fact, that some of the earlier grantees acquiesced in fresh grants being made by the Government on lands which they might have claimed for themselves as accretions, does not estop subsequent grantees from claiming accretions.²⁰ It is well established that a relator will not be entitled to information in the nature of a *quo warranto*, if it can be shown that he acquiesced in the election to which he objects, or that he is raising an objection which might have been put forward against himself at a previous election, or that while cognizant of the objection, he voluntarily so acted as to enable the respondent to exercise the office.²¹ Before granting a writ of *quo warranto*, it is necessary to see that the relator is a fit person to be entrusted with this writ. The Court will not listen to a candidate who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose. It will not issue a writ of *quo warranto* at the instance of the candidate for an election who did not object to the nomination of another candidate for the same constituency at the proper time.²² The fact that the parties did not raise the question as to want of jurisdiction or even acquiesced in the jurisdiction of a Court would not confer on the Court a jurisdiction which it has not.²³ The principle of acquiescence cannot be applied to convert irrelevant evidence into relevant evidence.²⁴ The admissibility of a document or evidence can be challenged though admitted without objection when the question is not merely one of the modes of proof.²⁵ Exercise of power in excess of that conferred by statute cannot be justified on the ground of acquiescence.¹ Estoppel by acquiescence has no application to an *ex post facto* submission not amounting to a ratification and inducing no action or omission. There is a distinction between acquiescence in an act which is still in progress, and mere submission to it

19. *Khuda Baksh v. Jai Shankar*, 1929 All. 586 : 115 I.C. 628.

20. *Secretary of State v. Foucar & Co., Ltd.*, 1934 P.C. 17 : 61 I.A. 18 : I.L.R. 12 Rang. 136 : 147 I.C. 657.

21. *A. R. V. Achar v. Madras State*, 1954 Mad. 563 : I.L.R. 1954 Mad. 908 : (1954) 1 M.L.J. 102.

22. *Miss Avi J. Cama v. Banwarilal Agarwal*, 1953 Nag. 81 : I.L.R. 1953 Nag. 267 : 1953 N.L.J. 508.

23. *P. J. Francis v. P. J. Verghese*, 1956 Mad. 680 following *Ledgard v. Bull*, A.I.R. 9 All. 191 : 13 I.A. 134 (P.C.) and *Minakshi v. Subramanya*, I.L.R. 11 Mad. 26 : 14 I.A. 160; *Nabir Bhat v. Hala Hamza*, A.I.R. 1976 J. & K. 25 : 1976 Kash L.J. 168; *Basant Cotton Mills Ltd. v. Fifth Industrial Tribunal of West Bengal*, 1977 Lab. I.C. 1311.

24. *Jhanda Singh v. Harnam Singh*, 1926 Lah. 415 : 94 I.C. 75 : 27 P.L.R. 260 (secondary evidence of docu-

ment).

25. *Venkata Subba Rao v. J. Kesava Rao*, (1967) 2 Andh. W.R. 444 (452); *Jhanda Singh v. Harnam Singh*, 1926 Lah. 415 : 94 I.C. 75 : 27 P.L.R. 260. (Secondary evidence of document); *Moolchand v. Lachman*, A.I.R. 1958 Raj. 72 (unstamped document required to be stamped); *Bhagwan Das v. Amardas Shamdas*, A.I.R. 1938 Pesh. 32 (original document lost; copy admitted as secondary evidence); *Thaji Beobi v. Thangappa Pillai*, I.L.R. (1907) 34 Cal. 386 : 17 M.L.J. 908; *Arumugam v. Olagappa Chetty*, (1868) 3 H.C.R. 312.

1. *K. Ramesh Shenoy v. Chief Officer Town Municipal Council*, (1974) 2 S.C.W.R. 275 : (1974) 2 S.C. 506 : 1974 U.J. (S.C.) 558 : 1974 S.C.D. 813 : 1974 Cur. L.J. 1975 M.C.C. 139; 1975 Civ. J. (S.C.) 59 : (1975) 1 S.C.R. 680 : A.I.R. 1974 S.C. 2177.

when it has been completed. In the first case, it may operate as an estoppel, if it has induced action infringing a right. In the second case, submission cannot change the past.² In a case in the Calcutta High Court where an administrator *pandente lite* who was entitled to retain as remuneration a percentage of the assets received by him overstated his receipts in his accounts and overpaid himself on that basis, and these accounts were passed by the Court with the plaintiffs' knowledge and without objection from him, it was held that a suit afterwards brought by the latter to recover the balance thus wrongfully retained was not barred by estoppel, acquiescence or laches.³ In this case it was said that it would be dangerous to hold that the procedure followed in passing such accounts could form the basis of an estoppel and that there was no laches where a statutory period of limitation existed and no acquiescence since the accounts were misleading.

If the owner of a piece of land stands by while another person professes to sell that land to a third party, and he does not interfere, but allows that other person to hold himself out to be the owner of the land and to make a transfer of it, he is not to be heard afterwards for the purpose of destroying that purchaser's title by asserting to the contrary, though he may upset that title, if he can show either that the purchaser had notice of his title, constructive or actual or that circumstances existed at the time of the purchase which, as a reasonable man, should have put him upon his guard and suggested enquiry, which enquiry if made, would have resulted in his ascertaining the title of the true owner.⁴ So also, where a tenant had been using the premises for business purposes to the knowledge of the landlord, the latter would be estopped from alleging that the flat had been let out for residential purposes.⁵ The same principle applies when one person permits another to mortgage the property of the former.⁶ A mortgagee who causes the mortgaged property to be sold in execution of a decree other than a decree obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage-lien, is estopped for ever from setting up the lien against the title of *bona fide* purchaser.⁷ Where some of the mortgagees led a subsequent purchaser of a portion of the mortgaged property and a puisne mortgagee of the remainder to believe that the whole property was unencumbered, it was held that they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against the subsequent transferees and the effect of the estoppel was to postpone them in respect of

2. Nand Kishore v. Damodar Balaji. 1942 Nag. 59 : I.L.R. 1942 N. 252 : 199 I.C. 731 ; relying on Thakora Fatesingji v. Bamanji Dalal, (1903) 27 B. 515, 531, 532 ; s.c. 5 Bom. L.R. 274 ; see also Tan Soon Li v. Burma Oil Co. Ltd., 1941 Rang. 166 : 194 I.C. 887 : 1941 R. L.R. 153.

3. Osmond Beeby v. Khitish Chandra Acharya Chaudhuri, 1915 Cal. 13 : I.L.R. 41 Cal. 771 : 26 I.C. 284 : 18 C.W.N. 631, per Jenkins, C.J. and Woodroffe, J.; see Redgrave v. Hurd, (1881) 20 Ch. D. 1.

4. Ramcoomar Koondoo v. Macqueen, (1872) 11 B.L.R. 46 : I.A. Sup. Vol. 40 (followed in Mahomed

Mozuffer v. Kishori Mohun. (1895) 22 C. 909 ; Uda Begum v. Imam-ud-din, 1875 I.A. 82 ; Biseshar v. Muirhead, (1892) 14 A. 362 and see Bhyro Dutt v. Lekhrane Koor. (1871) 16 W.R. 123, 125 ; Manmohinee Joginee v. Jogobundhoo Sathookhan. (1873) 19 W.R. 223 ; Baswantappa v. Ranu, (1884) 9 B. 86 ; Story Eq. Jur. Vol. 1 P. 385, cited in Gheran v. Kunj Behari. (1887) 9 A. 413.

5. Gopala Das Varma v. S. K. Bhardwaj. I.L.R. 1957 Punj. 1564.

6. Banee Pershad v. Baboo Maun. (1867) 8 W.R. 67.

7. Muhammad Hamid-ud-din v. Shib Sahai, (1899) 21 A. 909 ; (1899) 19 A.W.N. 87.

their share of the original debt to the *puiant* mortgagee. It was also held that it was open to the Court to sever their interest from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt.⁸ If a person stands by and allows a Court to sell his property, he cannot afterwards come forward and ask for possession.⁹ Where a plea of acquiescence or of standing-by has been raised by a tenant in order to resist the claim of the landlord to eject him and it is proved that the tenant has been encouraged to spend money, he can claim the protection given by a Court of Equity. In the absence of such a plea of standing-by or acquiescence, a Court of fact may, if the circumstances of the case justify, come to the conclusion that the landlord had expressly or impliedly contracted to lease the land to a tenant whose reclamation of waste land has not been objected to for some years. This, however, is not a presumption of law but a presumption of fact which may or may not arise in a case.¹⁰ If a person is allowed to expend money on that which is not his own, as where a stranger begins to build on land supposing it to be his own, and the real owner perceiving his mistake, abstains from setting him right, and leaves him, to persevere in his error, the Court will not afterwards allow the real owner to assert his title to the land.¹¹ The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying.¹² Where a person allows another to make certain constructions on

8. Sakhiuddin Saha v. Sonaula Sarkar. 1918 Cal. 411 : 45 I.C. 986 : 27 C.L.J. 453 : 22 C.W.N. 641; see also Sivakami Ammal v. C. Ganpathia, 1948 Mad. 120 : (1947) 1 M.L.J. 390 : 60 L.W. 435 ; Jnanendra Nath Roy v. Sashi Mukhi Debba. 1940 Cal. 60 : 186 I.C. 833 : 44 C.W.N. 240 ; Radhe Lal v. Kishori Lal. 1935 Lah. 527 : 157 I.C. 811 : 57 P.L.R. 301.
9. Baldeo Prasad v. Fakhr-ud-din. I.L.R. 27 All. 62 : 1 A.L.J. 402 (F.B.) ; see Narayani v. Nabin Chandra Chowdhari. 1917 Cal. 507 : I.L.R. 44 Cal. 720 : 36 I.C. 803 : 25 C.L.J. 351 : 21 C.W.N. 400 ; Dayamoyi v. Ananda Mohan Roy Chaudhuri. 1915 Cal. 242 : I.L.R. 42 Cal. 172 : 27 I.C. 61. (F.B.) (non-transferable occupancy holding).
10. Sawai Singhai Nathuram v. Kalloo. 1917 Nag. 40 : 44 J.C. 517.
11. Rafiq Hussain v. Uthaya Bishnath Prasad, 1925 Oudh 258 : 84 I.C. 511 ; Imami v. Ibrahim. 1929 Oudh 292 ; Mool Raj v. Janeshwar Lal, 1939 Lah. 502 : 184 I.C. 826 : 41 P.L.R. 573 ; Secretary of State v. Itwari, 1937 All. 512 : 170 I.C. 944 : 1937 A.L.J. 783 : 1937 A.W.R. 597 ; Dhanpat Rai v. Guranditta. 1921 Lah. 110 : I.L.R. 2 Lah. 258 : 64 I.C. 520 (parties coparceners) ; Ramsden v. Dyson. L.R. 1 E. and I. App. 129. 140, case or principle commented in Lala Beni Ram v.

Kundan Lal, 26 I.A. 58 : I.L.R. 21 All. 496 : 1 Bom. L.R. 400 : 3 C.W.N. 502 (P.C.) ; Ismail Khan v. Jaigun Bibi. I.L.R. 27 Cal. 570 : (1900) 4 C.W.N. 210 ; Ismail Khan v. Broughton, (1901) 5 C.W.N. 846 ; Casperz v. Kedar Nath. (1901) 5 C.W.N. 858 ; Nundo Kumar v. Banomali Gayan, (1902) 29 C. 871 ; Ahmad Yar v. Secretary of State, 28 I.A. 211 : I.L.R. 28 Cal. 639 (P.C.) ; Secretary of State v. Dattatraya Nayaji. (1901) 26 B. 271 : 3 Bom. L.R. 923 ; Ralli v. Forbes. 1922 Pat. 258 : I.L.R. 1 Pat. 717 : 67 I.C. 714 : 2 P.L.T. 467 ; Forbes v. Ralli. 1925 P.C. 146 : 52 I.A. 178 : I.L.R. 4 Pat. 707 : 87 I.C. 318 ; Ramanathan v. Ranganathan. 1919 Mad. 1083 : I.L.R. 40 Mad. 1134 : 43 I.C. 138 : 33 M.L.J. 252 (F.B.) ; Gobinda v. Ramcharank, 1925 Cal. 1107 : I.L.R. 52 Cal. 748 : 89 I.C. 804 : 29 C.W.N. 931 ; see as to these cases and as to the presumption of permanent tenancy in respect of homestead land an article in 5 C.W.N. cccxii ; see Ex parte, Ford, 1 Ch. D. 521, 528 ; P. Yeshwada-bai v. Ramchandra, (1893) 18 B. 66 ; see Dattaji v. Kalba, (1896) 21 B. 749 ; Chauth Mal v. Hagamila. 1974 (1) W.L.N. (H.C.) 202.

12. Canadian Pacific Railway Co. v. The King, 1932 P.C. 108 : 138 I.C. 292 : 61 M.L.J. 958 : 36 L.W. 91.

certain land without knowing that the land belongs to him, he cannot be estopped from claiming the land subsequently.¹³ No estoppel will arise unless the stranger who was building believed that he had a right to build on the land.¹⁴

Before a person building on the land of another can be said to have an equitable right to possession of the land, on the ground that the true owner stood by and allowed the construction to proceed, it is necessary, first, that the stranger must have supposed it to be his own, and in the second place there must have been standing-by.¹⁵ The mere fact that the plaintiff raised no objection when the building was constructed by the defendant and that there was long delay on her part in enforcing her rights, if any, in respect of the land in dispute, is not sufficient to establish acquiescence when the defendant has never alleged that he had acted in the *bona fide* belief that he was acting within his rights.¹⁶ A person seeking to create title to real property by estoppel must satisfy the Court that he had neither actual nor constructive notice of the title of the real owner, and had not before him any circumstances which could have put him on reasonable enquiry to find out the truth. The Evidence Act affords no definition of estoppel to dispense with the necessity of the purchaser making a reasonable enquiry apart from Section 41 of the Transfer of Property Act.¹⁷ Although Section 41, Transfer of Property Act, deals with a branch of estoppel, yet Section 115, Evidence Act, does not impose upon a person acting on the faith of a representation made to him the same duty of making inquiries into the truth of the representation as is imposed upon a transferee from an ostensible owner by Section 41, Transfer of Property Act. But, if there are circumstances which reasonably excite suspicion and call for inquiries, he might be presumed to be acquainted with facts which the necessary inquiries will have elicited.¹⁸ Section 41, Transfer of Property Act, is another species of estoppel when the representation is not made directly to the representee but when it consists in making it possible for the ostensible owners to mislead those with whom they are dealing on account of the special position of vantage in which they were placed by the conduct, express or implied, of the real owners.¹⁹ But there is no estoppel when the party was not acting under any mistaken belief.²⁰ An instance of an estoppel by omission occurs when a mortgagee, bringing the property to sale in execution of a money decree without giving the purchaser notice of his encumbrance,

13. Ram Kishan v. Karam Singh, 1949 All. 673.

14. Kailoo v. Rishabh, 1951 Nag. 347; 1951 N.L.J. 544; Maola v. Bahoru, 1923 All. 567.

15. Lalji Pinjara v. Yusuf Khan, 1939 Nag. 7; 131 I.C. 203; 1938 N.L.J. 418; see also Dan Bahadur v. Talewand Singh, 1937 Oudh 226; 167 I.C. 1170.

16. Mustafa Husain v. Mst. Saidul Nisan, 1927 Oudh 66; 99 I.C. 255.

17. Venkatarajna Aiyar v. Venkatarajna Aiyar, 1919 Mad. 50; 50 I.C. 969; 9 L.W. 318; 1919 M.W.N. 180; Saddha Singh v. Mangal

Singh, 1933 Oudh 166; 142 I.C. 860; 10 O.W.N. 58.

18. Shiam Lal v. Mata Din, 1934 Oudh 460; 151 I.C. 576; 11 O.W.N. 1097; 1934 O.L.R. 758; see Muhammad Shafi v. Muhammad Said, 1930 All. 847; I.L.R. 52 All. 248; 122 I.C. 871; Lachman Singh v. Collector of Moradabad, 1933 All. 641; 146 I.C. 873.

19. K. Satyanarayanamurthi v. T. Pydayya, 1943 Mad. 459; (1943) 1 M.L.J. 219.

20. Paddu v. Mahabir Prasad, 1919 O. 199; 53 I.C. 683; 6 O.L.J. 455.

will be estopped from subsequently enforcing the lien of which he has given no notice. Having by his conduct led the purchaser to believe that the property was offered for sale free of encumbrances and to pay full value for it, he cannot, as against the latter, be heard to deny that the sale took place free of encumbrances.²¹ In a case in the Madras High Court, it was held that while a person who does not raise an objection to an erroneous statement in a proclamation of sale which he ought to have raised is estopped from pleading an irregularity due to such statement, the rule of estoppel does not apply to a judgment-debtor who is unaware of the error in it and that where a judgment-debtor's omission to object was due to a mistake of fact as to the property intended to be sold he was not estopped.²² And where a person had purchased *bona fide* and for value on the faith of a preceding transfer which a Bank, being deceived by personation, had permitted, it was held that the Bank was estopped from treating the transfer to him as a nullity.²³ The estoppel against a mortgagee in favour of subsequent encumbrancers is dealt with by Section 78 of the

21. *Dullab Sircar v. Krishna Kumar*, 3 B.L.R. (A.C.) 407; (1869) 12 W.R. 205; *McConnell v. Mayer*, (1870) 2 N.W.P.H.C.R. 315; *Doolee Chund v. Oomda Begum*, (1875) 24 W.R. 263; *Tukaram Atmaram v. Ramchandra Budharam*, (1876) 1 B. 314; *Tinnappa v. Murugappa*, (1883) 7 M. 107; *Nursingh Narain v. Raghoobur Singh*, (1884) 10 C. 609; *Agarchand Gumanchand v. Rakhma Hanmant*, (1888) 12 B. 678; *Giriya Shetti v. Anthamma*, 1927 Mad. 1142; 100 I.C. 493; 52 M.L.J. 222; 38 M.L.T. 49; *Jaganatha v. Gangi Reddi*, (1892) 15 M. 303; *Kasturi v. Venkatachala-pathi*, (1892) 15 M. 412; the last case distinguishes *Banwari Das v. Muhammad Mashiat*, (1887) 9 A. 690; in which (at p. 702), and in *Gheran v. Kunj Behari*, (1887) 9 A. 413, it was pointed out that it cannot be said that one person solely by bidding at an auction-sale encourages another person (see Civ. P.C., Order XXI. rule 66) to buy. As to legal representatives being bound by an execution sale, see *Natha Hari v. Jamne*, (1871) 8 Bom. H.C.R. (A.C.) 57. It must always be shown that the circumstances of the case are such as to bring it within the purview of the section; *Solano v. Lalla Ram*, (1880) 7 C.L.R. 481. In the case of *Dhondo Balkrishna v. Raoji*, (1895) 20 B. 290, in which *Dullab v. Krishna*, supra, was cited, it was held that there was no estoppel, registration (except in a case of fraudulent concealment) being notice according to the settled course of the previous Bombay decisions.

For a case of somewhat converse character to that in text, see *Byjonath Sahoy v. Dohun Biswanath*, (1875) 24 W.R. 83. Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee at whose instance the sale is made is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale; *Sheshagiri Shaubhog v. Salvador Vas*, (1873) 5 B. 5; *Shait Abdulla v. Haji Abdulla*, (1880) 5 B. 8; see *Narisadas Jitram v. Joglekar*, 4 B. 57 and cases there cited; *Ramanath Dass v. Bolaram Phookun*, 7 C. 677; *Hari v. Lakshman*, (1881) 5 B. 614. Where a person claimed as his own property attached in execution of a decree against another person, and his claim being rejected without enquiry, purchased the property at the sale, it was held that his so purchasing did not estop him from asserting as against a mortgage prior to the sale that the property was his independent of the sale; *Hanuman Dat v. Assadalu*, 7 N.W.P. Rep. 145.

22. *Raja of Kalahasti v. Maharaja of Venkatagiri*, 1915 Mad. 989; I.L.R. 38 Mad 387; 21 I.C. 389; 25 M.L.J. 198; see *Basanta Kumari Guha v. Ramkanai Sen*, (1912) 13 C.L.J. 192; 9 I.C. 698.
23. *Bank of England v. Cutler*, (1907) 1 K.B. 889; and as to effect of acquiescence under a mistaken belief, see *Goura Chandra v. Secretary of State*, 32 I.A. 53; I.L.R. 28 Mad. 150; 9 C.W.N. 553; 1 C.L.J. 460 (P.C.).

Transfer of Property Act. Where two persons embark upon a joint adventure for the purpose of extinguishing a prior mortgage and taking a first charge on the property, it is the legal duty of each to inform his co-mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage, and the omission to give the information amounts to such an omission as is contemplated by this section, that is, an omission operating as an estoppel.²⁴

A person who purports to deal with property which is not his own in favour of a stranger, is estopped, if the property eventually becomes his, from saying that he had no previous title to convey.²⁵ If a man who has no title whatever to property grants it by conveyance which in fact would carry the legal estate and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes.¹ If a person, having right to a property, takes no steps towards asserting his right against the person in possession, but leaves that person so in possession with all the *indicia* of ownership, the former cannot afterwards assert his right against the vendee of the person in possession who takes without notice of his claim.² Section 41 of the Transfer of Property Act, applying the general principle of estoppel, deals with such transfers of property by ostensible owners.³

Estoppel: Possession. A defendant who claims title from a person other than the plaintiff is not estopped from pleading adverse possession in the alternative.⁴ So, a person who claims to be a grove-holder in the revenue proceedings and whose claim was rejected is not precluded from proving in the Civil Court that in fact he was in possession adversely in the fullest sense as a proprietor in the absence of evidence that he had ever been in possession otherwise than as a person purporting to enjoy the rights of a full owner. The question of estoppel against adverse possessor does not arise unless the true owner was induced to alter his position adversely by virtue of his assertion that he was a grove-holder.⁵ A landlord who allows a tenant to assert the validity of an invalid lease for the statutory period of more than 12 years may be barred from subsequently questioning the right of the tenant under its terms.⁶ The possession of a trespasser is adverse to the true owner during the period the latter is, as tenant, estopped from denying the landlord's (trespasser's) title.⁷ A tenant is not precluded by admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of

24. Pandurang v. Narayan Rao, 1918 Nag. 99: 44 I.C. 547.

25. Moonabee Amir v. Syed Ali, (1866) 5 W.R. 289; see S. 43 of the Transfer of Property Act explained in Syed Nural v. Sheo Sahai, (1892) 19 I.A. 277. See next note.

1. Tilakdhari Lal v. Khedan Lal, 1921 P.C. 112: I.L.R. 48 Cal. 1: 25 C.W.N. 49 (P.C.).

2. Mohesh Chunder v. Issur Chunder, (1886) 1 Ind. Jur. N.S. 226, citing Boyson v. Coles, 6 M. & S. 23; Dyer v. Pearson, 3 B. & C. 42; Howard v. Hudson, 1 E. & B. 1; Pickard v. Sears, (1837) 6 Ad. & El. 469; Freeman v. Cooke, (1848)

2 Ex. 654; Swan v. N. B. Australasian Co., (1860) 7 C.B.N.S. 400.

3. In Jayram v. Narayan, (1909) 5 Bom. L.R. 652, a mortgagor was held to be estopped from questioning his own right to mortgage; see also Narayan Khandu v. Kalgaunda, 14 B. 404.

4. Ram Charan Singh v. Chunnital, A.I.R. 1941 Oudh 454: 195 I.C. 168.

5. Yusuf v. Sarju, A.I.R. 1942 All. 42: 198 I.C. 496.

6. Budesab v. Hanmanta, 21 Bom. 509; Thakore v. Bamanji, 27 Bom. 515.

7. Hearsey v. Karam Singh, 37 I.C. 715: A.I.R. 1917 Oudh 330.

the landlord has been adverse to the right to evict either at will or on notice to quit.⁸ Persons who entered into possession as trustees are estopped from setting up adverse title until they obtain a proper discharge from the trust.⁹

Turning to acquisition of title by adverse possession, by *archakas* inasmuch as the *archakas* were in enjoyment of the lands in a fiduciary capacity as trustees, they cannot acquire title by adverse possession against the deity. It is well established that a trustee cannot, by setting up his own title to the trust property, acquire by adverse possession a title to the property. In *Srinivasa Moorthy v. Venkatavarada Ivengar*,¹⁰ their Lordships of the Privy Council observed as follows: "No person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself." In *Bitto Kunwar v. Kesho Prasad*,¹¹ the Privy Council again expressed a similar view in the following passage: "Their Lordships can only understand their (the High Court's) thinking thus by supposing they were of opinion that although there might be a trust, Bachcha Tewari and Ram Kishen (the trustees) might acquire a title by having possession of the property and appropriating it to their own use. The learned Judges appear not to have had in their minds the statement of the law in Sections 63 and 64, Indian Trusts Act, 1882."

The principle above stated, namely, that a trustee cannot acquire title by adverse possession of the trust property, applies equally to *quasi* or constructive trustees, the managers of religious endowments and in fact to all persons who stand in a fiduciary capacity to others.¹² The *shebait* of a deity cannot acquire title in the deity's property by prescription.¹³ There can be no question of adverse possession between the temple and the *archakas*. The possession of the *archakas* of the temple property is in a fiduciary capacity and they cannot prescribe against the temple.¹⁴ In such a case, a trustee cannot, by his declaration that he has committed or is about to commit a breach of trust, prejudice the rights of the beneficiaries and claim that, as from the date of declaration, he began to hold adversely to the trust. In order to make time run, he would have to surrender the property to the proper custodian or *mutawalli* and then enter upon it as a trespasser. It is only in such circumstances that either he or those claiming under him can justifiably say

8. *Thakore v. Bamanji*, 27 Bom. 515; *Ram v. Kamakhya*, 4 Pat. 139; 84 I.C. 586; A.I.R. 1925 Pat. 216.
9. *Abdul Rahim v. Fakir*, A.I.R. 1946 Nag. 401; I.L.R. 1946 Nag. 518.
10. 34 Mad. 257 (P.C.).
11. 19 All. 227 at p. 291 (P.C.).
12. *Asaram v. Ludheshwar*, 177 I.C. 6; A.I.R. 1938 Nag. 335 (F.B.); *Lachman Das v. Arya Pritinidhi Sabha*, Punjab, 138 I.C. 309; A.I.R. 1932 Lah. 605; *Pratapa Simha v. Simji Raja Saheb*, 98 I.C. 442; A.I.R. 1927 Mad. 50; *Fakruddin v. Kifayatullah*, 8 I.C. 578 (All.); *Sami Ayyangar v. Venkataramana Ayyanagar*, 150 I.C. 156; A.I.R.

1934 Mad. 381; *Prem Singh v. Mokund Singh*, 26 I.C. 345; A.I.R. 1914 Lah. 378; *Lallubhai Bapubhai v. Mankuvarbai*, 2 Bom. 388 (F.B.); *Abdul Rahim v. Mst. Barira*, A.I.R. 1921 Pat. 166 (2); 2 P.L.T. 556; and *Surendrakrishna Rao v. Ishwar Bubanchawari*, I.L.R. 60 C. 54; 144 I.C. 792; A.I.R. 1933 Cal. 295.
13. *Jagannath Mahaprabhu v. Bhagaban Das*, A.I.R. 1951 Orissa 255; *Anath Nath v. Ishwar Kali Mata*, A.I.R. 1949 Cal. 538.
14. *Venkatadri v. Seshacharyulu*, A.I.R. 1948 Mad. 72; I.L.R. 1948 M. 46; 60 L.W. 264.

that his or their title had become adverse.¹⁵ Finally, these *archakas* cannot claim to have acquired occupancy rights either by being let into possession of the property by the landholder, or by cultivating it adversely to the trust as of right for over a period of 12 years. Where a person is in possession of trust property and purports to act as trustee in defiance of the rights of the true owner, such a person cannot be deemed to be landholder under the Madras Estates Land Act.¹⁶ In the instant case, the *archakas* cannot acquire rights by adverse possession as already adverted to.¹⁷

25. Acquiescence whether equitable stoppel. In *Ramsden v. Dyson*,¹⁸ Lord Cranworth observed :

"If a stranger begins to build on my land supposing it to be his own, and I (the real owner) perceiving his mistake, abstain from setting him rights and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land, on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake, in which he had fallen, it was my duty to be active to state his adverse title and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented." In order that the doctrine of acquiescence may be applied against any person, it must be shown that he was aware of his rights and that he stood by in such a manner as to induce a belief in the mind of the other person that he assented to the performance of the act in question.¹⁹ The absence of either of these elements makes the doctrine inapplicable.²⁰ Acquiescence does not simply mean standing by, it does not mean acquiescence only. *It means assent after the party has come to know of his rights.*²¹ *The silence or inaction must amount to deception.*²² *To constitute estoppel by acquiescence or silence, there must be a mistake caused as to legal rights of the person pleading estoppel who must have spent money or acted under the mistaken belief. The person acquiescing must know of the existence of his own legal right (being inconsistent with the right of the other party), he must also know of the mistaken belief of the other party, and he must have encouraged that party to do the act or spend the money by abstaining from asserting his own legal right.*²³ The question of estoppel by negligence or by conduct or by holding out of ostensible authority was considered fully by the Privy Council in *Mercantile Bank of India Ltd. v. Central Bank of India, Ltd.*²⁴

15. *Mohammad Afjal v. Din Muhammad*, A.I.R. 1947 Lah. 177; I.L.R. 1946 Lah. 900.

16. *Pattabhirama Reddi v. Balarami*, I.L.R. 1945 M. 250; 218 I.C. 177; A.I.R. 1945 Mad. 43 (F.B.).

17. *Venkatanarasimha v. Ganganma*, A.I.R. 1954 Mad. 258; (1953) 2 M.I.J. 31; 66 L.W. 338 (Subbarao and Ramaswami, JJ.).

18. (1866) L.R. 1 H.L. App. 129.

19. *Bhonu v. Vincent*, 3 Pat. L.T. 53; *Gurunadham v. Venkata Rao*, A.I.R. 1959 A.P. 523.

20. *Suchit v. Habibullah*, 99 I.C. 199;

A.I.R. 1927 Oudh 89..

21. *Chaitanya Das Banerjee v. Ranjit Pal Chaudhary*, 1938 C. 263; I.L.R. (1938) 1 C. 512.

22. *Abdul Quadir v. Upendra*, 40 C.W.N. 1378.

23. *Wilmot v. Barber*, (1880) 15 Ch. D. 98; *Abdul Quadir v. Upendra* (supra); *Hemangini v. Bijoy*, 1924 C. 438; 75 I.C. 223; *Jainarain v. Jafar Beg*, 48 A. 353; 1926 All. 324. See *Greenwood v. Martin Bank Ltd.*, 1933 A.C. 51.

24. 1938 P.C. 52; 65 I.A. 75; 172 I.C. 745.

Where a person holds out another as having authority to act for him in a particular transaction or in a particular course of business, he will be estopped as against one who has been innocently induced to negotiate with the supposed agent from denying the authority of such person to act for him.²⁵ A representation by an agent is effectual for the purpose of estoppel as that by the principal. Even where an agent exceeds his authority, the principal is bound by the contract, if the contracting party has reasonable ground for believing and in good faith believes in the authority of the agent.² But a person who deals with an agent whose authority he believed to be limited, does so at his own risk. There can be no estoppel against a principal in respect of any steps in a transaction whereby the customer is deceived by the agent acting beyond his authority.³ Every act done by an agent in the course of his employment on behalf of the principal and within the apparent scope of his authority, binds the principal unless the agent is in fact unauthorised to do the particular act and the person dealing with him has notice of it.⁴ Good faith requires that the principal shall be held bound by the acts of the agent within the scope of his general authority for he has held him out to the public as competent to do the acts and to bind him thereby.⁵ Where the money is not deposited with the manager of a business in the course of the business, the proprietor is not estopped.⁶ Generally speaking, an agent entrusted by a principal with the management of his business or property is estopped from denying the principal's title. A representation by him has the same effect as representation by the principal where he induces others to contract with him. An agent of a principal by an unqualified assertion that he is authorised to act as such agent, is answerable to the person who so contracts for any damages he may sustain by reason of the authority being untrue, and the fact that the proposed agent honestly thinks he has authority in no way assists him.⁷ This rule is found in section 235, Contract Act.

(a) *Mere silence is not acquiescence.* It is incorrect to think that mere silence amounts to acquiescence. The Supreme Court has held that where the plaintiff claims charges at a certain rate and there is silence on the part of the defendant, it cannot be held that there is acquiescence on the part of the defendant and that there is an implied undertaking to pay those charges at that rate.⁸

(b) *Acquiescence in jurisdiction.* No estoppel. Where a tribunal has no jurisdiction to decide the matter, and no objection is raised as to its want

25. *Wing v. Harvey*, 5 De C.M. & G. 265 (C.R.); *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907) 23 T.L.R. 521.
1. *Kuthiyumma v. Urathel Marakkal*, 1931 Mad. 647; 135 I.C. 375.
2. *Ram Pratap v. G. Marshall*, 26 C. 701 (P.C.).
3. *Renso Chinese Bank, Ltd. v. Yan San*, 5 I.C. 789; 14 C.W.N. 38 (P.C.).
4. *Khulna Loan Co. Ltd. v. Jahin Golder*, 24 I.C. 209; A.I.R. 1914 C. 687; *Katyayani Devi v. Port Canning and Land Improvement*

- Co.*, 19 C.W.N. 56; 1915 Cal. 54; 25 I.C. 274.
5. *Story on Agency*; *Pickering v. Busk*, (1812) 15 East 38.
6. *D. Daya Kishan Kaul v. Frank B. Pool*, 47 P.L.R. 1954.
7. *Collen v. Wright*, (1857) 8 E. & B. 647; 27 L.J.Q.B. 215.
8. *Union of India v. Watkins Mayor & Co.*, A.I.R. 1966 S.C. 275; (1965) 2 S.C.W.R. 289; *State v. Motiram*, 1973 W.L.N. 132; 1973 Raj L.W. 397; A.I.R. 1973 Raj. 225.

of jurisdiction, any of the parties is not estopped from subsequently objecting to its jurisdiction.⁹ It is different though, where the Tribunal has jurisdiction but objection is raised to trial by it on the ground of harassment and inconvenience. In this latter class of cases, if a party acquiesces in the jurisdiction, they are not entitled to question it, after an adverse decision.¹⁰ Where, however, the Tribunal has jurisdiction, but there is some irregularity, and the parties submit to the jurisdiction and take part in the proceedings, they cannot say that the Tribunal has acted without jurisdiction. In such cases, the doctrine of waiver and estoppel has full application.¹¹

But where the appellants voluntarily submit to the jurisdiction of the Revisional Authority and of the High Court on the matter in issue and having submitted to the jurisdiction and having taken the chance of judgment in their favour, the appellants cannot be permitted to canvass in the Supreme Court for the first time the question whether it was competent for the High Court to decide the question referred to it under section 11 of the U.P. Sales Tax Act (15 of 1948).¹² If absence of jurisdiction of a Certificate Officer to realise alleged dues against the petitioner is patent, acquiescence cannot be a ground for refusing relief to the petitioner (acquiescence by getting the demand made against him scaled down and adjusted by the Certificate Officer).¹³ A person cannot take a chance of a favourable decision from a Tribunal and then turn round and challenge its jurisdiction when the award went against it. In the instant case, the defendant by his conduct intimated that he had no objection to the dispute being decided by the Tribunal although it could not do so lawfully. Thereby he induced the plaintiff to prosecute his case before the Tribunal which he might not have done, had an objection been taken. The defendant was, therefore, estopped from challenging the jurisdiction of the Tribunal. It may be noted that this principle applies only to arbitration tribunals under private agreement and not to statutory or judicial tribunals.¹⁴ If despite arbitrators having not made the award within time, the parties consented to appointment of umpire and took part in proceedings before the umpire, the party aggrieved is estopped from challenging its validity for lack of jurisdiction.¹⁵ Same view was taken when arbitrator made award after expiry of time without objection by parties who took part in proceedings.¹⁶ A party cannot challenge the legality of appoint-

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| <p>9. Bengal Coal Co., Ltd. v. Chairman, Central Government Industrial Tribunal, A.I.R. 1963 Pat. 118 : 1962 B.L.J.R. 681; R. P. Singh v. Baidhynath Prasad, 1973 B.L.J.R. 580 : A.I.R. 1973 Pat. 389; Nahir Bhatt v. Hala Hamza, A.I.R. 1976 J. & K. 25 : 1976 Kash. L.J. 168; Basant Cotton Mills v. Industrial Tribunal, W.B., 1977 Lab I.C. 1311.</p> <p>10. M/s. Pannalal Binraj v. Union of India, A. I. R. 1957 S.C. 397 : 1957 S. C. R. 253 : 1957 S.C.A. 660; Mukund Ram v. Registrar, Trade Unions, A.I.R. 1962 Pat. 338 : 1962 B.L.J.R. 294.</p> <p>11. Ganesh Chandra v. Artatrana, A.I.R. 1965 Orissa 17 : I.L.R. 1964 Cut. 685; see Syed Hassan v. State,</p> | <p>12. Tikaram & Sons v. Commissioner of Sales Tax, U.P., (1968) 9 S.C.R. 512 : (1969) 1 S.C.A. 36 : (1968) 2 S.C.J. 770 : 22 S.F.C. 308 : A.I.R. 1968 S.C. 1286 (1292).</p> <p>13. Chandrika Prasad v. State of Bihar, 1969 B.L.J.R. 906 (912) (absence of written instrument within the meaning of item No. 9 of Sch. I to the B. & O. Public Demands Recovery Act 4 of 1914).</p> <p>14. Lajpat Rai v. Arya Samaj Sikhs Sabha, 1969 Raj. L.W. 430 (435, 436) : 1970 Ser. L.R. 304.</p> <p>15. N. Chellappan v. Kerala S. E. Board, A.I.R. 1975 S.C. 230.</p> <p>16. M/s. Nehru Motor Transport Co-operative Society v. The Deputy Registrar Jodhpur, A.I.R. 1977 Raj. 283.</p> |
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ment of an arbitrator after having taken part in proceedings before him.¹⁷ When a party takes part in the suit after application for stay of suit under Section 34, Arbitration Act is dismissed, he has no right thereafter to get the suit stayed.¹⁸ When on request of the parties the judge in deciding their case adopted procedure opposed to the procedural law, the parties are estopped from challenging the order on the ground of adoption of wrong procedure.¹⁹

The principle of estoppel applies when a party seeks to take up inconsistent positions as to jurisdiction of Civil Court.²⁰ Thus, a person who has succeeded on the question of jurisdiction before the Tahsildar under the Andhra Tenancy Act, 1956 and obtained adjudication that no petition for fixation of fair rent lies against him on the footing that he is not a person governed by the provisions of that Act, cannot be allowed later to question the jurisdiction of the Civil Court to entertain the suit which was filed only in view of the finding given by the Tahsildar in the previous proceedings under the Andhra Tenancy Act.²¹

The plea of acquiescence if not raised in the trial court will not be allowed to be raised for the first time in appeal.²²

26. Estoppel by election. The effect of silence or inaction in concluding a person has been considered in cases where there is a right of election between two courses. Here, again, mere silence does not amount to an election, but it is the duty of one who has to make an election not to lie by so long as to lead some other person, whether the party against whom the election is to be made or another, to alter his position in the belief that the first named has elected to let things remain as they are; and by so doing he will be precluded from making a different election.²³ The equitable doctrine of estoppel by election is thus stated in the leading case of *Streatfield v. Streatfield*.²⁴

"Election is the obligation imposed upon a party by Courts of Equity to choose between two inconsistent or alternative claims or rights in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both."²⁵

17. *State of Orissa v. Govinda Choudhury*, (1974) 2 Cut. W.R. 917; *B. B. C. R. R. Khattar & Co. v. Hindustan Steel Ltd.*, (1976) 1 C. W.R. 232.
18. *Liquidator, U. C. C. & Yarn Syndicate Ltd. v. R. Birdichand*, (1974) 2 Cut. W.R. 881.
19. *Arto Ram Paul v. Balai Chandra Paul*, (1973) 1 Cal. 64.
20. *A. N. Shah v. Annapurnamma*, (1957) 1 An. W.R. 196; A.I.R. 1958 A.P. 779.
21. *V. Parendhamayya v. Sri Somasekharaswamy Temple*, (1970) 1 Andh.

- L.T. 154; A.I.R. 1970 A.P. 294 (395).
22. *M.J.V. Mudaliar v. S.V. Finance Corporation*, A.I.R. 1971 A.P. 63.
23. *Halsbury's Laws of England*, Fourth Ed., Vol. 16, p. 1090, para 1619.
24. (1735) 1 White & Tudor 373; *Union of India v. Bharat*, A.I.R. 1961 Punj. 157; I.L.R. (1961) 1 Punj. 271.
25. See also *Young v. Bristol Aeroplane Co., Ltd.*, 1946 A.C. 163 (H.L.); (1946) 1 All. E.R. 98; *Samudra v. Srinivasa*, A.I.R. 1956 Mad

A party may not approbate and reprobate and once it has elected in favour of a particular course, it should be bound by it.¹

The principle of election, of which the doctrine of approbation and reprobation is an aspect, can only apply to orders passed by or without consent of parties by a court of competent jurisdiction. Where there is an initial total lack of jurisdiction, as in the instant case, the orders passed will be *ab initio* void and no validity can be attached to them by consent of parties. The orders operate, not by reason of the consent, but because they are orders passed by a court of competent authority, even though they may be passed on consent.²

The words "in addition to and in derogation of" occurring in Section 19 of the Bihar Public Land Encroachment Act, 1956, seem to indicate that if, under any other law in force, remedy is provided for removal of encroachment that remedy would not be barred because a party unsuccessfully sought the aid of the said Bihar Act for the same purpose. The principle of election may not also apply because of the language of Section 19 of the Bihar Act.³

It has been held by a learned Judge of the Madras High Court that where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one he cannot afterwards pursue the other which alter the first choice is by reason of the inconsistency no longer open to him. Such cases do not require detriment to the other party as foundation for their application.⁴ In order to establish the estoppel all that is necessary is that the party should have sufficient information and knowledge to be able to recognise that he has two rights inconsistent with each other, and knowing that if he chooses one of those two rights and enforces that right, it necessarily is an act of election and necessarily precludes him from contending that the act adopted and ratified by him is invalid and that he should be allowed to change his position thereafter and say that the other remedy and right is the proper one.⁵ In a case their Lordships of the Supreme Court held that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The principle of election does not forbid a party from claiming the same relief against persons in different suits in respect of the same property, though the grounds of relief are different and inconsistent.⁶ The doctrine is also extended to cases of valuation. A mere erroneous valuation of a plaint either for jurisdictional or fiscal purposes, could not, it has been held by a Full Bench of the Madras High Court, amount to a representation on which it could be said that the opposite party would suffer a detriment. Where the defendant had accepted the valuation in the plaint for his appeal, he could still for purposes of an appeal to the Supreme Court, maintain that the

301; Haridas v. Vijayalakshmi, A. I.R. 1956 Bom. 721.

1. Halsbury's Laws of England, 4th Ed. Vol. 16, p. 1012, para 1507.
2. Sankar v. Buvanammal Ammal, (1971) 1 M.L.J. 230 (233, 234).
3. Bharatiya Hotel v. Union of India, 1968 B.L.J.R. 692; A.I.R. 1968 Pat. 476 (478).

301 at 304; (1956) 1 M.L.J. 276; 69 M.L.W. 62.

5. Haridas v. Vijayalakshmi, 1956 Bom. 721.
6. Nagubai Ammal v. B. Shama Rao, 1956 S.C. 593 at 602; 1956 S.C.A. 959; 1956 S.C.R. 451; 1956 S.C.J. 655; I.L.R. 1956 Mys. 152; 1956 Andh. L.T. 1090.

valuation was not real but was higher. The rule (of approbate and reprobate) is one of logic rather than of law based on the principle that where a party to a litigation has deliberately taken a particular position, without being induced so to take it by the opposite party, he must act consistently with it.⁷ The doctrine of election is not a mere legal prohibition to any party against ever changing his mind; it is an equitable doctrine which is applied in law in order to prevent prejudice being done to the opposite party. No doubt where a decree-holder has definitely elected to proceed in one of two ways permitted him by a decree he cannot be allowed later to go back upon his election and choose the second way instead of the way he originally chose. But where an execution application making a particular choice (asking for recovery of all instalments relying on a default clause) never came to the notice of the judgment-debtor at all, it cannot in any sense be said to prejudice the judgment-debtor. There can, therefore, be no legal obstacle whatever to the decree-holder deciding subsequently that he will execute the decree for the instalments which have fallen due.⁸ The principle of estoppel by election does not apply where a party has no choice to elect one of the two courses, but circumstances compel him to adopt one.⁹ For a further discussion of the maxim that a person cannot approbate and reprobate, see Introduction to this Chapter under the heading "Inconsistent position—Approval and Reprobation".

26-A. Issue-estoppel. The principle of issue-estoppel is different from the principle of double jeopardy or *autrefois acquit* as embodied in Section 300 of the Criminal Procedure Code, 1973. It is a different principle, namely, where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which may be permitted by the terms of Section 300 (2) of the Criminal Procedure Code, 1973. For issue-estoppel to arise, there must have been distinctly raised and inevitably decided the same issue in the earlier proceedings between the same parties.¹⁰ Where in each of two prosecutions the

7. Kuppanna Gounder v. Peruma Gounder, I.L.R. 1961 M. 1143; 74 M.L.W. 460; A.I.R. 1961 Mad. 511 (F.B.).
8. Ismail Rowther v. Gomakkani Rowther, 1942 Mad. 679; 203 I.C. 478; (1942) 2 M.L.J. 225; as to waiver of the right to enforce a default clause of an instalment decree, see Gopaldas v. Kanshi Ram, 1929 Lah. 390; 113 I.C. 541 and the cases cited therein.
9. Azra Abdullah v. M/s. Siltan Hotel, I.L.R. 1975 Kant 1443; (1975) 2 Kant L.J. 316; A.I.R. 1975 Kant 225.
10. Piara Singh v. The State of Punjab, (1969) 3 S.C.R. 236; (1969) 2 S.C.J. 878; (1969) 2 S.C.A. 318; 1970 S.C. (Cr) 112; (1969) 1 S.C. C. 379; 1969 S.C.D. 919; 1969 Cr. L.J. 1435 (1438, 1439); A.I.R. 1969 S.C. 961. See also Pratam Singh v. State of Punjab, 1956 Cr.

L.J. 805; A.I.R. 1956 S.C. 45 and Manipur Administration v. Thekchom Bira Singh, (1964) 7 S.C.R. 12; A.I.R. 1965 S.C. 87; Sambasivam v. P. P. Federation of Malaya, 1950 A.C. 458; Masud Khan v. State of U. P., (1973) 2 S.C.W.R. 604; 1973 S.C.C. (Cri.) 1086; 1973 Cri. L.R. (S.C.) 718; (1975) 1 S.C.J. 129; 1973 U.J. (S.C.) 889; 1974 S.C. Cri. R. 62; 1975 Mad. L.J. (Cri.) 67; (1974) 1 S.C.R. 793; 1973 B.B.C.J. 863; (1974) 3 S.C.C. 469; A.I.R. 1974 S.C. 28; 1974 B.B.C.J. 285 (the facts of both cases must be the same); Ram Krishna Bose v. Gouri Bose, 1971 Cri. L.J. 1784 (Cal.); Sami Thevar v. Sadaya Thevar, 1971 Mad. L.W. (Cri.) 111; Ravindra Singh v. State of Haryana, 1975 S.C.C. (Cri.) 202; 1975 Cri. App. R. (S.C.) 95; 1975 Cri. L.J. 765; 1975 B.B.C.J. 221; (1975) 3

prosecutor before the Court is the State, the doctrine of issue-estoppel cannot apply. Therefore, the decision in the former case cannot operate as an issue-estoppel in a later case against persons who were not parties in the former case. The accused were not, therefore, estopped from putting forward their defence.¹¹ The principle of issue-estoppel will not apply when against an accused person a murder case and simultaneously a case under the Arms Act proceeded, and while convicted in murder case he was acquitted in Arms Act case and no appeal was preferred against acquittal.¹² This principle is also not applicable where both earlier and subsequent cases are not criminal cases.¹³

When the subsequent case of defalcation of money related to a different period, the finding of acquittal in the earlier case does not operate as issue-estoppel.¹⁴ Doubt about the extent and manner of the use of this principle has been expressed by Delhi High Court.¹⁵

26-B. Estoppel in matters of employment under Union or States. In view of the specific provision in Article 310 of the Constitution, there is no scope for the application of the principle of estoppel in matters of employment under the Union or the States.¹⁶

27. Benami transactions. (a) *General.* Connected with this subject are estoppels arising from *benami* transactions, which have long been recognised and given effect to by Courts in India. Assuming that the transaction is of a *benami* character, as to which strict proof is required, the general rule, in the absence of any statutory limitation,¹⁷ is to give effect to the real title

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- S.C.C. 742 : 1975 Cri. L.R. (S. C.) 207 : 1975 S.C. Cri. R. 208 : A.I.R. 1975 S.C. 856 : Santosh v. State, 77 Cal. W.N. 495 : I.L.R. (1973) 2 Cal. 173 : 1973 Cri. L.J. 968 : Karubi Sanul v. State, (1976) 42 C.L.T. 207. (The principle is for the benefit of accused only and cannot be used against him).
11. Mohar Rai v. State of Bihar, (1968) 3 S.C.R. 525 : 1969 S.C.D. 584 : 1969 S.C.J. 1 : I.L.R. 47 Pat. 693 : 1968 A.L.J. 1094 : 1969 B.L.J.R. 35 : 1968 Cr. L.J. 1479 : 1968 M.P.W.R. 2 : 1969 M.L.J. (Cr.) 31 : 1968 M.L.W. (Cr.) 200 : A.I.R. 1968 S.C. 1281 (1285).
 12. Bhoor Singh v. State of Punjab, 1974 Cri. L.J. 929 : A.I.R. 1974 S.C. 1256.
 13. Masud Khan v. State of U. P., (1973) 2 S.C.W.R. 604 : 1973 S.C.C. (Cri.) 1084 : 1973 Cri. L.R. (S.C.) 718 : (1975) 1 S.C.J. 129 : 1973 U.J. (S.C.) 889 : 1974 S.C. Cri. R. 62 : 1975 Mad. L.J. (Cri.) 67 : (1974) 1 S.C.R. 793 : 1973 B.L.J. 863 : (1974) 3 S.C.C. 469 : A.I.R. 1974 S.C. 28.
 14. Gopal Prasad v. State of Bihar, 1970 S.C.D. 1116 : 1971 Cri. L.J. 420 : (1971) 1 U.M. N.P. 107 : (1971) 2 S.C. Cri. R. 410 : (1971) 2 S.C.R. 619 : (1972) 1 S.C.J. 574 : 1972 M.L.J. (Cri.) 947 : 1972 B.L.J.R. 497 : 1973 Mad. I.W. (Cri.) 6 : I.L.R. (1972) 51 Pat. 346 : (1970) Cri. App. R. (S.C.) 467 : (1970) 2 S.C.W.R. 795 : A.I.R. 1971 S.C. 458.
 15. Chandrika Parshad v. State, 1975 Rajdhani L.R. 551.
 16. State of U. P. v. Babu Ram, (1962) 1 S.C.R. 679 : (1961) 1 S.C.A. 593 : I.L.R. (1961) 1 All. 509 : (1961) 1 Cri. L.J. 773 : A.I.R. 1961 S.C. 751 : Ramanatha Pillai v. State of Kerala, 1970 K.L.J. 210 : 1970 K.L.T. 1008 (1014).
 17. See Civ. P. C., S. 66 ; S. 36 of Bengal Land Revenue Sales Act, XI of 1859 ; S. 184 of Act XIX of 1873 ; see now U.P. Act III of 1901 (where immovable property has been sold in execution of a decree or for arrears of Government revenue, a stranger will not be allowed to claim the property on the ground that the certified purchaser merely purchased benami on his account, and any suit brought on such an allegation will be dismissed with costs).

and to allow the truth to be shown. Where the *benami* title has been created in order to conceal the fact that the real owner had effected a purchase which was absolutely illegal, either as being forbidden by statute or contrary to public policy, a suit by the real owner or his representatives to recover the property from the *benamidar* will fail, on the ground that he has no title and Section 82 of the Indian Trusts Act of 1882 will not prevent this defence being set up. Of course, the *benamidar* himself will have no better title, except from the fact that he is in possession. Such a possessory title will be good against all the world except against the true owner.¹⁸ Where a Police Officer purchases property in the name of another, effect cannot be given to his real title as this would defeat the provisions of the particular Police Act or Section 23 of the Indian Contract Act.¹⁹ The law of *benami* is merely a deduction from the equitable doctrine of resulting trusts and therefore the real owner may establish the trust against the *benamidar* or set it up as a defence to a suit by the *benamidar*, if the latter attempts to enforce his apparent title against the beneficial owner. Similarly, creditor's of the real owner may have recourse to the *benami* property; but if creditors of the *benamidar* seize the property, the real owner is entitled to have the property released.²⁰

(b) *Fraud on third parties.* But a third party is not allowed to suffer by the voluntary acts of owners of property. And it is not to be supposed that, because the existence of *benami* transactions has been judicially recognized, parties are at liberty to use this system to the injury of others, whether by direct fraud, or by putting other parties in a position to defraud or take undue advantage of innocent persons.²¹ Such transactions may give rise to an estoppel against the real owner and his representatives²² in favour of innocent third parties, whether purchasers, mortgagees or creditors, whose acts have been influenced by the conduct of the real owner in permitting the ostensible owner to appear as such. In such a case the real nature of the transaction cannot be shown, and the real owner is estopped from setting up the secret trust in his own favour against a title acquired without notice from the person who holds *benami* for him.²³ If the owner of property clothes a

18. *Pahlwan v. Ram Bharose*, I.L.R. (1904) 27 All. 169; *Sundar v. Parbati*, 16 I.A. 186; I.L.R. 12 All. 51.

19. *Sundarbai v. Manohar*, 1933 Bom. 262; 35 Bom. L.R. 404; 144 I. C. 781.

20. *Balas Kunwar v. Desraj Ranjit Singh*, 1915 P.C. 96; 42 I.A. 202; I.L.R. 37 All. 557; 30 I.C. 299; see also Mayne's Hindu Law, 11th Ed., ss. 815—825 and cases there cited.

21. *Rakhaldas Moduck v. Bindoo Bhashinee*, (1863) 1 Marsh 293, 295.

22. *Shiam Lal v. Mata Din*, 1934 Oudh 460; 151 I.C. 576; 11 O.W.N. 1097; see *Luchman Chunder v. Kali Churn*, (1873) 10 W.R. 292, distinguished in *Sarat Chunder v. Gopal Chunder*, (1888) 16 Cal. 148, and see *Chunder Koomar v. Hurbans Sahai*, (1888) 16 C. 137; *Sarat Chunder*

v. Gopal Chunder, (1888) 16 C. 148, but there is no estoppel against the purchaser at a sale held in execution of a decree obtained against a person who would by his conduct be precluded from denying the title of third parties who have dealt with his *benamidar*.

23. *Ramcoomar Koondoo v. McQueen*, (1873) 11 B.L.R. (P.C.) 46, 54; *Rakhaldas Moduck v. Bindoo Bhashinee* (supra); *Luchman Chunder v. Kali Churn*, (supra); *Bhagwan Doss v. Upooch Singh*, (1868) 10 W.R. 185; *Obhoy Churn v. Punchanun Bose*, Marsh 564; 2 Hay. 630; *Kalev Doss v. Govind Chunder*, Marsh. 569, 571; *Renni v. Gunga Narain*, (1865) 3 W.R. 10; *Nandan Lal v. Taylor*, (1866) 5 W.R. 36; *Brojonath Ghose v. Koylash Chunder*, (1868) 9 W.R. 593; *Nindhe Singh v. Bisso Nath*, (1875) 24 W.

third person with the apparent ownership and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party disposes of the property and who takes it in good faith and for value.²⁴

The ground of the rule is obvious; it would be monstrous, if it were allowed that a man should invest another with the apparent ownership of his property, and then, after the other has raised money upon the property, resume it in virtue of a private understanding.²⁵ "If a grantor conveys property in a form actually and actively misleading, so that persons, reading the conveyance, necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction, but that the grantees take on a secret trust not disclosed in the conveyance".¹ Where the owner of certain immovable property, after having executed a fictitious sale-deed thereof in favour of some persons, brings about a sale of the same by these ostensible vendees in favour of a third party who purchases the property for consideration upon representations made to him by the real owner, the latter will be precluded from setting up his title against the second purchaser, and the sale to him will have the effect of conveying to him the interest of the actual owner, even as against an execution-creditor of the latter.² In the case cited, on the sale of a property by the manager of an unencumbered estate, it was purchased *benami* on behalf of the *zemindar* of the estate but no transfer to the *benamidar* was made. Thereafter the *benamidar*, on the instruction of the *zemindar*, transferred the property without consideration by a deed of sale to the *zemindar's* illegitimate daughter. The *zemindar* by petition supported an application by the daughter for mutation of names which was thereby effected. It was held that the *zemindar*

R. 79; Chunder Commar v. Hurbans Sahai, (1888) 16 C. 137; Smith v. Mokhum Mahtoom, (1872) 18 W.R. 526; Ram Mohinee v. Pran Koomaree, (1865) 3 W.R. 87; Sarat Chunder v. Gopal Chunder, (1892) 19 I.A. 203; Ananda Mohan Roy v. Nilphamari Loan Office, Ltd., 1921 Cal. 549; 65 I.C. 245; 26 C.W.N. 436; Mst. Lachmi Devi v. Firm Uttam Chand Kapur & Sons, 1937 Lah. 272; cf. Sarat Chunder v. Gopal Chunder, (1888) 16 C. 148; where it was held that the mere fact of a *benami* transfer did not amount to a binding representation; the contest must, moreover, be between the true owner of the property and a person claiming under the *benamidar*; Bashi Chunder v. Enayet Ali, (1892) 20 C. 236; in Muhammad Khan v. Muhammad Ibrahim, (1904) 1 All. I. J. 214, the Court, referring to the principal case held that the party had no constructive notice of the real title; see Radha Madhab Paikara v. Kalpataru Roy, (1913)

17 C.L.J. 209; 16 I.C. 811 (innocent purchase in sale on collusive mortgage by *benamidar*); Baburam v. Madhab, (1913) 40 C. 565; 19 I.C. 9; 18 C.W.N. 341; Nisakar Das v. Bairagi Samal, 1914 Cal. 175 (2); 19 I.C. 909; 19 C.L.J. 330; Magu Brahma v. Bholi Das, 1914 Cal. 331; 20 I. C. 195; 19 C.L.J. 352; 18 C.W. N. 657.

24. Li Tse Shi v. Pong Tsoi Ching, 1935 P.C. 208; 1936 A.W.R. 207; 159 I.C. 794; 43 L.W. 12; Rimmer v. Webster, (1902) 2 Ch. D. 163; 71 L.J. Ch. 561; 86 L.T. 491; 50 W.R. 517.

25. Rakhaldooss Moduck v. Bindoo Bhashinee, (1863) 1 Marsh. 293, 294.

1. Re King's Settlement, (1931) 2 Ch. 294 at 299; 100 L.J. Ch. 359; 145 L.T. 517, affirmed in Tsang Chuen v. I.I. Po Kwai, 1932 P.C. 255; 139 I.C. 891; 1932 A.L.J. 971.

2. Tulshi Ram v. Mutsaddi Lal, (1904) 2 All. L.J. 97.

and those claiming under him were estopped from denying the title of the daughter because as a result of *zemindar's* acts, her position had been changed, she thereby becoming liable for the revenue assessed upon the property.³ A *benamidar* is a trustee for the real owner, and the latter is bound by the fraudulent conduct of the *benamidar* where third parties are not privy to the fraud, unless their title can be overthrown by showing either that they had direct notice or something amounting to constructive notice, of the real title or that circumstances existed which ought to have put them on an inquiry, which, if prosecuted, would have led to a discovery of it. The beneficial owner might make the trustee personally liable but the transaction with the third parties would stand.⁴ Third parties, however, dealing with a *benamidar* will be affected by notice, actual or constructive, of the real title,⁵ for if they are cognizant of the real facts they can, in no way, be said to have been misled. Constructive notice will be imputed to a person who, for the purpose of avoiding notice, designedly refrains from enquiry, which by the exercise of ordinary intelligence would lead to a knowledge of the facts.⁶ And where a state of things exists, which could not legally exist unless the property was subject to a burden, a purchaser will be said to have notice of that burden.⁷ Thus, if a third party is in possession, a purchaser is put on enquiry as to his interest.⁸

(c) *Fraud upon creditors.* So far reference has been made to the rule that the Courts will not enforce the rights of a real owner, where they would operate to defraud innocent persons. "A still stronger case is that in which property has been placed in a false name, for the express purpose of defrauding creditors. As against the latter, of course, the transaction is wholly invalid. Where the fraudulent purpose has been, in fact, carried out, either entirely or as to a substantial part, the real owner is not entitled to recover the property from the *benamidar*. Where, however, the purpose of the fraudulent conveyance is defeated, the alienor or his representative is entitled to recover the property and the *benamidar* who colluded with him cannot rely upon the contemplated fraud as an answer to the action."⁹

(d) *Estoppel as between parties to fraud.* It is, in the first case, clear that where two persons have combined to commit a fraud upon a third, the transaction is wholly void as between those persons and the party defrauded.¹⁰ It has, however, been a question of some difficulty as to how far the parties may, as between themselves, show the truth of the transaction. What-

3. *Raja of Deo v. Abdullah*, 1918 P. C. 85 : 45 I.A. 97 : I.L.R. 45 Cal. 909 : 45 I.C. 770 (P.C.).

4. *Bindubashinee Debi v. Kashinath*, 1932 Cal. 167 : I.L.R. 58 Cal. 1971 : 135 I.C. 433, following *Gur Narayan v. Sheo Lal Singh*, 1918 P.C. 140 : 46 I.A. 1 : I.L.R. 46 Cal. 566 : 49 I.C. 1.

5. *Ramcoomar Kondoo v. M. Queen*, (1873) 11 B.L.R. (P.C.) 46, 54 and cases cited in note 3 and in *Mayne's Hindu Law*, 8th Ed., s. 444.

6. *Radha Madhab Patkara v. Kalapataru Roy*, (1914) 17 C.L.J. 209.

7. *Magu Brahma v. Bhol Doss*, 1911

Cal. 351 : 20 I.C. 195 : 19 C.L.J. 352 : 18 C.W.N. 657 ; *Allen v. Seckham*, (1879) 11 Ch. D. 790.

8. *Mancharji v. Kongaroo*, (1869) 6 B.H.C.R. 59 (O.C.H.).

9. *Mayne's Hindu Law*, 11th Ed., s. 824.

10. *Nawab Sidhee v. Ojoodhyaeram Khan*, (1886) 10 Moo. I.A. 540, followed in *Kalappa v. Shivaya*, (1895) 20 B. 492 : see *Erava v. Sidramappa*, 21 B. 424, 448, 449 ; *Byijnath Lal v. Ramoodeen Chowdhary*, (1875) 1 I.A. 106 ; *Gopi Wasudev v. Markande Narayan*, (1878) 3 B. 30, 33.

ever doubt there may be as to the plaintiff's right to avoid his own deed by setting up his own fraudulent act, it is open to the defendant to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or the defendant's creditors generally.¹¹ Whether a plaintiff shall be so allowed to plead his fraud will depend upon the question whether the fraud has been carried beyond the stage of mere intention. If the fraudulent purpose has been wholly or partially carried into effect, the real owner will not be permitted to succeed in a suit instituted by him for recovery of the property. It is a well-recognised principle that, after fraud has been perpetrated, no party to the fraud can take advantage of his own act and that the real owner shall not be permitted to challenge the title of the ostensible owner, if a *benami* conveyance was executed in order to perpetrate a fraud.¹² But, where the fraud has not been carried into execution, he may succeed.¹³ It has been held by the Privy Council that where *benami* conveyance of land is made for the purpose of fraudulently defeating the claim of an equitable mortgagee, and the claim of the latter is not defeated, the grantor can recover back the land from the grantee, and that the *benami* conveyance, being in such circumstances an

11. Babaji v. Krishna, (1893) 18 B. 372, followed in Preonath Koer v. Kazi Mahomed Shahzad, (1905) 8 C.W.N. 620.
12. Bhimsen Mahapatra v. Ramchandra Das, 1950 Orissa 123; Lukhee Narain v. Taramonee Dossee, (1865) 3 W. R. 92; Shiva Narain Ram v. Mst. Phuljharia, 1919 Pat. 539; 52 I.C. 402; Varadarajulu Naidu v. Srinivasa Naidu, I.L.R. 20 Mad. 333; Parthasarathy v. Kandaswami, 1923 Mad. 711; 73 I.C. 954; 45 M.L.J. 161; 18 L.W. 156; Ramaswami v. Alamelu Ammal, 1924 Mad. 604; 78 I.C. 921; 46 M.L.J. 298; 1924 M.W.N. 204; 34 M.L.T. 301; Sidhingappa v. Hirasu, I.L.R. 31 Bom. 405; 9 Bom. L.R. 542; Ma Man Chaw v. Ma E., 1927 Rang. 86; I.L.R. 4 Rang. 429; 99 I.C. 349; Kotayya v. Mahalakshamma, 1933 Mad. 457; I.L.R. 56 Mad. 646; 145 I.C. 308.
13. Jadu Nath v. Rup Lal, I.L.R. 33 Cal. 967; 10 C.W.N. 650; 4 C.L.J. 22 in which all the authorities are reviewed; Goberdhan Singh v. Ritu Ray, (1896) 23 C. 962; Kali Charan v. Rasik Lal, (1894) 23 C. 962 in Chenvirappa v. Putappa, (1887) 11 B. 708; Sham Lal v. Anarendro nath, (1895) 23 C. 460; Banka Behari v. Raj Kumar, (1899) 4 C.W.N. 289; 27 C. 231; Govinda Kuar v. Lala Kishun, (1900) 28 C. 570; Surya Mull v. Dwarka Prasad, 1929 Pat. 127; I.L.R. 7 Pat. 798; 115 I.C. 890; 10 P.L.T. 138; Mayne's Hindu Law, 11th Ed., s.

824 and cases there and in the preceding decision cited. The rule, however, appears to be stricter in the Madras High Court; Yasamati Krishnayya v. Chundru Pappayya, (1897) 20 M. 326, 330; Rangammal v. Venkatachari, (1896) 20 M. 323; 6 M.L.J. 64; Varadarajulu Naidu v. Srinivasulu Naidu, (1897) 20 M. 330, 338 (it is very doubtful whether in a case in which the maxim in *pari delicto* would otherwise apply any exception arises by reason that the illegal purpose has not been carried out; see, however, as to these cases; Jadu Nath v. Rup Lal, I.L.R. 33 Cal. 967; 4 C.L.J. 22; (1900) 10 C.W.N. 650 at p. 661. In Honapa v. Narsapa, (1898) 23 B. 406; Farran, C.J., at p. 409, was of opinion that the law applicable was that laid down in Yasamati Krishnayya v. Chundru Pappayya, *supra*; but treats Calcutta decisions at being to same effect, and Fulton, J., stated at p. 418, that when the fraud was not completed it might well be contended that as the collusive transaction had not really frustrated justice, the original owner retained a good claim to the property; see also May on Fraudulent and Voluntary Dispositions of Property, 2nd Ed., pp. 470-472; as to fictitious sales made to evade process for recovery of arrears of revenue, see Ram Prasad v. Shiva Prasad, 1 N. W.P. Rep. 71, and see Petherpermal Chetty v. Muniandy Servai (*infra*).

inoperative instrument, it is unnecessary to bring an action to set it aside.¹⁴ In *Petherpermal Chetty v. Muniandy Servai*,¹⁵ their Lordships of the Privy Council observed: "To enable a fraudulent confederation to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with." Following this and overruling its earlier decisions to the contrary, a Full Bench of the Madras High Court has held that a mere fraudulent intention evidenced by the transaction is not sufficient to prevent a person, who has been a party to the fraudulent transaction, from setting up his own fraud. The intended fraud must have been effected either entirely or to a substantial extent.¹⁶ The same view has been taken by the other High Courts also.¹⁷

With regard to an apparent conflict between the two maxims, *nemo allegans turpitudinem suam audiendus est* (no one alleging his own baseness ought to be heard) and *in pari delicto potior est conditio possidentis*, (in equal fault, the condition of the possessor is the more favourable) a Full Bench of the Lahore High Court observed: "It may be stated at the outset that there is no real conflict between the two maxims. The principle underlying both is the same; one embodies the general rule and the other an exception to that rule. It is one of the fundamental doctrines of all civilized systems of the jurisprudence that a court of law shall not lend its aid to enforce a transaction which is tainted with fraud. A person, who has polluted his hands by being a party or privy to a fraudulent transaction, shall not be allowed to approach the fountain of justice 'with his own infamy on his lips' and obtain relief on the strength of such a transaction. The moment he relies on such an agreement, he will be told *nemo allegans suam turpitudinem audiendus est*. This is the general rule. But its rigid application to all cases, regardless of the attendant circumstances, might result at times in giving effect, directly or indirectly, to the fraudulent design of its authors, and thus defeat the very object for which the rule was framed. In order to avoid such undesirable consequences, several exceptions to the rule have been recognized. One such exception arises in the familiar case in which the fraudulent transaction is still executory and the purpose of the fraud has not been effected. In such a case, one of the parties to the fraud is allowed to approach the Court, repudiate the transaction, and recover money or property which had been handed over by him to the opposite party in furtherance of the transaction. In such circumstances, public policy requires that a *locus penitentiae* be given to one or other of the parties and he be allowed to retrace his steps, state the true facts before the Court, and, by revoking

¹⁴ *Petherpermal Chetty v. Muniandy Servai*, (1908) 35 I.A. 98; I.L.R. 35 Cal. 551; 5 A.L.J. 290.

¹⁵ (1906) 35 I.A. 98, 103; I.L.R. 35 Cal. 551, 559.

¹⁶ *K Venkataramayya v. Y. Pullayya*, 1936 Mad. 717; I.L.R. 59 Mad. 998; 164 I.C. 588 (F.B.).

¹⁷ *Nawab Singh v. Daljit Singh*, 1936 All. 401; 162 I.C. 958; 1936 A.L.J. 285; 1936 A.W.R. 290; *Bai Devmani v. Ravi Shanker*, 1929 Bom. 147; I.L.R. 53 Bom. 321; 116 I.C. 236; 31 Bom. L.R. 109;

Girdhari Lal Prayag Dutt v. Manikamma Narayansami, 1914 Bom. 283; I.L.R. 38 Bom. 10; 21 I.C. 50; 15 Bom. L.R. 805; *Jadu Nath v. Rup Lal*, I.L.R. 33 Cal. 967; *Goberdhan v. Ritu Roy*, I.L.R. 23 Cal. 962; *Surya Mull v. Dwarka Prasad*, 1929 Pat. 127; 115 I.C. 890; *Qadir Bakhsh v. Hakam*, 1932 Lah. 503; I.L.R. 13 Lah. 713; 139 I.C. 17 (F.B.); *Bishwanath v. Surat Singh*, 1943 Nag. 113; 204 I.C. 423; 1942 N.L.J. 586.

the authority of his confederate, to carry out the fraudulent scheme, defeat the purpose of the contemplated fraud."¹⁸

Even as against a transferee, who has himself been a party to a scheme of fraud intended to defeat the creditors of the transferor, the latter should not be permitted to defeat the transferee's legal title by pleading the fraudulent scheme. The mere fact of the creditor having been delayed in obtaining satisfaction will not preclude the transferor from pleading the *benami* character of the transaction as against his transferee. Much less will the mere intention to effect an illegal object when the assignment was executed, preclude the true owner from asserting his rights.¹⁹ On the other hand when the fraud of the transferor and transferee has been carried out and the possession remains with transferor the Court will not help the transferee in obtaining possession from the transferor.²⁰ When a sole surviving coparcener, or all the coparceners, then in existence, save property by resorting to *benami* transactions in order to deprive the creditors of their dues and the fraud is carried out, it will not be open to the subsequent born coparceners to recover that very property, especially when it is in the hands of alienees from the ostensible owner. In such a situation, the principle "Let the estate lie where it falls" takes effect.²¹ Where the ostensible transferee never had any exclusive possession of the property in question, which was for a great many years treated as part of the joint family property, and which was enjoyed by the joint family (of which the plaintiff was the sole surviving member) for more than twelve years before suit, it was held that the plaintiff was entitled to have a declaration of his right to the property and to confirmation of his possession.²² And in a case in the Calcutta High Court, where property had been placed *benami* with a view to defrauding a creditor and this purpose has been achieved, it was held that the execution-creditor was entitled to defeat a suit brought by the judgment-debtor against a transferee of the property by proving the fraud.²³ As to the purchase of a decree by a judgment-debtor *benami*, see cases cited below.²⁴

(e) *Promissory note*. It is not the promisor of a note to contend that someone other than the payee on the face of a pronote is the real owner of the note.²⁵ A person, even if he is the true owner, is not competent to prosecute the suit, if he is not the holder of the note, and the facts that the

18. *Quadir Buksh v. Ilakam*, 1932 Lah. 503 at 506: I.L.R. 13 Lah. 713: 130 I.C. 17; see also *Raghupati Chatterjee v. Nrisingha Hori Das*, 1923 Cal. 90: 71 I.C. 1: 36 C.L.J. 491.

19. *P. Venkata Krishnayya v. C. Venkataratnam*, 1935 Mad. 947: 158 I.C. 854: 42 L.W. 452: 1935 M.W.N. 996; see also *Subbaraya Naicker v. Venkatesa Naicker*, 1934 Mad. 252: 150 I.C. 381: 39 L.W. 357. *Bai Devmani v. Ravi Shankar*, 1929 Bom. 147: I.L.R. 53 Bom. 321: 116 I.C. 236.

20. *Umrao Chand and others v. Inder Chand*, 1971 Raj. L.W. 500: I.L.R. (1971) 21 Raj. 823: 1970 W.L.N. (Part I) 494.

21. *Lacha Reddi v. Venkamma*, 1956 Andh. Pra. 225.

22. *Govinda Kuar v. Lala Kishun*, (1900) 28 C. 370.

23. *Nisakar Das v. Bairagi Samal*, 1914 Cal. 175 (2): 19 I.C. 909: 19 C.L.J. 330; not following *Hari v. Ram Chandra*, (1906) 31 B. 61: 8 Bom. L.R. 873.

24. *Obhoy Churn v. Nobin Chunder*, (1874) 23 W.R. 95; *Soroop Chunder v. Trilokainatha Roy*, (1868) 9 W.R. 230.

25. *Subbanarayana Vathiyar v. Ramaswami Aiyar*, I.L.R. 30 Mad. 88: 16 M.L.J. 508: 1 M.L.T. 377 (F.B.); *Sundaram Ammal v. Krishnaswamy*, 1957 Mad. 573.

holder of the note has been made a party and has admitted that he is only the plaintiff's *benamidar*, makes no difference. The property is the note, including the right to receive or recover the amount due thereon, is vested in the holder and cannot be transferred to the plaintiff except by the process prescribed by law, viz., by endorsement and delivery.¹ Though it is not competent for the promisor to raise the contention, as between a beneficial owner under the note, and the ostensible payee, the question as to who is entitled to the money can be gone into.²

28. Family arrangements. Estoppel by conduct may arise in the case of family arrangements, the decisions as to which extend not merely to cases in which arrangements are made between members of a family for the preservation of its peace but also to cases in which arrangements are made between them for the preservation of its property.³

For a family allotment to create an estoppel, the parties should have been parties to the settlement or should have claimed under or through such parties, or should have acted on it, or derived some benefit under it; it should be an honest settlement of an existing dispute, which must not be manifestly *ultra vires* of the parties to settle.⁴ Where family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a Court of Equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a Court of equity would have a very great difficulty in permitting such a contract to bind the parties.⁵ When a family arrangement has been entered into, or acquiesced in by all the persons interested in the family property, and has been carried into effect, then none of the persons who consented thereto may thereafter be heard to repudiate that arrangement, or to set up that it is not binding in law.⁶ The mere fact that an agreement is entered into by persons who are relations of each other, does not make such an agreement a family settlement so as to be binding on persons who are not even parties thereto.⁷ An agreement between some members of the family only is not enforceable. An agreement by a reversioner, to convey or relinquish a future right, not acted upon, when the succession opens on the death of the widow, does not estop a party from bringing an action for his share in the property.⁸ Since a

1. *Ramanuja v. Sadagopa*. I.L.R. 28 Mad. 205; 15 M.L.J. 249; *Reoti Lal v. Mst. Munna Kuar*. 1922 All. 70; I.L.R. 44 All. 290; 65 I.C. 785; 20 A.L.J. 126.

2. *Venkatarama Reddiar v. Valli Akkal*, 1935 Mad. 181; I.L.R. 58 Mad. 693; 153 I.C. 944.

3. *Williams v. Williams*, L.R. 2 Ch. App. 294; cited in *Lakshmibai v. Ganput*. (1868) 5 Bom. H.C.R. 128; see *Mst. Hardei v. Bhagwan Singh*. 1919 P.C. 27; 50 I.C. 812; 24 C.W.N. 105 (P.C.).

4. *Khantamoyce Debi v. Hridayaranda*.

1929 Cal. 149; 118 I.C. 566; 48 C.L.J. 489.

5. Per Lord Eldon, L.C. in *Gordon v. Gordan*, (1816) 3 Swans 400 at 463; 36 P.R. 910; *Martin Cashin v. Peter J. Cashin*. 1938 P.C. 103; 1939 M.W.N. 85.

6. *Ma Kyaw v. Daw Kye U*. 1935 Rang. 355; 159 I.C. 798.

7. *Mittar Sain v. Dataram*. 1926 All. 194; 90 I.C. 1000; 24 A.L.J. 185.

8. *Joti Lal Shah v. Beni Madho*. 1937 Pat. 280; 168 I.C. 512; 1937 P.W. N. 183.

family arrangement, or a waiver, does prevent a person setting up his legal title, he is estopped even on a question of law.⁹ A family arrangement which is just and equitable may be upheld, even if the family is a Mohammedan family.¹⁰ A family arrangement stands on a different footing from an ordinary contract. A settlement of doubtful claims, or rather what the parties believed to be doubtful claims without the worry and expense of litigation might itself be a sufficient "consideration" for such an arrangement. The fact that there was no other consideration to support the arrangement, or that it transferred the property to a person without any right, is not, therefore, a sufficient ground for setting aside a family arrangement.¹¹ Where a reversioner for good consideration agrees not to lay claim to a property when the succession opens out, he must in equity be held bound by that agreement.¹² Although a reversionary right cannot be the subject of a transfer, there is nothing to prevent a reversioner from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed, and, therefore, where a reversioner enters into a compromise of a doubtful claim to the property to which he has a right of succession, the compromise is binding on him and when the succession opens, he cannot claim the property in contravention of the compromise.¹³ Where the parties to a partition, who were reversioners, have acted on the assumption that the reversion had opened to them and that they had the right of dividing the properties although the partition took place during the lifetime of the widow, and have continued to enjoy the shares allotted to them from 1916 until 1939, they were held to be estopped from disputing the partition. In dealing with the question of such estoppel, it is not necessary to insist upon positive evidence that the widow had consented to the partition.¹⁴ During the lifetime of the widow, a presumptive reversioner has only a *spes successionis* in the estate of the last male-holder and he cannot, therefore, purport to convey the said interest or otherwise deal with it. His rights in the property would be crystallised only after the succession opens. But after succession opens, or even during the widow's lifetime, he may elect to stand by the transaction entered into by the widow or otherwise ratify it, in which case he would be precluded from questioning the transaction. In this connection, the cases have dealt with three different aspects of the principle of estoppel: (1) that which is embodied in Section 115 of the Evidence Act; (2) election in the strict sense of the term, whereby the person electing takes a benefit under the transaction, and (3) ratification, i. e., agreeing to abide by the transaction. A presumptive reversioner, coming under any one of the aforesaid categories, is precluded from questioning the transaction when succession opens and when he becomes the actual reversioner. So far, the law is well

9. *Allah Rabbul Almin v. Hasnain Ahmad*, 1952 All. 1011 at 1022; per *Devi, J.*
10. *Ameer Hasan v. Md. Ejaz Husain*, 1929 Oudh 134: 117 I.C. 456: 60 W.N. 51.
11. *Mst. Ichunun v. Banwari Lal*, 1929 Lah. 16: 114 I.C. 711.
12. *Raghubir Dutt Pandey v. Narain Datt Pande*, 1930 All. 498 (2): 126 I.C. 24: 1930 A.L.J. 1541; *Kanhai Lal v. Brij Lal*, 1918 P.C. 70: 45 I.A. 118: I.L.R. 40 All. 487: 47

- I.C. 207; *Beni Madho v. Shambhu Nath*, 1929 All. 196: 114 I.C. 908.
13. *Moti Shah v. Ghandhary Singh*, 1926 All. 715; I.L.R. 48 All. 637: 96 I.C. 595: 24 A.L.J. 873; see also *Bachchu Singh v. Harbans Singh*, 1953 All. 213: 1952 A.W. R. 52; *Tara Ramalingam v. Seerappa*, (1961) 3 Orissa J.D. 201, relying on A.I.R. 1958 Cal. 447.
14. *Adimoola Padayachi v. Kasi Ammal*, 1943 Mad. 701: (1943) 2 M.L.J. 178: 56 L.W. 434.

settled and there is no dispute.¹⁵ If at the time of taking benefit under the transaction the presumptive reversioner was a minor, the principle of election will also apply if after attaining majority he ratifies the transaction.¹⁶

A compromise between a widow and presumptive reversioners giving certain property absolutely to widow and the widow renouncing her claim in respect of the remaining property is binding on them and after succession opens they cannot claim to succeed to the property given to the widow.¹⁷ Where a family arrangement had been entered into on behalf of a Hindu minor and the other reversioners to the estate, and the remote reversioners had also been greatly benefited by it, the latter was held not entitled to assail it later on.¹⁸ A family arrangement is binding as much on the parties thereto as on their sons and descendants.¹⁹ If the interests of the minor children are fully safeguarded, and if all the adult members of the family accept the arrangement, it binds the minors.²⁰ In a case it has been held that, in the case of a minor, the principle of estoppel will be controlled by another rule governing the law of minors. A minor obviously cannot be compelled to take the benefit of a transaction which will have the effect of depriving him of his legal rights, when succession opens. But a minor can certainly, after attaining majority, ratify a transaction entered into on his behalf by the guardian. If he so ratifies the transaction, entered into by his guardian and accepts the benefit thereunder, there cannot be any difference in the application of the principle of election.²¹ So, where infants had since attaining their majority, by their conduct, adopted the acts of their mother and guardian and agreed to treat the will of a testator as valid, it was held that, by their acquiescence in the disposition of the property, they were estopped from disputing the provisions of the will.²² Not only may there be an estoppel giving effect to a family arrangement, but a party may, by his conduct, be estopped from insisting upon a family arrangement.²³ However, in a case

15. *Seetharamayya v. Sarva Chandayya*, 1955 Andh. 68; (1954) 2 M.L.J. Andh. 162; see also *Ramakrishna Pillai v. Tirunarayana Pillai*, 1932 Mad. 198; I.L.R. 55 Mad. 40; 139 I.C. 684; *Shah Nawaz v. Ghulam Murtaza*, 1942 Lah. 138; 201 I.C. 292; 44 P.L.R. 87; *Sakenlal Chhotalal v. Mehta Chunni Lal Manni Lal*, 1953 Sau. 146; *S. Shanmugam Pillai v. K. Shanmugam Pillai*, (1972) 2 S.C.W.R. 80; 1972 S.C.D. 659; (1972) 4 Civ. App. J. (S.C.) 56; (1972) 3 Um. N.P. 533; (1973) 2 S.C.C. 312; (1973) 1 S.C.R. 570; A.I.R. 1972 S.C. 2069.
16. *S. Shanmugam Pillai v. K. Shanmugam Pillai*, *supra*.
17. *Krishna Bihari Lal v. Gulabchand*, (1971) 1 S.C.W.R. 614; 1971 Cur. L.J. 652; (1971) 1 S.C.C. 857; 1971 U.J. (S.C.) 492; (1971) 2 U.M.N.P. 601; (1971) 1 Civ. A. P.J. 206 (S.C.); (1971) 1 S.C.J. 90; 1973 M.P.W.R. 85; 1973 A.L.J. 94; 1973 Jab. L.J. 331; 1973 M.P.L.J. 991; 1971 (Supp.) S.C. R. 27; A.I.R. 1971 S.C. 1041.
18. *Ramcharan v. Girijanandani*, A.I.R. 1959 All. 473; 1959 All. W.R. (H.C.) 85.
19. *Budhsagai v. Vishnu Sahai*, 1925 All. 366; I.L.R. 47 All. 327; 86 I.C. 554; 23 A.L.J. 141; *Bahadur Singh v. Ram Bahadur*, 1923 All. 204; I.L.R. 45 All. 277; 71 I.C. 405; 21 A.L.J. 140.
20. *Ameer Hasan v. Md. Ejaz Husain*, 1929 Oudh 134; 117 I.C. 456; 6 O.W.N. 51.
21. *Seetharamayya v. Sarva Chandravva*, 1955 Andh. 68 at 73, *supra*.
22. *Lakshmi Bai v. Gurput*, (1868) 5 Bom. H.C.R. 128; see also *Sia Dasi v. Gur Sahai*, (1880) 8 A. 362; *Rajendra Narain v. Bijai Govind*, (1889) 2 Moo. I.A. 233 234; *Damodar Dass v. Mahiran Pandah*, (1885) 13 C.L.R. 96.
23. *Janaki Ammal v. Kamalathammal*, (1873) 7 Mad. H.C.R. 263; see *P. P. Assan v. P. T. Moidin Kutti*, 1935 Mad. 140; 155 I.C. 284; 68 M.L.J. 129.

in the Calcutta High Court, where a Hindu mother bequeathed to a daughter property to which a son was entitled, adding a proviso that if male children were born to him they should inherit, and he had acquiesced in this disposition, it was held that the will was invalid, as the mother had no interest to bequeath, and also that the bequest to unborn grandsons was ineffectual, and that the son's acquiescence did not, in the circumstances, suffice to raise an estoppel and that a grandson and a purchaser from him were not estopped.²⁴ A Hindu widow in possession of her husband's estate, cannot, under the guise of a family settlement, alienate it in favour of her husband's near relations. She can, of course, represent the estate, and enter into a valid settlement, binding upon the inheritance, in cases where the estate as such or any portion of it is threatened by a serious dispute *bona fide* raised by a relation of her husband, or even by a stranger. Strictly speaking, such a settlement is not, in the ordinary sense, a family settlement. It can only be supported as a reasonable compromise entered into in the interests of the estate and therefore unassailable by any person subsequently claiming to be entitled thereto.²⁵

29. Invalid adoption acted upon. An estoppel may, in certain cases, arise where an invalid adoption has been acted upon, and the person adopted, has through representations, been led to change his original situation. So, where the defendant actively participated in the adoption of the plaintiff by the defendant's brother, and by many acts signified to the plaintiff and to his adopting father the defendant's complete acquiescence in the adoption, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed the adopting father to die in the belief that the adoption was valid, and finally concurred in the performance by the plaintiff of the funeral ceremonies, it was held that the defendant was estopped from disputing the validity of the adoption.¹ The doctrine of estoppel cannot confer on a person the status which an adoption alone can give him. But the doctrine can be invoked to prevent a challenge to the adoption by one who has induced the adopted boy to change his position so irrevocably as to render it impossible for him to revert to his original position in his natural

24. *Durga Das v. Ishan Chandra*, 39 I. C. 223 : A.I.R. 1917 C. 70 : 44 C. 145 ; see *Board v. Board*, (1873) 9 Q.B. 48 (acceptance under a will) ; *Rup Chand Ghose v. Sarbessar Chandar*, (1906) 3 C.L.J. 629 ; *Amulya Ratan Sarcar v. Tarini Nath Dey*, 27 I.C. 235 : A.I.R. 1915 C. 43 : 42 C. 254 (heir-at-law).

25. *Pullayya v. Appanna*, 1957 Andh. Pra. 847 at 851.

1. *Sadashiv Moreswar v. Harimoreswar*, (1874) 11 Bom. H.C.R. 190 ; *Chintu v. Dhonda*, ib., (1873) 192 note ; *Ravji Vinayakrav v. Lakshmi Bai*, (1817) 11 B. 381 ; *Chitko v. Janaki*, (1874) 11 Bom. H.C.R. 199 ; *Kannammal v. Virammami*, (1892) 15 M. 486 ; see how-

ever, also *Tayammaul v. Sashachalla*, (1865) 10 Moo. I.A. 429. See also *Sundarbai v. Devaji Shankar*, 1954 S.C. 82 : 1953 S.C.J. 693 ; (1953) 2 M.L.J. 782 ; *Chandi Charan v. Naba Gopal*, 1957 Pat. 365 ; *Umaram Gogoi v. Puruk Chand*, 1925 Cal. 993 : 85 I.G. 540 ; *Venkatasubhamma v. Venkamma*, 1924 Mad. 308 : 77 I.C. 214 : 19 L.W. 83 ; see also *Parmanand v. Laxmi Narain*, 1955 M.B. 129 : 1955 M. B.L.T. 718 ; *Udit Narain Singh v. Ramdhir Singh*, 1923 All. 58 : I.L.R. 45 All 169 : 69 I.C. 971 ; *Chuhar v. Mst. Jas Kaur*, 1917 Lah. 439 : 41 I.C. 927 ; see also next note.

family.² Where the defendant who challenged the adoption was the grandson of a party to the compromise under which the adoption was made and under which he received a material benefit and who was present and consenting when the ceremonies were performed, the defendant was held to be estopped from disputing the adoption and was held bound by his grandfather's action.³ But in order that estoppel by conduct may raise an invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must then become so altered that it would be impossible to restore him to it.⁴ It is not cast upon the person who sets up the estoppel to prove conclusively that he was in fact damnified by the father resiling from the story of the adoption, but it is enough if he proves to the satisfaction of the Court that the likelihood of his being prejudiced by the alteration of position was so great that the Court will presume that the plaintiff must have been damnified. The estoppel operates only against the persons responsible for the change of circumstances in the life of the adopted son.⁵ In a case in the Madras High Court, it was held that an invalid adoption does not *per se* change the adoptee's rights in his natural family, and that, in such a case, no estoppel arises unless, as a consequence, the position of the party setting up the estoppel is changed to his disadvantage.⁶ If no giving and taking in adoption is proved to have taken place, a person's presence or his subsequent acquiescence in the adoption or its acknowledgment will not estop him from challenging the validity of the adoption.⁷ In the undermentioned Madras case,⁸ it was held that the rule of estoppel by conduct does not apply, when an adoption is made by a person in full belief that the adoption is valid in law, and thereby and by the subsequent conduct of the adopter, the person adopted is induced to abstain from claiming a share in the inheritance of his

2. *Laxman v. Mst. Bayabai*, 1955 Nag. 241, 243 : I.L.R. 1955 Nag. 656 : 1955 N.L.J. 785 ; *J. Parasuramayya v. J. Venkataramayya*, 1927 Mad. 777 : 103 I.C. 855 : 1927 M.W.N. 311.
3. *Moman v. Mst. Dhanni*, 1920 Lah. 415 : I.L.R. 1 Lah. 31 : 55 I.C. 869.
4. *Parvatibayamma v. Ramakrishna*, (1894) 18 Mad. 145 : 5 M.L.J. 44, following *Gopalayyan v. Raghupati Ayyan*, (1878) 7 Mad. H.C.R. 250; *Kuverji v. Babai*, (1894) 19 Bom. 974. For cases in which it was held there was no estoppel, see *Gurulingaswami v. Ramalakshamma*, (1894) 18 Mad. 55 : 4 M.L.J. 237 ; *Santappayya v. Rangappayya*, (1894) 18 M. 397 : 5 M.L.J. 66 ; *Yeshvant Puttu v. Radhabai*, (1889) 14 B. 312 and see *Tirini Charan v. Saroda Sundari*, (1889) 3 B.L.R. 145 ; *D. Veeraraghava Reddy v. D. Kamalamma*, 1951 Mad. 405 : (1950) 2 M.L.J. 575 : 63 L.W. 952 : 1950 M.W.N. 710 (it is unnecessary to measure extent of

prejudice).

5. *J. Parasuramayya v. J. Venkataramayya*, 1927 Mad. 777 ; *Ra Dharan Kunwar v. Balwant Sing* 39 I.A. 142 : I.L.R. 34 All. 396 : 15 I.C. 673 (P.C.).
6. *Vaithilingam Mudali v. Muniga* 1914 Mad. 460 : I.L.R. 37 Ma. 529 : 15 I.C. 299 ; *Ramachari Saraswati Ammal*, 1920 Mad. 619 : 60 I.C. 246 : 12 L.W. 544 : 19 M.W.N. 421.
7. *Gopee Lall v. Mst. Sree Chundraol Buhoojee*, (1873) 19 W.R. 12 : A. Sup. Vol. 131 : (1872) Beng. L.R. 391 ; *Dhanraj Joharn v. Soni Bai*, 1925 P.C. 118 : I.A. 231 : I.L.R. 52 Cal. 482 : 87 I.C. 357 ; *Tirkangauda v. Shiva pa*, 1944 Bom. 40 : I.L.R. 19 Bom. 706 : 212 I.C. 232 ; *Pern nand v. Laxmi Narain*, 1955 M. 129 ; *Ram Chandra Narayan Murlidhar Yeshwant*, 1938 Bom. : 173 I.C. 36 : 39 Bom. L.J. 599.
8. *Eranjoli Vishnu v. Eranjoli Krishnan*, (1883) 7 Mad. 3.

natural family, so as to prevent a person claiming through the adopter from impugning the validity of the adoption. But the construction which was placed by this decision on the word "intentionally" in Section 115 was overruled by the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha*,⁹ in which case their Lordships said of the Madras case cited that they would have "great difficulty in holding as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recognised constitute a representation in law only, and not of fact."

In a case in the Punjab High Court, where a second son had been adopted in the lifetime of the first, and the first had permitted him to share the inheritance, it was held that the first adopted son and his representatives were not estopped from denying the validity of the second adoption though they would not have been allowed to deny the fact of such adoption.¹⁰ In this case, the decision in *Sarat Chunder Dey v. Gopal Chunder Laha*,¹¹ was distinguished on the ground that the Madras case overruled by it was on matters of fact and that the Privy Council did not suggest that the section covered not only facts but also representations in law.¹² Even if a person represents to the adoptee that he could be validly given in adoption there is no representation of a fact to constitute an estoppel under this section. Similarly, his subsequent conduct in recognising the adoptee as an adopted son for a number of years though giving rise to an inference that the conditions necessary for an adoption were duly fulfilled does not operate as an estoppel. He cannot on that account dispute the fact of adoption, but its legality cannot be established by mere estoppel.¹³ When in a suit to set aside an adoption brought by the adoptive mother against her adopted son, it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant, and that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of it celebrated, and that the defendant performed the *shraddh* ceremony of his adoptive father, and had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, it was held by the Allahabad High Court that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void.¹⁴ And this decision has been upheld by the Privy Council, which declared that the estoppel was personal and would not bind anyone claiming by an independent title.¹⁵ As to estoppel arising by reason of the recognition by one member of a joint Hindu family of another as being also a member,¹⁶ or by reason of plaintiff treating defendant as being in certain relationship to common ancestor; see the res-

9. 19 I.A. 203, 218 : I.L.R. 20 Cal. 290. As to estoppel on a point of law; see *Gopee Lall v. Mst. Sree Chandraleek Buhoojee*, (1873) 19 W.R. 12 : 11 L.R. 391 : I.A. Sup. Vol. 131 : 3 Sar. 217 followed in *Dhamraj Joharmal v. Soni Bai*, 1925 P.C. 118 : 52 I.A. 231 : I.L.R. 52 Cal. 482 : 87 I.C. 357 (P.C.).
10. *Tek Chand v. Mst. Gopal Devi*, 46 P.R. 1912 at p. 171.
11. 19 I.A. 203, 218 : I.L.R. 20 Cal. 296.

12. *Dharam Kunwar v. Balwant Singh*, (1908) 30 All. 549.
13. *Tirkangauda v. Shivappa* 1944 Bom. 40 : I.L.R. 1943 Bom. 706 : 212 I.C. 232.
14. *Dharam Kunwar v. Balwant Singh*, (1908) 30 All. 549.
15. *Dharam Kunwar v. Balwant Singh*, 39 I.A. 142, 143 : I.L.R. 34 All. 398 : 15 I.C. 673 (P.C.).
16. *Lala Muddun v. Khikhinda Koer*, 18 I.A. 9 : I.L.R. 18 Cal. 341 (P.C.).

pective under-noted cases.¹⁷ In the last-mentioned case, it was pointed out that, though a course of conduct may not amount to an estoppel in point of law, it may nevertheless be strong evidence and throw upon the party, whose conduct is in question, a heavy burden of proof. The correct rule of estoppel applicable in the case of adoption is that it does not confer status. It shuts out the mouth of certain persons if they try to deny the adoption; but where both the parties are equally conversant with the true state of facts, this doctrine has no application.¹⁸

30. Other instances of estoppel by conduct. Where it has been understood by the parties that a certain mortgage has been converted into a sale and that the property has passed to the defendant by purchase, the mere admission that it has been converted into a sale does not operate as an estoppel or prevent the mortgagor from redeeming the property.¹⁹ And where one person agrees to sell immovable property to another, and in pursuance of the agreement, the promisee pays earnest and, by a registered document, the earnest is made a charge upon the property, but subsequently, on finding that the promisor has no title to the property, the parties repudiate the agreement, but afterwards the promisor acquires title to the property and sells it to a third person, then, since, before the sale of the property, the agreement is repudiated by the parties and does not subsist, the statement contained in it no longer provides a declaration, act or omission within the meaning of this section to ground a plea of estoppel.²⁰ But where a mortgagor hypothecates property over which he has no title along with property over which he has a good title, and the mortgaged properties are sold in execution of the mortgage-decree, and the mortgagor acquires title to property subsequently to the sale, the auction-purchaser can prevent the mortgagor and his representatives from claiming that property under the rule of estoppel.²¹ Where sale deed is not executed by the seller but he has received consideration and has delivered possession to the purchaser over the property, it is not open to the seller after the expiry of long time to say that he is not under an obligation to execute the sale deed.²²

Having accepted the plaintiff's allegation that lease is only in respect of land and having allowed the trial court to proceed on that basis, the defendant is estopped from contending in appeal that the lease was also in respect of construction standing on that land.²³ Where an assessee gives up a portion of his claim voluntarily before the Taxing authority, he cannot be heard to say that the higher Tribunal should consider the point whether the claim given up by him is at all taxable.²⁴ Where the J. D. requested the Court

17. *Agarwal Singh v. Foujdar Singh*, (1880) 8 C. L. R. 346.

18. *Kishorilal v. Mst. Chaltibai*, 1959 (Sup.) 1 S.C.R. 638: 1959 S.C.J. 560: A.I.R. 1959 S.C. 504.

19. *Abdul Rahim v. Madhavrav Apaji*, (1889) 14 B. 78.

20. *Panchanan v. Nirode Kumar*, A. I.R. 1962 C. 12.

21. *Arulai v. Jagdeesiah*, A.I.R. 1964 M. 122: I.L.R. (1964) 1 M. 85: 76 L.W. 603.

22. *Ghulam Qader v. Ghulam Hussain*, 1972 Kash. L.J. 107: 1972 J. & K. L.R. 236: A.I.R. 1973 J. & K. 11 (F.B.).

23. *Moti Lal Bhatia v. Usuf Ali*, 1972 Ren. C.R. 475: 1972 Ren. C.J. 225: 1972 M.P.W.R. 268: 1972 Jab. L.J. 532: 1972 M.P.L.J. 187.

24. *Central Camera Co. (P) Ltd. v. The Government of Madras*, (1971) 27 S.T.C. 112 (Mad.).

that sale be not advertised in newspaper he cannot turn round and say that auction sale is illegal on that ground.²⁵

Even if a Consolidation Officer had no jurisdiction to refer a matter to arbitration but did so, and the award given by the Arbitrator was in fact accepted by the parties and acted upon, it was a case of the parties having come to an agreement which was accepted by the Consolidation Officer and the order passed by him would operate as an order based upon consent and agreement of the parties. Such an order will operate as an estoppel in subsequent litigations between the parties.¹

If the petition before the Regional Transport Authority does not raise the question of that tribunal being properly constituted, the applicant is precluded by his own conduct from raising it in a writ petition to the High Court.²

When a party submitted himself to rules and conditions duly notified and took a chance of purchasing and getting a licence under the said terms and conditions, he cannot later on turn round and say that the Mysore Excise (Disposal of Privileges of Retail Vend and Liquors) Rules, 1967.³

A person who submits himself to the jurisdiction of an authority (District Magistrate in the instant case), is estopped from challenging that jurisdiction.⁴ But when an officer had absolutely no jurisdiction a party acquiescing is not estopped from contending subsequently that the decision is *non est*.⁵

Where the petitioner, a transport operator, appeared before the Regional Transport Authority in answer to notices for cancellation of his permits and took part in the proceeding, he cannot, in a writ petition to quash those proceedings, contend that the Regional Transport Authority had no jurisdiction or power to take cognizance of the matter.⁶

Where the parties do not lead any evidence on any of the factors mentioned in Section 8 of the Jammu and Kashmir Houses and Shops Rent Control Act 14 of 2009 but ask the court to pass an order in terms of their agreement, such conduct of the parties clearly operates as an estoppel in a second application for the same relief.⁷

Proof of knowledge is proof of consent or acquiescence. A court cannot put aside the inference flowing from probabilities and the normal course of

25. Karnataka Bank Ltd. v. K. Shammanna, A. I. R. 1972 Mys. 321.

1. Sukhbasi v. Ram Charan, 1968, A.L.J. 123 : 1968 A.W.R. (H.C.) 350 (352); Kashinath Yamosa v. Narasingha, A.I.R. 1961 S.C. 1077.

2. H. C. Channiah v. Regional Transport Authority, 12 Law Rep. 549 (550).

3. P. Bhooma Reddy v. State of Mysore, (1968) 16 L.R. 285 (303).

4. Nadia Dt. Bus Owner's Association v. District Magistrate, Nadia, A.I. R. 1969 Cal. 458 (460).

5. G. S. H. S. S. Nayagaon Saren v.

State of Bihar, 1975 Labour I.C. 947 : (1975) 1 Serv. L.R. 234.

6. Central Karnataka Motor Services, Ltd. v. State, (1968) 16 Law Rep. 492 (494).

7. Autar Singh v. Sohan Lal, A.I.R. 1970 J. & K. 26 (28) (F.B.). See Venkatasubba Rao v. Jagannadha Rao, (1964) 2 S.C.R. 310 : 1964 2 S.C.J. 518 : (1964) 2 S.C.W.R. 75 : (1964) 2 A.W.R. (S.C.) 112 : (1964) 2 Andh. L.T. 359 : (1964) 2 M.L.J. (S.C.) 112 : A.I.R. 1967 S.C. 591.

conduct of parties for a long time (alterations, substitutions, remodelling and renovations of theatre by plaintiffs-lessees with the knowledge of the defendants-lessors.⁸

A plaintiff is not prevented from claiming relief on an alternative basis. He is not estopped from averring what can be truly and correctly gathered from the record.⁹

When the committee could not call for applications for appointment, the presentation of an application, pursuant to the notification advertised in exercise of a non-existent power, by an existing employee of the Wakf Board, cannot amount to an estoppel so as to prevent the applicant from challenging the decision of the Wakf Board.¹⁰

Inviting applications from all over India does not estop selection of candidates who had passed from a particular University.¹¹

Where a cheque is sent in full and final settlement of all the dues, and the creditor accepts the cheque and realises it, the real emphasis is not on the acceptance of a smaller sum of money when a larger sum is due but on the acceptance of the debtor's condition that if the tendered money be at all accepted it must be so done in discharge of the entire debt. If the creditor accepts the money on the debtor's condition, he is estopped from claiming more.¹² Where two members of a joint Hindu family had held out another as the manager of the estate so as to induce outsiders dealing with him to believe he had authority to mortgage the whole interest in the property, those members were estopped from contending that the mortgages effected by that other were not binding on their shares, if that other did, as a matter of fact, borrow the money for the benefit of the family.¹³

A receipt is nothing but an admission by the party making it that he is receiving the money specified in the document. It is an admission against his own interest and, of course, he is bound by it, and so are those who claim through or under him. It is not an admission against any person not claiming through him.¹⁴

31. Estoppel in case of inconsistent positions. See also comment under Head 6 of Introductory Note. An estoppel may arise in the case of inconsistent positions. It is well settled that a party cannot be allowed to approbate and reprobate. A party cannot be heard who says things contrary

8. *Isherdas Sahni & Bros. v. Rajeswara Rao*, (1968) 2 M.L.J. 233 (253); 81 M.L.W. 531.
9. *Harisingh v. Ratanlal*, 1969 J.L.J. 639 (642); 1969 M.P.L.J. 662; 1969 M.P.W.R. 946; 1969 Ren. L.R. 877; 1969 Ren. L.J. 961.
10. *Mohd. Dilawar Ali v. A.P. Muslim Wakf Board*, (1967) 1 Andh. W.R. 221; A.I.R. 1967 A.P. 291 (293).
11. *Mrs. Jasmine v. Union of India*, (1977) Lab. I.C. 773; (1976) 1 Karn. L.J. 391; (1976) 2 Serv. L.R. 215; (1977) 1 Lab. L.J. 12.
12. *Dipchand v. M. Abhechand & Co.*

- A.I.R. 1962 C. 166; 65 C.W.N. 754.
13. *Krishnaji v. Moro*, (1890) 15 B. 32; as to standing-by during alienation by father; see *Surab Narain v. Shew Gobind*, (1873) 11 B.L.R. App. 29; as to acquiescence of Hindu minor after attaining majority, see *Gopal Narain v. Muddomutty*, (1874) 14 B.L.R. 32.
14. *Govind v. Chandrabhaga*, 1916 Nag. 61; 34 I.C. 675; 12 N.L.R. 100; followed in *Shamlal Shrikrishan v. Mst. Jiyabai*, 1944 Nag. 62; I.L.R. 1943 Nag. 678; 211 I.C. 306.

to each other. The maxim creates a sort of estoppel. The reason is that consistency of proceeding is required of all those who come or are brought before Courts. One, who without mistake induced by the opposite party, takes a particular position deliberately in the course of a litigation, must act consistently with it. One cannot play fast and loose. So, where the defendant in a case successfully contests the competency of execution proceedings on the basis of a decree on the ground that the decree contemplated enforcement of the claim by a separate suit, he cannot be allowed to say, when the plaintiff files such a suit, that the suit is not the appropriate remedy.¹⁵ So, where the plaintiff puts the actual value of the subject-matter of the suit in the plaint which is not erroneous, he is precluded from subsequently contending the valuation given by him in the plaint was wrong.¹⁶ Before the doctrine can apply, there has to be estoppel in one form or the other.¹⁷ If there is no estoppel, there can be no question of the rule of approbation and reprobation coming into operation.¹⁸ In the abovenoted case, a suit was filed for declaration of ownership of land by adverse possession. The defendants pleaded that plaintiffs were tenants and there was no question of ownership by adverse possession. No issue was framed in that suit whether plaintiffs were tenants of defendants, and the suit was dismissed. Subsequently, the defendants filed a suit for possession of the land on the ground that the plaintiffs of the former suit were trespassers. In the earlier suit, the defendants admitted that those plaintiffs were tenants but in the subsequent suit that admission was found erroneous and was withdrawn. Nothing that was done by the defendant of the previous suit made the plaintiffs of the former suit alter their position in any manner. In both the suits, those plaintiffs claimed to be the owners of the land. The defendants in the former suit did not derive any benefit by the previous litigation. Under these circumstances, it was held that the rule of approbation and reprobation did not apply. The admission having been held to be erroneous was held not binding on the defendants of the previous suit. Besides, it was held that the plaintiffs of the former suit, having claimed ownership by adverse possession in the earlier suit, could not, in the subsequent suit, plead that they were the tenants of the defendants of the previous suit on the basis of their admission. It was observed that the rule of estoppel did apply to the plaintiffs of the earlier suit.

A party cannot be permitted to assume inconsistent positions in a court to the detriment of his opponent.¹⁹

If a party in a suit raises the plea that property is a wakf property, he is debarred in a subsequent suit from alleging to the contrary.²⁰

Where a party is given option either to amend his pleading, or to supply particulars, or to strike off particular paras, as being vague and that party chooses merely to amend his pleading, he loses his right to adopt the alternative.²¹

15. *B. S. Lal v. Sardar Mal*, A.I.R. 1964 M.P. 124 : 1963 M.P.L.J. 79.

16. *Budhi Panigrahi v. Bhagirathi*, A.I.R. 1962 Orissa 159.

17. *Nagubai v. Shama Rao*, 1956 S.C. R. 451 : A.I.R. 1956 S.C. 593.

18. *Rulhu Ram v. Than Singh*, A.I.R. 1967 Punj. 328 : 68 Punj. L.R. 866.

19. *Hari Singh v. Ratan Lal*, 1969 J.L.J. (639) 642 : 1969 M.P.L.J. 662 : 1969 M.P.W.R. 946.

20. *Ghasi v. Wakf Alalaulad*, 1969 A.L.J. 923 (925) : 1969 A.W.R. (H.C.) 602.

21. *Amin Lal v. Hunna Mal*, A.I.R. 1965 S.C. 1243 : (1966) 1 S.C.J. 43.

A party cannot both approbate and reprobate. Where one of the two Courts would have the necessary jurisdiction, a party cannot be heard to contend in one Court that the other Court alone had the requisite jurisdiction, and to contend precisely to the opposite effect in the other Court. There is a clear estoppel against this kind of pleading.²²

Where a person is allowed to appear for a competitive examination, as being duly qualified, and he is successful in that examination, and is appointed as a probationer for two years, but is discharged after the expiry of probationary period on the ground that he was not qualified to appear at the competitive examination, and in the meanwhile the person becomes overage, the Government is estopped by the doctrine, and his discharge is illegal.²³ When an unqualified person was appointed and confirmed with the knowledge that he is not a law graduate, the Government is estopped from removing him on that ground.²⁴ The principle of estoppel is not applicable against termination of a temporary appointment when the person knew that his appointment was temporary.²⁵ Selection Committee is not estopped from not admitting a candidate in Medical College on the ground of not proving his domicile simply because the candidate was allowed to appear for competitive test.¹ Where a Hindu reversioner compromised with the widow and benefited by such compromise, he was held estopped from claiming the estate when the succession opened.² So also, a reversioner who had voluntarily signed the deed executed by a widow cannot legally claim in opposition thereto.³ So, in the case last cited, where some of the sons of a Hindu widow who had only a daughter's interest in the property joined in the mortgage executed by her and thus represented that the property was being mortgaged by their mother for legal necessity, it was held that the sons could not be allowed to go back upon those representations, when dealing with a party who had changed his position relying on the representations of fact, and were estopped from denying the validity of the mortgage to which they were parties. In the case cited, a Hindu reversioner relinquished his rights to a portion of the inheritance in favour of the widow in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance. It was held, that neither the reversioner nor any person claiming through him could set up that the relinquishment was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow.⁴ Where a suit, to enforce a security-bond filed in a Privy Council appeal, was dismissed on the grounds (a) that the necessary parties had not been impleaded, and (b) that the claim was barred by Section 47 of the Civil Procedure Code, and in an application for execution to enforce the said security being made, the decree-holder was met

22. *Controller of Insurance v. Vanguard Insurance Co. Ltd.*, A.I.R. 1966 M. 437; (1966) 1 M.L.J. 196.
23. *K. Jagannadhan v. District Collector*, A.I.R. 1966 A.P. 59; (1965) 2 Andh. W.R. 437.
24. I.L.R. 1973 H.P. 171.
25. *S. Subramanyam v. Executive Officer*, (1974) 1 Lab. L.J. 464 (Mad.).
1. *N. K. Devi v. K. Medical College*, I.L.R. (1973) A.P. 1155; A.I.R. 1972 A.P. 83.

2. *Lala Kanshi Lal v. Lala Brij Lal*, 2 C.W.N. 914 (P.C.); *Asha Beevi v. Karuppan Chetty*, 1918 Mad. 119; I.L.R. 41 Mad. 365; 45 I.C. 35; 34 M.L.J. 460; 7 L.W. 215.
3. *Shib Chandra Kar v. Dulcken*, 1918 Cal. 13; 48 I.C. 78; 28 C.L.J. 123.
4. *Jogendra Nath Bhunya v. Mohindra Ghora*, 1919 Cal. 964; 47 I.C. 978.

with the plea that the order passed before the institution of the above suit in a previous execution proceeding referring him to seek his remedy by suit, operated as a bar to a fresh application for execution. It was held, that the order passed in the suit had the effect of nullifying the previous order passed in the execution proceeding, and that a party should not be allowed to take up a position inconsistent with that on which he had succeeded in defeating a claim in a previous proceeding brought to enforce it.⁵ One out of two plaintiffs joined in an application with the defendant to the Court for the case to be referred to arbitration. On the next day, the other plaintiff, G. R. conducted the proceedings throughout on behalf of the plaintiffs. An award was duly filed but G. R. objected to it on the ground that he had not signed the original application to the Court for an order of reference. It was held that G. R. was estopped by his own action from raising any objection as to the legality of the arbitration proceedings on account of the want of his writing.⁶

An award, apart from anything else, operates as estoppel.⁷ If goods are in a man's possession, order, or disposition under such circumstances as to enable him by means of them to obtain false credit, the owner who has permitted him to obtain that false credit must suffer the penalty of losing his goods for the benefit of those who have given the credit.⁸ Where an offer of sale was made to a pre-emptor, and he refused to avail himself of it, and consented to a sale to a stranger, it was held that after a sale to a stranger, he could not set up his right of pre-emption.⁹ See for the effect of an admission as to the rate of interest in an account stated by a banker, the case noted below.¹⁰ The service of notice of foreclosure on the occupant of mortgaged property (a party who claimed as purchaser from the mortgagor, but who had not established his title) does not estop the mortgagee from disputing the occupant's title to redeem the mortgaged premises.¹¹ If a person takes out probate of a will, his heirs are not estopped from disputing the will.¹² *Semble*, a tenant may be estopped from objecting to the terms of a *patta* where he has accepted *pattas* containing similar terms for a series of years previously in respect of the same holding and has, by his conduct, led the landlord to suppose that the *patta* would not be objected to.¹³ In *Chauhan v. Bihari Lal*,¹⁴ A sold a share in the equity of redemption of certain property to B and in a suit by B to redeem the mortgage, A applied to the Court stating that he also had a right in the equity of redemption and asked to be joined with B as a co-plaintiff. This was allowed and the redemption suit fought out by the two co-plaintiffs. Subsequently, A sued for cancellation of the sale of the equity of redemption to B on the ground of fraud. Held, that as, by his conduct in the redemption suit, A had elected to affirm the sale and to act upon it, he was not entitled to the relief he was now seek-

5. *Basti Begam v. Sajjad Mirza*, 1918 Oudh 442: 47 I.C. 558: 21 O.C. 188.

6. *Gauri Shankar v. Ganga Ram*, 1919 Lah. 381: 52 I.C. 859.

7. *Municipal Committee v. Harda Electric Supply Co.*, A.I.R. 1964 M.P. 101: 1964 M.P.L.J. 579.

8. *Baileau v. Miller*, (1882) 10 C.L.R. 591.

9. *Braja Kishore v. Kirti Chandra*, L.E.—385

(1871) 7 B.L.R. 19.

10. *Makundi Kuar v. Balkrishen Das*, (1880) 3 A. 328.

11. *Prannath Roy v. Rookea Begum*, 7 Moo. I.A. 323: 4 W.R. 37.

12. *Mahomed Mudan v. Khodezunissa*, (1865) 2 W.R. 181.

13. *Sree Sankarachari v. Varada Pillai*, (1903) 27 M. 332.

14. 1919 Oudh 192: 52 I.C. 513.

ing. Where a party to a suit agreed to a decree in favour of his opponent on certain conditions which were not afterwards fulfilled, and the compromise fell through, the admissions made by him for the purpose of compromising the litigation were held not to amount to a waiver of his right. Nor did they prevent the party's representative from pleading the true state of facts in any other litigation.¹⁵ Where a mortgagee, on enquiry by an intending vendee, gives him the exact amount due on his mortgage and the latter acts on his information and retains that amount out of the purchase-money for paying off the mortgage, the mortgagee is estopped from recovering any larger amount from the vendee.¹⁶ Where a prior transferee by his conduct, amounting to a representation that though he took a conveyance, the transferor remained the owner of the property and had authority to dispose of it, misled others to purchase the property, it was held that he was estopped from subsequently denying that the transferor was the owner of the property and competent to dispose of it.¹⁷ A man, who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.¹⁸ A mortgagee who causes the mortgaged property to be sold in execution of a decree, other than a decree obtained upon his mortgage without notifying to the intending purchaser the existence of his mortgage lien, is estopped for ever from setting up that lien against the title of a *bona fide* purchaser.¹⁹ But, no such estoppel arises, if the omission to mention the charge in the sale proclamation was more likely due to an omission on the part of some officer of the Court than to any deliberate omission on the part of the charge-holder,²⁰ or if the auction-purchaser had notice of the charge.²¹ Where a mortgagee takes an active part in bringing about a sale and, by his silence or acquiescence, leads the purchaser to believe that he was purchasing unencumbered property, the mortgagee is estopped from setting up his mortgage to the prejudice of the purchaser.²² Where a mortgagee takes a mortgage from a person in possession and obtains possession from him, he is not permitted to question the mortgagor's title.²³ A mortgagee brought a suit for possession of the mortgaged property against a person whom he treated as a successor of the original mortgagor. It was held that the mortgagee was estopped from raising the plea.²⁴

32. Representation in writing. As already observed, it makes no difference what form the representation takes, or whether it be written or

15. *Tikaya Ram v. Wassu Misr*, 1919 Lah. 148 : 50 I.C. 564.

16. *Secretary, Chief Khalsa Dewan v. Punjab National Bank*, 1920 Lah. 382 : 55 I.C. 492; 3 L.L.J. 274.

17. *Md. Batcha Sahib v. Arunachalam*, 1926 Mad. 39 : 90 I.C. 875 : 49 M.L.J. 396 : 1925 M.W.N. 596.

18. *Munnoo Lal v. Lalla Choonce Lal*, (1873) 1 A. 144 : 21 W.R. 21 ; *Jia Lal v. Mst. Sacra Bibi*, 1927 Oudh 104 : 99 I.C. 2 ; *R. M. P. A. Z. Chettiar Firm v. Ko Maung Gale*, 1935 Rang. 191 : I.L.R. 13 Rang. 346 : 156 I.C. 707 (representation by agent of mortgagee).

19. *Muhammad Hamiduddin v. Shib Sahai*, I.L.R. 21 All. 309 : (1899)

19 A.W.N., 87 ; *Manik Ram v. Ram Autar*, 1915 Oudh 185 : 27 I.C. 611 : 2 O.L.J. 22.

20. *Ram Sarup v. Bharat Singh*, 1921 All. 115 : I.L.R. 43 All. 703 : 64 I.C. 763.

21. *Jnanendra Nath v. Sashi Mukhi*, 1940 Cal. 60 : 186 I.C. 833 : 44 C.W.N. 240.

22. *Dara Sivarao v. Kola Subbarao*, 1934 Mad. 302 : 148 I.C. 612 : 66 M.L.J. 563.

23. *Surendra Nath Mitra v. Khitendra Mohan Mitra*, 1919 Cal. 314 : 53 I.C. 59 : 29 C.L.J. 434.

24. *Govind v. Chokhe*, 1919 Oudh 190 : 49 I.C. 356 : 6 O.L.J. 1.

verbal²⁵ in India, there is no technical doctrine of estoppel by deed; estoppels arising from written matter are only one form of the general estoppel by representation for which provision is made by the present section. It will, however, prove useful to note some of the general principles touching estoppels in writing and the cases decided thereon.¹ The intention of the deed, as appearing on the face of it, must be regarded. A recital will be binding, if it was a bargain on the faith of which the parties acted.² The deeds and contracts of the people of India ought (the Privy Council have said) to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties, which the transaction discloses.³ A party will be precluded from contradicting an instrument to the prejudice of another only, where that other has been induced to alter his position upon the faith of the statement contained in the instrument. Recitals, therefore, which have not had this effect cannot operate as estoppels.⁴ So, a statement of consideration in a deed is not conclusive evidence of the existence of such consideration, but it is only evidence as far as it goes;⁵ and so also a receipt may be contradicted or explained.⁶ Estoppels must be made out clearly, and this is an ancient rule as to estoppel by statements in a deed.⁷ Those who rely upon a document as an estoppel, the nature of an estoppel being to exclude an inquiry by evidence into the truth must clearly establish that it does amount to that which they assert.⁸ If the document is ambiguous, the construction of it may be aided by looking at the surrounding circumstances.⁹

25. As to certain classes of documents which (amongst others) may raise an estoppel, see Caspersz. op. cit., 4th Ed., ss. 377—385; Holding v. Elliot, 5 H. & N. 117; document representing goods, such as warehouse receipts and delivery orders; *Ganges Manufacturing Co. v. Sourajmul*, (1880) 5 C. 669; *Knights v. Wiffen*, (1870) L.R. 5 Q.B. 660; *Coventry v. The Great Eastern Ry. Co.*, L.R. (1883) 11 Q.B.D. 776; *Seton v. Lafone*, L.R. (1887) 19 Q.B.D. 68; *Farmloo v. Bain*, L.R. 1 C.P.D. 445; railway receipts; *G. I. P. Railway Co. v. Hanmandas Ramkison*, (1889) 14 B. 57; bills of lading; *Lishman v. Christie*, 19 Q.B.D. 333, 340; *Grant v. Norway*, 10 C.B. 665; *Cox v. Bruce*, 18 Q.B.D. 147; *Sind*, etc. *Bank v. Mudsoosoodun Chowdhry, Bourke*, (1865) O.C. 322; see as to accounts and awards, Caspersz, op. cit., 4th Ed., ss. 386—399.

1. See Caspersz, op. cit., 4th Ed., Ch. XIV. where the Indian cases will be found collected.
2. *South-Easter Railway Co. v. Wharton*, 6 H. & N. 520, 526.
3. *Hunooman Persaud v. Mst. Baboe Manraj Koonweree*, (1856) 6 Moo. I.A. 411, per Knight Bruce, L.J.,

and see *Ramlal Sett v. Kanai Lal*, (1886) 12 C. 663; *Shripat Singh Dugar v. Prodyot Kumar*, 1916 P.C. 220; 44 I.A. 1; I.L.R. 44 Cal. 524; 39 I.C. 252; *Kasturchand Lakhmaji v. Jakhia Padia*, I.L.R. 17 Cal. 584 (P.C.).

4. *Mst. Sampat Kuer v. Ram Lal*, 1937 Pat. 598; 171 I.C. 711; *Zarotan Nessa v. Faizur Rahman*, 1955 Assam 126.
5. *Param Singh v. Lalji Mal*, 1 A. 403, 410; see this case considered and on certain points dissented from in *Chenvirappa v. Puttappa*, (1887) 11 B. 708.
6. See S. 92, Prov. (I), ante, and cases there cited, and *Ram Surun v. Pran Peare*, (1870) 13 Moo. I.A. 551, 559; *Zamindar Serimata v. Virappa Chetti*, (1884) 2 Mad. H. C.R. 174; v. post.
7. *Tweedie v. Poorne Chunder*, (1887) 8 W.R. 125; *Mama v. Sallayjee*, 1918 L.B. 53; 46 I.C. 609.
8. *Low v. Bourverie*, L.R. (1891) 3 Ch. 106.
9. *Rani Mewa v. Rani Hulas*, (1874) 13 B.L.R. 312; see *Seva Ram v. Ali Bakhsh*, (1881) 3 A. 805, where the estoppel was held to have been clearly made out.

Where a plaintiff sued the defendant to recover a sum of money by attachment and sale of certain property in the legal possession of the defendant; and both the plaintiff and the defendant professed to receive their title by virtue of a document which the Court found was invalid according to Mahomedan law; it was held, that the defendant was not estopped from denying its validity, and the Court was not bound to hold that the document, as between the parties, was valid. The defendant being *in* possession, it was for the plaintiff to establish her right to attach and sell the property by showing superior title in herself, whatever might be the rights of the defendant.¹⁰ In a case in the Calcutta High Court, it was held that since a non-transferable occupancy holding cannot be bequeathed, the heir-at-law is not estopped from denying the validity of a devise in a will which purported to bequeath such a holding.¹¹ In this case it was said that the Court was not prepared to accept, as an inviolable principle of law, the rule that in every case of gift the doctrine of estoppel may be applied, and it was pointed out that in this instance the beginning of the heir-at-law's right and of the operation of the will were simultaneous.¹²

A receipt signed by a party, like any other statement made by him and produced afterwards to affect him, is evidence but evidence only, and is not conclusive but capable of explanation.¹³ It may, however, like any other statement, be conclusive evidence in favour of any person who may have been induced thereby to alter his condition.¹⁴ Thus, when in a registered deed of sale it was recited that the vendor had received payment in full and there was also an acknowledgment by the vendor to that effect, and the vendor parted with the title-deeds, it was held that she was estopped from claiming a lien for an unpaid balance of purchase-money against a mortgagee for value without notice.¹⁵ In the case of a mortgage, executed by the manager of a joint Hindu family, the executant of the mortgage is estopped from denying the correctness of the recitals made by him, "if on the faith thereof if the creditor may have been led to advance the loan. The other coparceners are, however, not bound by the recitals, and the burden of proof of legal necessity or benefit of the family rests on the creditor."¹⁶ It has been

10. *Rani Mewa v. Rani Hulas*, (1874) 13 B.L.R. 312; see *Seva Ram v. Ali Baksh*, (1881) 3 A. 805, where the estoppel was held to have been clearly made out and see S. 92, Prov. 6.

11. *Kuvarbai v. Mir Alam*, (1883) 7 B. 170.

12. *Amulya Ratan Sarkar v. Tarini Nath Dey*, 1915 Cal. 43 : I.L.R. 42 Cal. 254 : 27 I.C. 235 : 21 C.L.J. 187 : 18 C.W.N. 1290; see *Durga Das Khan v. Ishan Chandra Dey*, 1917 Cal. 70 : I.L.R. 44 Cal. 145 : 39 I.C. 223.

13. *Farrar v. Hutchinson*, 9 A. & E. 641; a receipt is nothing more than a *prima facie* acknowledgment that the money has been paid; *Skaife v. Jackson*, 3 B. & C. 421; *Graves v. Key*, 3 B. & Ad. 318; see S. 91, Illust. (v), ante and cases at 666-667 ante. On the other hand, while

a receipt is only evidence of payment, a release annihilates the debt; *Bowes v. Foster*, 2 H. & N. 779.

14. *Graves v. Key*, 3 B. & A. 318; see *Rice v. Rice*, 2 Drewry, 73 (unpaid vendor); *Shropshire Union, etc. Co. v. R. L. R.*, 7 E. & I. App. 496, 510 (the same); *Bickerton v. Walker*, L.R. 31 Ch. D. 151; and *Powell v. Browne*, C.A. (1907) 24 T.L.R. 71 : 97 L.T. 854 (mortgagor acknowledging receipt of mortgage money estopped as against assignee of mortgage who has given full value).

15. *Tehilram Girdharidas v. Kashibai*, (1909) 1 I.C. 614 : 10 Bom. L.R. 403.

16. *Sohan Lal v. Chhagan Lal*, 1957 Raj. 355, relying on *Seth Kishore Lal v. Bhawani Shankar*, 1940 P.C. 145 : I.L.R. 1940 Kar. 282 : 189 I. C. 435.

an ancient practice among Hindus of endorsing payments on bonds.¹⁷ It is also very customary to stipulate that no payment will be recognised except "after causing the payment to be entered on the back of the bond, or after taking a receipt for the same". But such a stipulation does not operate as estoppel, and the obligor of the bond may prove by other means that the debt, or a part of it, has been satisfied.¹⁸ The mere absence of an endorsement of payment on the back of a kistbundi bond cannot prevail against positive proof of payment, and evidence of such payment must be admitted.¹⁹ though, of course, in deciding whether the alleged payments were made, the omission of endorsement is an important circumstance to be considered.²⁰

33. Recitals. A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence,²¹ as against the parties who make it and those who claim under them,²² and it is of more or less weight against them according to circumstances.²³ It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence against other persons than any other statement would be.²⁴ A person who had clearly written in his visa application that he had migrated to Pakistan in a particular year, is estopped from going back on his declaration.²⁵ An improvement trust resolving to release land included in a scheme in favour of co-operative society and informing the society about it, is estopped from revoking the sanction after the society acting on that resolution purchased land from the original

17. *Narayan Undir v. Motilal Ramdas*, (1875) 1 B. 45.

18. *Kalee Das v. Tara Chund*, (1867) 8 W.R. 316; *Narayan Undir v. Motilal Ramdas*, (1875) 1 B. 45.

19. *Girdharee Singh v. Laloo Koonwar*, (1865) 3 W.R. Misc. 23.

20. *Seshachellum Chetty v. Gobindappa*, (1870) 5 Mad. H.C.R. 451; *Nagan Mal v. Azemoolah*, (1869) 1 N.W.P.H.C.R. 146.

21. *Sankies v. Prosonomoyce Dossee*, (1881) 6 C. 794; *Gour Monce v. Krishna Chunder*, (1878) 4 C. 397; *Nimhoo Sahoo v. Boodhoo Jumadar*, (1870) 13 W.R. 2; *Tehilram v. Girdharidas Kashibai*, (1908) 33 B. 53; 1 I.C. 614 (recitals in deeds of sale); *Sikher Chund v. Dulputty Singh*, (1879) 5 C. 363, 375 (recitals of necessity for contracting debt); *Sunkar Lall v. Juddobuns Sahaye* (1868) 9 W.R. 285 (that money was borrowed for husband's *shraddh*); *Mahomed Hamidoolah v. Madho Soodun*, (1869) 11 W.R. 298 (possession); *Gopal v. Narayan*, (1863) 1 Bom. H.C.R. 331 (separation); *Bheeknarain Singh v. Necol Kooer*, (1863) Marsh. 373 (mook-tearnamah); *Rao Kurun v. Mehtab Koonwar*, (1868) 3 Agra 150 (previous mortgage); as to recitals in wills, see *Nilmonee Chowdhury v. Zuheerunissa Khanum*, (1867) 8 W.

R. 371; *Bomanjee Muncherjee v. Hossain Abdullah*, 5 W.R.P.C. 61; *Lakshman Dada v. Ram Chandra*, (1876) 1 B. 511; *Vasonji Mooraji v. Chanda Bibi*, 1915 P.C. 18; 1 L.R. 37 All. 369; 29 I.C. 781 (P.C.).

22. *Banga Chandra Dhur Biswas v. Jagat Kishore*, 1916 P.C. 110; 43 I.A. 249; 1 I.L.R. 44 Cal. 186; 36 I.C. 420 (P.C.); *Brij Lal v. Indar Kunwar*, 1914 P.C. 38; 1 I.L.R. 36 All. 187; 23 I.C. 715 (P.C.) (recitals of legal necessity ordinarily inconclusive on mortgages or sales by Hindu widow); and see *Khub Lal Singh v. Ajodhya Misser*, 43 C. 574; (1916) 31 I.C. 433; 22 C.L.J. 345; A.I.R. 1916 C. 792; see notes on "Burden of Proof and Presumptions".

23. *D. Veeraraghava Reddi v. D. Kamamma*, 1951 Mad. 403; (1950) 2 M.L.J. 575; 65 L.W. 952; 1950 M.W.N. 710.

24. *Brajeshwara Peshakar v. Budhanuddi*, (1880) 6 C. 268; *Monohar Singh v. Sumitra Kuar*, (1895) 17 A. 428. and a recital does not estop in favour of third persons who did not contraction the faith of it; *Stroughill v. Buck*, (1850) 14 Q.B. 781, 784, 787.

25. *Ghulam Nabi v. Union of India*, 1973 All. L.J. 972.

owner.¹ Where the plaintiff is not a party to any deed and the statement relied upon is unilateral, there is no estoppel by deed and the party making the admission may give evidence to rebut the presumption arising from such a statement. If that is not satisfactorily done, the fact admitted must be taken to be established.² If a document clearly shows a division of right, its legal construction and effect cannot be controlled or altered by evidence of the subsequent conduct of the parties.³ A recital by one party of state of facts, on the faith of which the other party was induced to change his situation, as for instance, by entering into a contract, is an estoppel in favour of the party whose position is thus altered.⁴ Where a *mutawalli* executed a *supurdnama* and the document was acted upon and possession was transferred and sums of money were received, it was held that the document amounted to a representation that the *mutawalli* was competent to make the transfer and that he was estopped from denying the validity of the *supurdnama*.⁵ Though the recitals will be evidence, there is no authority to show that a party to an instrument will be estopped in an action by the other party, not founded on the deed and wholly collateral to it, to dispute the facts admitted in the deed.⁶ When a person did not raise any objection to his appointment letter mentioning that the appointment was on probation he is estopped from showing that he was not appointed on probation.⁷

The question whether one of the parties to a fraud against third person can show the truth as against the other has already been discussed in connection with the subject of *benami* transactions.⁸ The rule of title by estoppel has been the subject of enactment in Section 43 of the Transfer of Property Act (IV of 1882) and the 18th section of the Specific Relief Act (I of 1877) (new Section 13 of Act 47 of 1963) to which, as also to the under-mentioned cases, reference should be made.⁹ The vital difference between the representation referred to in Section 43, Transfer of Property Act, and the representation mentioned in Section 115, Evidence Act is, that while the representation under Section 43, Transfer of Property Act, is a term of the contract or the transfer, the same is not necessarily so in the case of a representation mentioned in Section 115, Evidence Act. Where a representation is a term of the contract or of a transfer made for consideration, the promisee or transferee need not rely upon the doctrine of representation embodied in Section 115, Evidence Act. He can rely upon two other doctrines—the doctrine of the common law called “estoppel by deed” coupled with the doctrine

1. L. U. K. Co-operative Society Ltd. v. State, 1974 M.P.L.J. 887 : 1975 Jab. L.J. 547 : A.I.R. 1975 M.P. 98.
2. D. Veeraraghava Reddi v. Kamalamma, 1951 Mad. 403.
3. A. Venkatapathil v. D. Venkatanarasimha Raja, 1936 P.C. 264. 269 : 63 I.A. 397 : 164 I.C. 1 ; Harkishan Singh v. Partap Singh, 1938 P.C. 189 : 175 I.C. 332 : 1938 A.L.J. 763.
4. Stroughill v. Buck, *supra* ; and see *ib.* as to circumstances in which an estoppel operates on all or is confined to a single party ; South-

- Eastern Railway Co. v. Wharton, (1861) 6 H. & N. 520, 527.
5. Afzal Hussain v. Chhedi Lal, 1995 All. 792 : I.L.R. 57 All. 727 : 155 I.C. 791 : 1935 A.L.J. 217.
6. Carpenter v. Buller, (1841) 8 M. & W. 209, 212.
7. I.L.R. (1971) 2 Punj. 58.
8. *v. ante*.
9. Deoli Chand v. Nirban Singh, (1879) 5 C. 253 ; Pranjivan Govardhandas v. Bajju, (1879) 4 B. 34 ; Radhey Lal v. Mahesh Prasad, (1885) 7 A. 864 ; Sheo Prasad v. Udai Singh, (1880) 2 A. 718.

of "feeding the estoppel" and the doctrine of equity, that "equity treats that as done which ought to be done".

Under both these doctrines, knowledge on the part of the promisee or transferee that the transferor did not have the authority to transfer the property which he purported to transfer is immaterial, and does not deprive one of the benefit of the doctrines, except when the contract or transfer is illegal or invalid.¹⁰ The mere fact of a person attesting a deed is no evidence in itself that he consented to it or knew its contents; that is, mere attestation does not necessarily import concurrence, though it may be shown by other evidence that, when he became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it.¹¹ In a case it has been held that it is not legitimate to import the considerations governing personal estoppel under Section 115 of the Evidence Act into Section 43 of the Transfer of Property Act. It is not a condition of the applicability of Section 43 that the transferee should have had no knowledge or means of knowledge of the factual position regarding the title of the transferor. If a fraudulent or erroneous representation that the transferor is authorised to transfer the property is incorporated in the deed of transfer, and the transferee accepts the transfer on those terms and pays the full consideration, the case falls within the protection given by Section 43 even though the transferee has knowledge of the facts relating to the title.¹² As to documents executed by *pardanashin* women, Hindus or Mahomedans, *v. ante*, Section 111.¹³ The rule of estoppel arising from part-performance is enacted in Section 53-A of the Transfer of Property Act, IV of 1882, as amended by the Transfer of Property (Amendment) Act, XX of 1929, to which reference should be made. When the doctrine of part-performance, as laid down in Section 53-A, is not applicable for want of writing as contemplated in Section 53-A, any other defence based on equitable considerations cannot succeed.¹⁴ There is not necessarily any inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it.¹⁵ In the case cited, the plaintiffs, occupancy tenants of a village, were held estopped from claiming to pre-empt a sale which the vendees succeeded in obtaining through the active instrumentality of two of the villagers as representatives of the whole village.¹⁶

10. *Parmanand v. Champa Lal*, 1 I.L.R. (1956) 1 All. 313; 1956 All. 225; 1956 A.L.J. 1 (F.B.); see also *Kabul Chand v. Badri Das*, 1938 All. 22; 1 I.L.R. 1938 All. 63.
11. *Ram Chunder v. Hari Das*, (1882) 9 C. 463, 466; *Rajilakhee Debi v. Gocool Chunder*, (1889) 3 B.L.R. (P.C.) 57, 63, *v. ante*, p. 2272, note 5 (c) (v) (1); as to attestation by reversioners of estates held by Hindu females, see last case, and *Gopaul Chunder v. Gour Monee*, (1866) 6 W.R. 52; *Madhub Chunder v. Gobind Chunder*, (1868) 9 W.R. 350; see also *Mahadevi v. Neelamoney*, (1896) 20 M. 269, 273; *Collier v. Baron*, 2 N.L.R. 34; see *Kandasami Pillai v. Nagalinga Pillai*, (1913) 36 M. 564; 16 I.C. 30; 23 M.L.J. 301; 1912 M. W.N. 882; 12 M.L.T. 188 (atten-

- tation in Madras); *Lakhpatri v. Rambodh Singh*, 1915 All. 255; 1 L.R. 37 All. 350; 29 I.C. 218; 13 A.L.J. 616; *Deno Nath Das v. Kotiswar Bhattacharya*, (1913) 21 I.C. 367; *Banga Chandra v. Jagat Kishore*, 1916 P.C. 110; *Hari Kishun Bhagat v. Kashi Pershad*, 1914 P.C. 90; 42 I.A. 64; 1 I.L.R. 42 Cal. 876; 27 I.C. 674.
12. *Veeraswami v. Subbarao*, 1957 Andh. Pra. 288; 1956 Andh. W.R. 1115; see also the cases cited therein.
13. *ante*, S. 111 and cases there cited.
14. *Katihar Jute Mills, Ltd. v. Calcutta Match Works (India), Ltd.*, 1958 Pat. 133.
15. *Srish v. Roy*, (1904) 6 Bom. L.R. 501.
16. *Idris v. Skinner*, 1918 P.C. 154; 56 I.C. 723.

34. "Intentionally". To constitute an estoppel, it is necessary that the statement or conduct charged should have been intentional,¹⁷ with the object of inducing the other party to change his situation in consequence. There can be no question of estoppel, if there has been no misrepresentation, by declaration or conduct, intended to induce a course of conduct on the part of another.¹⁸ Mere loose talk does not usually estop. A party will not be estopped by information given by him merely informally, as a matter of conversation, with no intention of establishing contractual relation with the party to whom he speaks; it being the duty of the parties asking him for such information to notify him, if they would bind him, that they intended to act upon his answers. At the same time, a party, by negligence in asserting a claim, may be afterwards estopped from setting up such claim against strangers.¹⁹ The representation must have been made with the intention, either actual, or reasonably to be inferred²⁰ by the person to whom it was made, that it should be acted upon. A third person to whom the representation was not made cannot claim the estoppel, unless it was intended or apparently intended that he should act upon it.²¹ The term "wilfully" as used in the case of *Pickard v. Sears*,²² is in effect equivalent to "intentionally"²³ or "voluntarily",²⁴ and by the term "wilfully", we must understand, "if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth".²⁵ Therefore, intention to have the representation acted upon may be presumable as well as actual, so that a man would be bound as well when his conduct or the circumstances of the case justified the inference of intention as when he actually intended the result. Negligence, when naturally and directly tending to indicate intention, will, therefore, have the same effect in creating the estoppel as actual intention.¹

17. *Mitra Sen Singh v. Mst. Janki Kunwar*, 1924 P.C. 213; 51 I.A. 326; I.L.R. 46 All. 728; 82 I.C. 946.

18. *Imperial Bank of Canada v. Hays Victoria Begley*, 1936 P.C. 193; 163 I.C. 295; 1936 A.L.J. 944.

19. *Wharton, Ev.*, ss. 1079, 1155; as to fact stated as hearsay offered to prove an estoppel, see *Roe v. Ferrars*, (1801) 2 B. & P. 542; *Stephen v. Broman*, 16 N.Y. 381 (Amer.). "In general where there is nothing reasonably indicating that the representation was intended to be acted upon as a statement of the truth, or that it was tantamount to a promise or agreement that the declaration made is true so as to amount to an undertaking to respond in case of its falsity, the party making it is not estopped from proving the truth"; *Bigelow, op. cit.*, 6th Ed., 685.

20. *v. post.*

21. *Mayenbarg v. Haynes*, 50 N.Y. 675

(Amer.); *Bigelow, op. cit.*, 6th Ed., 686; *Carr v. London & N. W. Ry. Co.*, 1875 L.R. 10 C.P. 307.

22. (1837) 6 A. & E. 469.

23. *Sarat v. Gopal*, 19 I.A. 203, 219; I.L.R. (1892) 20 Cal. 296.

24. *Cornish v. Abington*, (1859) 4 H. & N. 549; (*Sarat v. Gopal*, supra) *Parke, B.*, perceiving that the word "wilfully" might be read as opposed not merely to 'involuntarily' but to 'unintentionally' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow; *Bigelow, op. cit.*, 6th Ed., 690n.

25. *Freeman v. Cooke*, (1848) 2 Ex. R. 654, per Baron Parke, cited in *Sarat Chunder v. Gopal Chunder*, supra.

1. *Freeman v. Cooke*, (1848) 2 Ex. R. 654; *Gregg v. Wells*, (1839) 10 A. & E. 90, 97; *Carr v. London Ry. Co.*, 1875 L.R. 10 C.P. 307; *Arnold v. Cheque Bank*, (1876) 1

But mere want of care towards preventing an unauthorized transfer of one's property, or the like act, creates no estoppel; otherwise, a man might be precluded from alleging that his signature has been forged on the ground that he had negligently employed a dishonest clerk. It is only when the negligence is a breach of duty to the party claiming the estoppel, as for instance, where it has amounted to permitting another to clothe himself with an apparent authority to act for the party against whom the estoppel is alleged, that the rule of intention is satisfied.² A person, who by his declaration, act, or omission, has caused another to believe a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the statute, if a reasonable man would take the representation to be true and believe it was meant that he should act upon it.³ It is not necessary, however, to prove an intention to deceive in order to make a case of estoppel, nor is it necessary to an estoppel that the person whose acts or declarations induced another to act must have been under no mistake or misapprehension himself. Section 115 does not make it a condition of estoppel resulting in that such person was either committing, or seeking to commit, a fraud, or that he was acting with a full knowledge of the circumstances and under no mistake or misapprehension.⁴ It is not necessary that fraudulent intention should be established.⁵ It is also not necessary that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply.⁶ In an Allahabad case,⁷ it has been held that for an estoppel by representation "to come into operation, there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position". It is submitted that the use of the word "deception" in the quotation is not happy, and that the word means not a fraudulent representation but a representation likely to mislead another.

- C.P.D. 578; *Vagliano v. Bank of England*, (1889) 23 Q.B.D. 245; *Seron v. Lafone*, L.R. (1887) 19 Q.B.D. 68; *Bigelow*, op. cit., 6th Ed., 686, 687.
2. *Bigelow*, op. cit., 6th Ed., 687, 688; citing *Swan v. North British Australasian Co.*, (1863) 2 H. & C. 175; as to silence as to the fact of a forged signature, see *M'Kenzie v. British Linen Co.*, (1881) 6 App. Cas. 82.
 3. *Sarat Chunder v. Gopal Chunder*, (1892) 19 I.A. 203, 215, 218, supra. The High Court of Madras had previously [*Vishnu v. Krishnan*, (1883) 7 M. 3] expressed the view that by the substitution in this section of the word "intentionally" for "wilfully", in the rule stated in *Pickard v. Sears*, (1837) 6 A. & E. 469, it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it had been stated by the English Courts. But the Privy Council disagreed with this view, and held that on

the contrary, the substitution was made for the purpose of declaring the law in India to be precisely that of the law of England.

4. *Sarat Chunder v. Gopal Chunder*, I.L.R. 20 C. 296, overruling *Ganga Sahai v. Hira Singh*, (1880) 2 A. 809; *Vishnu v. Krishnan*, (1883) 7 M. 3; *Vaman Raviji v. Nagesh Vishnu*, 1940 Bom. 216; I.L.R. 1940 Bom. 426; 189 I.C. 656; 42 Bom. L.R. 428; *Hazari Lal v. Chowdhury Halku Lal*, 1948 Nag. 236; I.L.R. 1948 Nag. 662; 1949 N.L.J. 22; *Sheo Narayan v. Jugeshwar Kuer*, 1950 Pat. 9; I.L.R. 28 Pat. 519; *Harbanslal v. Divisional Superintendent, Central Railways*, A.I.R. 1960 All. 164.
5. *Balbir Prasad v. Jugul Kishore*, 1918 Pat. 646 (2); 46 I.C. 473; 3 Pat. L.J. 454.
6. *Abdullah Shah v. Mohammad Yaqub*, 1938 Lah. 558; 178 I.C. 896.
7. *Muhammad Musa v. Qasim Husain*, 1935 All. 739 at 740; 155 I. C. 1063; 1935 A.L.J. 964.

Where, however, it was found that the plaintiffs had successfully combined with another to defraud possible pre-emptors by having a sale transaction entered in the deed in the form of a mortgage, they were held estopped from setting up their own fraud and pleading that the transaction which was ostensibly a mortgage was really a sale.⁸ What the section mainly regards is the position of the person who was induced to act, and not the motive or state of knowledge of the party upon whose representation the action took place. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*, it may, in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it, as it was intended he should do.⁹ Where a person while giving sub-lease permitted the sub-tenant to use the premises contrary to the conditions of the main lease stipulated between him and his landlord he will be estopped from ejecting the sub-tenant on the ground of breach of the condition.¹⁰

In all cases of representation capable of raising an estoppel, the representation must be shown to have been made with the intention of producing a certain state of belief in the mind of the representee.¹¹ The essence of the doctrine is that the defendant should have been misled.¹² It has been held in America that the representation must have been a free voluntary act; and, if obtained by the party who has acted upon it, it must have been obtained without artifice. If it has been procured by duress or by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon; indeed, it is said that where the conduct supposed to have created an estoppel was brought about or directly encouraged by the party alleging the estoppel, no estoppel is created. But that must probably be understood of something in the way of artifice or other questionable endeavour.¹³ It is not necessary that the person inducing belief should have been aware of his rights.¹⁴ But an involuntary representation or a representation (by conduct), made under compulsion of law, would not raise an estoppel.¹⁵ In a case, a shop-keeper received consignments of chemicals liable to terminal tax but by mistake he was not charged at the time. He, therefore, concluded that he was not liable to tax and sold the chemical on that basis. It was held that the Municipality was not estopped from taxing the shop-keeper as no representation was intentionally made by it.¹⁶ From the mere fact that a person in possession of property raised no

8. *Tikaya Ram v. Wassu Misir*, 1919 Lah. 148; 50 I.C. 564.

9. *Ralli v. Forbes*, 1922 Pat. 258; I. L.R. 1 Pat. 717; 67 I.C. 744; *Tikaya Ram v. Wassu Misir*, supra, citing *Calmecro v. Lorimer*, (1860) 3 Macq. 827; *Pickard v. Sears*, (1897) 6 A. & E. 459; *Freeman v. Cooke*, (1848) 2 Exch. 684; *Cornish v. Abington*, (1839) 4 H.P.N. 549; *Carr v. London and North Western Railway Co.*, I.R. (1875) 10 C.P. 316; *Seton v. Lafone*, (1887) 19 Q.B.D. 68.

10. *Faqir Chand v. R. R. Bhanot*, A. I.R. 1973 S.C. 921; *M/s. R. S. A. Saran v. H. C. Thakral*, 1972 Ren. C.R. 593.

11. *Baghel Singh v. Mihan Singh*, 1953 Punj. 171, 173; 55 P.L.R. 377.

12. *Swaranamoyee Dasi v. Probodh Chandra Sarkar*, 1933 Cal. 253, 260; 143 I.C. 402; 55 C.L.J. 420; 36 C.W.N. 758.

13. *Bigelow*, op. cit., 6th Ed., 646, 647; as to admission under duress, see *Wharton*, Ev. s. 1099.

14. *Mata v. Lalji*, 1927 All. 838; 106 I.C. 524; 25 A.L.J. 878.

15. *Harendra Nath v. Gopal Chandra*, 1935 Cal. 177; I.L.R. 62 Cal. 421; 156 I.C. 445; 39 C.W.N. 512.

16. *Kamruddin Yusuf Ali v. Municipal Committee, Khandwa*, 1939 Nag. 195; 183 I.C. 443; 1939 N.L.J. 265.

objection to its attachment, it cannot be said that he thereby intentionally caused or permitted the subsequent auction-purchaser to believe a thing to be true and to act upon such belief so as to estop him from raising an objection under Order 21, Rule 100, Civil Procedure Code, and filing a suit under Order 21, Rule 103 of the Code on the objection being disallowed.¹⁷ The representation and the action taken must be connected together as cause and effect. Not only must it be shown that there was belief in a particular fact, and action taken upon such belief but also that the action and belief were induced by a representation of the plaintiff intended or calculated to have the result which has happened.¹⁸ Where the probabilities are that both parties were under a mistaken impression as to their respective rights and each acted under his or her impression, and one of the parties asks the Court to believe that any conduct or omission on the part of the other misled the former party into adopting a particular course of action, it is necessary for the Court to scrutinise the connexion between the representation and the course of conduct alleged to have been pursued as a result thereof.¹⁹ But though the representation must have been the inducement to the change of position, it need not have been the sole inducement, if it were adequate to the result,—that is, if it might have governed conduct of a prudent man, and if it did influence the result, that will be enough, though other inducements operated with it. And the law will not undertake, in favour of a wrong-doer, to separate the various inducements presented and ascertain precisely how much weight was given to the representation in question.²⁰ But, though the representation need not be exclusively acted upon, there can be no estoppel where the party claiming one is obliged before changing his position, to enquire into the existence of other facts to make the inducement sufficient and to rely upon them also in acting.²¹ In such a case, it is clear that the inducement was not adequate, and therefore not the cause of the result, viz., the action taken. If the party is absent at the time of the transaction, his silence or other conduct must at least be of a nature to have an obvious and direct tendency to cause the omission or the step taken.²² Not merely may there be active inducement on the part of the declarant of a belief in the mind of another person, but it is enough, if the declaration is such by which the declarant, in the ordinary course, permits somebody else to believe in the truth of the declaration and to act in that belief.²³ The section uses the word "permitted" as the expression is apt to cases of omission and negligence. Conduct of omission or negligence may be the cause of the action taken: such conduct raising inferences which are often as casually effective as any positive declaration may be.

17. *Mohammad Hayat v. Ghulam Nabi*, 1931 Lab. 598: 132 I.C. 201: 32 P.L.R. 390.

18. *Solano v. Lalla Ram*, (1880) 7 C.L.R. 481; *Mohunt Das v. Nilkomal Dewan*, (1899) 4 C.W.N. 283; *Kuverji Kavasji v. Municipality of Lonavala*, 1921 Bom. 198: I.L.R. 45 Bom. 164; *T. A. Hurst v. Shyamsundarlal*, 1934 Cal. 441: I.L.R. 61 Cal. 64: 151 I.C. 334. In *Beni Prasad v. Muktesar Rai*, (1899) 21 A. 316. 322, it was held that that which really induced the party to abandon a portion of his

claim was not the acts of the other party relied upon as an estoppel but an extraneous cause independent of such party; v. post "To act".

19. *R. I. Narayan Nambi v. P. I. Sankaran Nambi*, 1937 Mad. 158: 168 I.C. 842: 44 L.W. 859.

20. *Bigelow*, op. cit., 6th Ed., 646, 647; v. post.

21. *ib.*, 6th Ed., 696—698

22. *ib.*, 6th Ed., 662

23. *Barkat Ali v. Prasanna Kunikr*, 1929 Cal. 819: 33 C.W.N. 873.

35. "To believe". There can be no estoppel, if the party to whom the representation is made does not believe it to be true, for, in such cases, the resulting conduct is in no sense the effect of the preceding declaration, or if the party deceived does not act on that belief so as to alter his previous position.²⁴ A person cannot be said to rely on the statement, if he knew that it was false; he must reasonably believe it to be true and therefore act upon it.²⁵ This section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter his position to his own detriment.¹ A person relying upon this section has to establish not only that the opposite party had made a certain declaration but that the said declaration had been believed and had been acted upon, and that it was not reasonably possible for the said party to know the true state of affairs by pursuing enquiries reasonably and with diligence. Where truth is accessible to a party, the plea of estoppel upon representation fails.² There can be no estoppel arising out of legal proceedings, when the truth of the matter appears on the face of the proceedings.³ The person who claims the benefit of an estoppel must show that he was ignorant of the truth in regard to the representation.⁴

24. *Collier v. Baron*, 2 N.L.R. 34. Cf. *Kuverji Kavasji v. Municipality of Lonavala*, 1921 Bom. 198 : I.L.R. 45 Bom. 164.

25. *Canada and Dominion Sugar Co., Ltd. v. Canadian National (West Indies) Steamships Ltd.*, 1947 P.C. 40 : 228 I.C. 614.

1. *Grish Chandra v. Ishwar Chandra*, (1869) 3 B.L.R. A.C. 397 : s.c. 12 W.R. 226; *Karali Charan v. Mahatab Chandra*, Sev. Rep., July—Dec, 1864, p. 29; *Jhinguri Tewari v. Durga*, (1885) 7 A. 878; *Narayan v. Raoji*, (1904) 28 B. 393, 397 : 6 Bom. L.R. 417; *Kalloo Gaji v. Rishabh Kumar*, 1951 Nag. 347 : 1951 N.L.J. 544. So in an action for deceit, if it is proved that the plaintiff did not rely upon the false statement complained of, he cannot maintain the action; *Smith v. Chadwick*, (1882) 20 Ch. D. 27; *Sarda Prosad Roy v. Ananda Moy Dutta*, 1918 Cal. 248 : 46 I.C. 228; *Nainsukhdas Sheonarayan v. Gowardhandas Bindrabandas*, 1948 Nag. 110 : I.L.R. 1947 Nag. 510; *Fakir Khan v. Ismail Khan*, 1933 Lah. 179 : I.L.R. 14 Lah. 218 : 141 I.C. 264; *Vallabhdas Mulji v. Pranshanker Narbhe Shanker*, 1929 Bom. 24 : 113 I.C. 313 : 30 Bom. L.R. 1519; *Kampta Prasad v. Bhulaj*, 1927 All. 365 : 100 I.C. 527; *J.A. Verannes v. J. G. Robinson*, 1927 P.C. 151 : 54 I.A. 276 : I.L.R. 5 Rang. 427 : 102 I.C. 639; *Bhutanath Janan v. Gopal Prasad Sahn*, 1940 Cal. 436 : 44 C.W.N. 761; *Gaya Pande v. Amar Deo Pande*,

1924 All. 787 : 85 I.C. 498 : 22 A.L.J. 855; *Shiam Lal v. Mata Din*, 1934 Oudh 460 : 151 I.C. 576 : 11 O.W.N. 1097 (if there are circumstances which reasonably excite suspicion and call for inquiries, he might be presumed to be acquainted with facts which the necessary inquiries will have elicited but it cannot be said that all persons claiming the benefit of estoppel must make enquiries in every case about the truth of representation made to them); *Mohini Mohan Mitra v. Radha Sundari Dass*, 1935 Cal. 481 : 39 C.W.N. 1014.

2. *Mohammad Shafi v. Mohammad Said*, 1930 All. 847 : I.L.R. 52 All. 248 : 122 I.C. 871; *Mutsaddi Lal v. Union of India*, 1955 Hyd. 61 : I.L.R. 1955 Hyd. 256; *Ram Singh v. Baldeo Prasad*, 1932 All. 643 : 138 I.C. 552 : 1932 A.L.J. 605.

3. Bigelow, op. cit., 6th Ed., 681—683 and cases there cited; as to the presumption of knowledge v. ib., pp. 627, 611 and ante; S. 114; "Intention", "Knowledge"; as to circumstances, which may necessitate enquiry, see *Bisheshur v. Muirhead*, (1892) 14 A. 362; *Ramcoomar Koondoo v. Macqueen*, (1872) 11 B.L.R. 46; *Balmokand v. Small Town Committee*, Talaganj, 1935 Lah. 960.

4. *Tara Lal v. Sarobar Singh*, (1899) 4 C.W.N. 533 : 27 C. 768; *Narayan v. Raoji*, (1904) 28 B. 393 at p. 397 : 6 Bom. L.R. 417.

When both parties are equally conversant with the true state of the facts, it is absurd to refer to the doctrine of estoppel.⁵ Plea of estoppel was raised by plaintiff since defendants had described in certain documents the plaintiff as adopted son of N, but the plaintiff had in certain subsequent documents described himself as son of D; the plea of estoppel was rejected.⁶

When a candidate at the University examination knew the true state of affairs including the provisions of rules and there is nothing to show that the University ever agreed to waive any provision, there is no estoppel against the University.⁷

So, where the plaintiff was as much acquainted with the actual facts of the case as the defendant, there being, in fact, no misrepresentation by the latter upon which the plaintiff had been induced to act or to alter his position, there was held to be no estoppel.⁸ In such cases, the person making the representation to another does not "cause or permit" that other to believe the representation to be true. The representation, in order to work as estoppel, must be of a nature to lead naturally, that is, to lead a man of prudence to the action taken.⁹ To justify a prudent man in acting upon it, it must be plain, not doubtful, or matter of questionable inference, for certainty is essential to all estoppels. The Courts will not readily suffer a man to be deprived of his property, when he had no intention to part with it.¹⁰ Again, to say that the representation must be such as would naturally lead a prudent man to act upon it is also to say that it must be material. That is equally essential to the estoppel.¹¹ This, however, does not mean that the representation in question must have been the sole inducement to the change of position; if it were adequate to the result—that is, if it might have governed the conduct of a prudent man—and if it did influence the result, that will be

5. *Ranchodlal Vandravandas Patwari v. Secretary of State for India*, 35 B. 183; *Beni Ram v. Kundun Lal*, (1890) 26 I.A. 658; I.L.R. 21 All. 496; 1 Bom. L.R. 400; 9 C.W.N. 502; *Honapa v. Narsapa*, (1898) 28 B. 406; *Ramsden v. Dyson*, (1865) 1 E. & I. A.C. 129; *Firm Lorind Chand Lachhman Das v. Punjab National Bank, Ltd.*, 1940 Lah. 254; 191 I.C. 830; *Debi Prasad v. Baijnath*, 1928 Oudh 506; 95 I.C. 585; *Deota Din Singh v. Raj Narain Singh*, 1934 All. 75; 147 I.C. 715; *Kishori Lal v. Collector of Etah*, 1934 P.C. 83; 148 I.C. 546; 38 C.W.N. 344; *Bansidhar Dhandhanla v. Hazari Ram Marwari*, 1933 Pat. 210 (2); 143 I.C. 542; 14 P.L.T. 189; *Guddappa Chikappa v. Balaji Ramji*, 1941 Bom. 274; I.L.R. 1941 Bom. 575; 196 I.C. 90; 43 Bom. L.R. 681 (F.B.); *Jagdip Prasad Sahi v. Mst. Rajo Kuer*, 1923 Pat. 464; I.L.R. 2 Pat. 585; 75 I.C. 1022; *Swaminadha Aiyar v. Swaminatha Aiyar*, 1927 Mad. 458; 99 I.C. 722; 38 M.I.T. 32; *Shiva Dutt v. Kedhar Nath*, A.I.R. 1972 H.P. 20;

- Srinivasan v. Sundaramurthi*, 1972 (1) Mad. L.J. 141; I.L.R. (1972) 1 Mad. 377; *Jai Prakash Saksena v. Chairman, Bihar School Exam. Board*, A.I.R. 1976 Pat. 301.
6. *Khunnoo Lal v. Union of India*, 40 Cut. L.T. 70.
7. *Haripadadas v. Utkal University*, 45 C.L.T. 24; A.I.R. 1978 Orissa 68.
8. *Mst. Oodey Koowar v. Mst. Ladoo* 13 Moo. 1870.
9. *Bigelow*, op. cit., 6th Ed., 634.
10. *ib.*, 578; see *Smith v. Chadwick*, (1882) 20 Ch. D. 27 (if a statement by which the plaintiff says he has been deceived is ambiguous, the plaintiff is bound to state the meaning which he attached to it, and cannot leave the Court to put a meaning upon it).
11. *Bigelow*, op. cit., 6th Ed., 645, 646; *Smith v. Chadwick*, *supra* (if a statement, although untrue, is so trivial that it could not, in the opinion of the Court, have influenced the conduct of the plaintiff, it will not support an action for deceit); see *Taylor, Ev.* s. 98.

enough, though other inducement operated with it. And the law will not undertake in favour of a wrong-doer, to separate the various inducements presented, and ascertain precisely how much weight was given to the representation in question.¹²

36. "A thing". A proposition of law is not "a thing" within the meaning of the section and this expression refers to a belief in a fact.¹³ So also, an admission on a point of law is not an admission of a thing within the meaning of the section.¹⁴ The representation, in order to work an estoppel, must be a material statement of fact.¹⁵ The rule excluding statements of opinion and statements of law has been said to be based upon the ground that the truth is uncertain, or that the person to whom the statement is made knows as much about the matter as the other.¹⁶ The fact, that defendant induced the belief that a custom was valid, is not such a belief in the truth of a "thing" which means a belief in a fact.¹⁷ A representation that the interest of a person devolved upon certain person is a representation of a "thing". Not merely may there be active inducement on the part of the declarant of a belief in the mind of another person, but it is enough if the declaration is such by which the declarant, in the ordinary course, permits somebody else to believe in the truth of the declaration and to act in that belief.¹⁸ In the undermentioned case,¹⁹ the Court expressed an opinion that a grantor might possibly be estopped from questioning the permanent character of a lease by reason of misrepresentations even on a point of law which was not clear, and free from doubt. The fact must be a fact alleged to be at the time actually in existence or past and executed. The representation must have references to a present or past state of things; for, if a party makes a representation concerning something in the future, it must generally be either a mere statement of intention or opinion uncertain to the knowledge

12. McAleer v. Horsey, 35 Imd. 439 (Amer.); Bigelow, op. cit., 6th Ed. 646; Narayan v. Raoji, (1904) 28 B. 393, 397; 6 Bom. L.R. 417.
13. Rajnarain Bose v. Universal Life Assurance Co., (1881) 7 C. 594; see Gopee Lall v. Chundraolee Buhoojee, (1872) 11 B.L.R. 391; s.c. 19 Suth W.R. 12 (P.C.); Surendraksoy Roy v. Durgasundari Dasee, (1882) 19 I.A. 108, 115, 116; Tagore v. Tagore, (1872) I.A. Sup. Vol. p. 71; Morgan v. Couchman, (1853) 14 C.B. 100; as to admission of law, see p. 476, ante; Tek Chand v. Mst. Gopal Debi, 46 P. R. (1912); see Mark D'Cruz v. Jitendra Nath Chatterjee, 1919 Cal. 417; I.L.R. 46 Cal. 1079; 53 I.C. 684; 30 C.L.J. 94; as to the meaning of the word "thing", see Ma Pyu v. Maung Po Chet, 1918 U.B. 51; 39 I.C. 385; 11 Bur. L.T. 14.
14. Dungariya v. Nand Lal, 3 All. L. J. 534.
15. Bigelow, op. cit., 6th Ed., 634—636, states that to be the general rule, adding that it can seldom happen

that a statement of opinion or of a proposition of law will preclude party making it from denying its correctness except where it is understood to mean nothing but a simple statement of fact; that statements of opinion, however, often approach to representations of fact, the whole suggestion in regard to real opinion treading on delicate ground; and that it seems probable that the rule against representations of law has been pressed too far; see cases cited ib., Jethabhai v. Nathabhai, (1904) 28 B. 399 at 407; 6 Bom. L.R. 428 and Forbes v. Ralli, 1925 P.C. 146; 52 I.A. 178; I.L.R. 4 Pat. 707; 87 I.C. 318.

16. Bigelow, op. cit., 6th Ed., 635; Forbes v. Ralli, supra.
17. Ramji Dass v. Jai Gopal, 1923 Lah. 244; 69 I.C. 431.
18. Barkat Ali v. Prasanna Kumar, 1929 Cal. 819; 33 C.W.N. 873.
19. Mahammad Afzal Khan v. Ghulam Kasim Khan, 30 I.A. 190; I.L.R. 30 Cal. 843; 5 Bom. L.R. 486; 8 C.W.N. 31; 87 P.R. 1903 (P.C.).

of both parties,²⁰ or it will come to a contract, with the peculiar consequence of a contract, or to a waiver of some term of a contract, or of the performance of some other kind of duty.²¹

37. "To act". The creation of a belief *alone* is not what the section requires. It is further necessary that the person who is made to believe something must act upon that belief.²² No estoppel can arise when no representation is shown to have been (1) made and (2) acted upon.²³ It is essential to an estoppel that one party has been induced by the declaration, act or conduct of the other to do or forbear²⁴ from doing something which he would not, or would have done, as the case might be, but for such declaration, act or conduct of the other party. In order to hold a case to be within this section, the Court must come to the following findings: (a) that the plaintiff believed a certain fact to be true; (b) that in consequence of and as the effect of such belief, he acted in a particular manner; (c) that that belief and the plaintiff's so acting upon that belief were brought about by some representation (either declaration, act or omission) on the part of the defendant which representation was intentionally made, in order to produce that result.²⁵ Estoppel can only arise, when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief. So, where a person alleges that a certain property belonged to the testator, he can be estopped from subsequently showing that the testator was not the owner only if it was established that he intentionally caused the opposite party to believe that fact to be true and to act on that belief. If the opposite party had not acted in regard to the property on that belief, no question of estoppel could

20. The intent of a party is necessarily uncertain as to its fulfilment. No person has a right to rely on it. A person cannot be bound not to change his intention nor can he be precluded from showing such a change merely because he has previously represented that his intentions were once different from those which he eventually executed: *Langdon v. Doud*, 10 Allen 433: s.c. 6 Allen 423 (Amer.), per Bigelow, C.J.

21. Bigelow, op. cit., 6th Ed., 637: *Maddison v. Alderson*, (1883) 8 App. Cas. 467, 473: 5 Ev. D. 293: *Jorden v. Money*, (1954) 5 H.L. Cas. 185, 213-215: *Citizens Bank v. First National Bank* (1873) L.R. 6 H.L. 352, 360: *Jethabhai v. Nathabhai*, (1904) 28 B. 399, 403: 6 Bom. L.R. 428; Pollock on Contract, App. note K and cases there cited.

22. *Ranbir Karan Singh v. Jogindra Chandra*, 1940 All. 134, 141: I.L.R. 1940 All. 100: 187 I.C. 170: 1940 A.L.J. 1; *Smt. Rukmani Debi v. Smt. Mihir Bala Sarkar*, (1977) 1 Cal. L.J. 125: 81 C.W.N. 481: A.I.R. 1977 Cal. 161.

23. *Y. Venkataramavva v. Y. Seshayya*,

1942 Mad. 193: 201 I.C. 50: (1941) 2 M.L.J. 877.

24. The damage need not be shown to be a positive step taken to one's prejudice; it is enough to show that the party claiming the estoppel was induced by the other party to refrain from obtaining a particular benefit which he would otherwise have been reasonably sure of acquiring; *Bigelow*, op. cit., 6th Ed., 703, citing *Knights v. Wiffen*, (1870) L.R. 5 Q.B. 660.

25. *Solano v. Lalla Ram*, (1880) 7 C.L.R. 481, or which being intentionally made had the effect of producing that result, v. supra and see *Jhimguri Tewari v. Durga*, (1885) 7 A. 878; *Mohunt Das v. Nil Komal Dewan*, (1899) 4 C.W.N. 223; cf. *Kuverji Kavasji v. Municipality of Lonavala*, 1921 Bom. 109: I.L.R. 45 Bom. 104. There must have been prejudicial acting on faith of representation and change of position: *Gusaun Mal v. Ram Rakha Mal*, 1919 Lah. 263: 50 I.C. 128; *Har Lal v. Basania Singh*, 75 P.W.R. 1918: 78 P.L.R. 1918; *William Jacks & Co. v. Joosab Mahomed*, 1924 Bom. 115: I.L.R. 48 Bom. 881: 82 I.C. 791.

arise in the case.¹ When acting on a representation made by Government that land does not belong to it, a person does something and upon acquisition of the land by Government receives its compensation, the Government is estopped from claiming that the land belongs to it.² Where the Government by its behaviour represented that it accepted the concession granted by Portuguese Government to a person for supplying electrical energy and he spent money acting on such representation, Government is estopped from contending that they did not recognise that concession.³ When mistake is in the knowledge of only one party and the other party acts and shifts his position, he can plead estoppel. University is estopped from saying that marks sheet issued by it was incorrect.⁴ To establish an estoppel it is not sufficient to find that it may well be doubted that the plaintiff would have acted in the way he did, but for the way in which the defendant had acted. It must be proved, as a fact, that the plaintiff could not have acted in the way he did, and that the defendant by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief.⁵ As the foundation of the doctrine is the changed situation of the parties referable to the representation as its cause, a person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter to his own detriment⁶ his previous position.⁷

1. *Hem Nolini v. Isolyne*, A.I.R. 1962 S.C. 1471; I.L.R. (1962) 2 A. 685; (1962) 2 S.C.A. 490.
2. *State of Rajasthan v. Ram Swarup Das*, 1975 W.L.N. 68; 1975 Raj. L.W. 627.
3. *Chowgula & Company v. Union of India*, A.I.R. 1972 Goa 33.
4. *Naba Kishore v. Utkal University*, A.I.R. 1978 Orissa 65.
5. *Narsingdas v. Rahimanbai*, (1904) 28 B. 440; 6 Bom. L.R. 440, followed in *William Jacks & Co. v. Jociab Mahomed*, 1924 Bom. 115; I.L.R. 48 Bom. 38; 82 I.C. 791; 25 Bom. L.R. 1170. See also *Joychand Seroagi v. Shyama Charan Nath*, 1942 Cal. 448; 199 I.C. 425.
6. *Dhyan Singh v. Jugal Kishore*, 1952 S.C. 145; 1952 S.C.A. 417; I.L.R. (1953) 1 All. 225; 1952 A.L.J. 324; 90 C.L.J. 206; 1952 M.W. N. 528. Prejudice to the party claiming the estoppel should be shown; *Schmaltz v. Avery*, (1851) 16 Q.B. 635; *Bigelow*, op. cit., 6th Ed., 701, 702; it is not enough that the representation has been barely acted upon; if still no substantial prejudice would result by admitting the party who made it to contradict it, he will not, according to the American cases, be estopped, *ib.* It does not prejudice one, in law to do something one was bound to do; *ib.* 638n (1); *Anantum Veeraraju v. Valluri Venkayya*, I.L.R. 1959 Andh. Pra. 951; A.I.R. 1960 A.P. 222.
7. *Grish Chandra v. Iswar Chandra*, (1869) 3 B.L.R. A.C. 337, 341;

s.c. (1869) 12 W.R. 226; *Sev. Rep.* July-Dec. (1864), p. 29; *In re Purmananddas Jeewandas*, (1882) 7 B. 109; *Mst. Oodey Koowar v. Mst. Ladoo*, (1870) 13 Moo. I.A. 585; *Kuverji v. Babai*, (1894) 19 B. 374, 389, approved by the Privy Council in *John Agabog Vertannes v. J. G. Robinson*, 1927 P.C. 151; 54 I.A. 276; I.L.R. 5 Rang. 427; 102 I.C. 639; *Phoenix Mills, Ltd. v. M. H. Dinshaw & Co.*, 1946 Bom. 469; 226 I.C. 503; 48 Bom. L.R. 313; *Mohd. Maqsood Ali v. Hoshnar Singh*, 1945 All. 377; I.L.R. 1945 All. 394; 1945 A.L.J. 185; *Muhammad Musa v. Qasim Husain*, 1935 All. 739; 155 I.C. 1063; 1935 A.L.J. 964; 1935 A.W. R. 766; *Imperial Bank of Canada v. Mary Victoria Begley*, 1936 P.C. 193; 163 I.C. 295; 1936 A.L.J. 944; *Abdulla v. Fateh Muhammad*, 1921 Lah. 117 (2); 62 I.C. 809; *Shaikh Abdul Rahim v. Mst. Barira*, 1921 Pat. 166 (2); 61 I.C. 807; *Cooverji Varjang v. Cooverbai Nagsey Champsey*, 1940 Bom. 330; I.L.R. 1940 Bom. 562; 191 I.C. 129; 42 Bom. I.R. 564; *District Local Board, Ahmedabad v. Secretary of State*, 1938 P.C. 87; 172 I.C. 981; *Durga v. Jhinguri*, (1884) 7 A. 511, 515; the altering of his position by the person pleading the estoppel is an essential part of the rule; *Peddammuthulaty v. Timma Reddy*, (1864) 2 Mad. H.C.R. 271; *In re Purmananddas Jeewandas*, (1882) 7 B. 109, 117; *Mst.*

Where a decree having been passed partly in favour of the plaintiff and partly in favour of the defendant, the plaintiff induced the defendant to pay the full amount decreed and to enter into an agreement which made it impossible for him to question the decree, it was held that the plaintiff was estopped from acting contrary to his undertaking and appealing against the decree.⁸ An attaching creditor is not the representative of the judgment-debtor,⁹ a prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase;¹⁰ and the same principle applies to estoppel by representation.¹¹ A subsequent mortgagee is bound by the representations made by the mortgagor to a prior mortgagee and is estopped from challenging the validity of the prior mortgage, so far as it affects the share which was subsequently mortgaged.¹² An official Receiver, who represents the entire body of creditors, cannot be estopped by a statement made by some only of the creditors.¹³ A person, who represented that a lady was the full owner of certain property and accepted a transfer of a portion of it from her, is estopped from denying the truth of the representation in a suit between himself and the legal representatives of the lady.¹⁴ The doctrine of estoppel cannot be applied to a witness who is not a party to the suit, where the party calling him is not estopped.¹⁵ A person who is only a witness and not a party to a title suit is not estopped from claiming title to property in another suit.¹⁶ There is no principle of law, short of estoppel, by which a

Oodey Koowar v. Mst. Ladoo, (1870) 13 M.I.A. 585, 598; *Asudibai v. Haribai*, 1943 Sind 177; I. L.R. 1943 Kar. 227; *Canada & Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.*, 1947 P.C. 40; 228 I.C. 614; *Thakar Das v. Jai Kishen Das*, 1938 Lah. 448; 40 P.L.R. 763; *Kanglu Baula Kotwal v. Chief Executive Officer*, 1955 Nag. 49; I.L.R. 1954 Nag. 875 (F.B.); *Munyaraj v. Vankatapati*, 1955 Hyd. 172; *Shoo Tahal Ram v. Binack Shukul*, 1931 All. 689; I.L.R. 53 All. 747; 1931 A.L.J. 653; *Ahmad Azim v. Sufi Jan*, 1926 Oudh 561; 97 I.C. 897; 3 O.W.N. Sup. 102; *Fakir Khan v. Ismail Khan*, 1933 Lah. 179; I. L.R. 14 Lah. 218; 141 I.C. 264; *Nisar Ali Khan v. Muhammad Ali Khan*, 1929 Oudh 494; 119 I.C. 337; 6 O.W.N. 549; *Muhammad Sami-ud-din v. Manu Lal*, (1889) 4 A. 386. The rule that the representation must have been acted upon is further illustrated by *Howard v. Hudson*, 2 El. & B. 1; *Simpson v. Anglo-American Telegraph Co.*, 5 Q.B.D. 188; *Stimson v. Farnham*, L.R. 7 Q.B. 175; *Schmaltz v. Averv*, 16 Q.B. 655; *Cripper v. Smith*, 28 Ch. D. 700; *Gur Narayan v. Shoo Lal Singh*, 1918 P.C. 140; I.L.R. 46 Cal. 566; 4 I.A. 1; 49 I.C. 1; *Carr v.*

London N.W. Ry. Co., 10 C. 317; *Mahadevi v. Neelamani*, (1896) 20 M. 269, 273; *Kristo Mani v. Secretary of State*, (1898) 3 C.W.N. 99, 105; *Tara Lal v. Sarobur Singh*, (1899) 4 C.W.N. 533, 538; *Fatimunnissa Begum v. Soondar Das*, (1900) 4 C.W.N. 565; *Manohar Lal v. Nanak Chand*, 1919 Lah. 53; 52 I.C. 479; 32 P.L.R. 1920; *Nanak Chand v. Chameli Kunwar*, 1919 All. 231; 50 I.C. 777; 17 A. L.J. 288, where the defendant did not act on belief.

8. *Bhrigunath Prasad v. Mst. Annapurna Dai*, 1934 Pat. 644; 153 I.C. 1098.
9. *Nainsukhdas v. Gowardhandas*, 1948 Nag. 110; I.L.R. 1947 Nag. 510.
10. *Abdul Ali v. Mia Khan*, I.L.R. 35 Bom. 297; 10 I.C. 890; 13 Bom. L.R. 268.
11. *Kanik Mandal v. Medne Rai*, 1942 Pat. 317; 201 I.C. 560.
12. *Gur Dayal v. Taid Husain*, 1919 Oudh 88; 54 I.C. 766.
13. *Sunder Singh Sachar v. Baksi Shiv Ram*, 1933 Lah. 354; 144 I.C. 762; 34 P.L.R. 436.
14. *Mohammad Hasan v. Ali Haider*, 1925 Oudh 337; 85 I.C. 509.
15. *Rajib Hossain v. Zingraji*, 1920 Nag. 133; 54 I.C. 962.
16. *Langa Manjhi v. Jaba Majhian*, 1970 Pat. L.J.R. 573; A.I.R. 1971 Pat. 185.

party who is at once the representative of two different persons is precluded from holding up as a shield against the claims of another his rights as representative of one of these two persons merely because the other person whom also he represents did something in disregard of his right as a representative of the first.¹⁷ Anything done by a person in his representative character cannot create an estoppel on what is a personal claim by himself by a perfectly different arrangement.¹⁸ The rule is fundamental that unless the representation of the party to be estopped has also been really acted upon, the other party acting differently, that is to say, from the way he would otherwise have acted, so that to deny the representation would be to prejudice him, no estoppel arises. Neither a statement of any kind nor an admission *in pais* can amount of itself to conclusive evidence. But if, on the other hand, the representation has been acted upon promptly, under circumstances, such as those already detailed, the party making the statement or guilty of the conduct in question will be precluded from alleging the contrary of that which he has given the other party to understand to be true. And it matters not, if the party acting upon representation was justified in so doing, how he has changed his position, whether by the purchase of property, the surrender of possession, the erection of improvements or other outlay upon land or goods about which the estoppel is claimed, or the expenditure of money in litigation, or it is held even by being induced to refrain from steps which would otherwise probably have been taken. But unless the representation is in some way acted upon, unequivocally, as tested by the first step taken, the estoppel cannot arise; nor will any estoppel arise when the party acting upon the representation has done only what he was legally bound to do. And though it need not be exclusively acted upon, there can be no estoppel, where the party claiming one is obliged, before changing his position, to enquire into the existence of other facts to make the inducement sufficient and to rely upon them also in acting. In other words, though the party may, no doubt, act upon any one of several representations or inducements from different sources, it will not answer for him to put together two severally insufficient inducements from different and independent sources. It may be that when prejudice or damage is made out and the other circumstances are such as to create an estoppel, it is unnecessary to measure the *quantum* or extent of the prejudice or damage or arrive at the result that it is irreparable.¹⁹ Where it is plain that the representation has been substantially acted upon, there is, of course, no question (supposing the existence of other elements) that an estoppel arises, but the general rule is that only the person to whom the representation was made, or for whom it was designed, can act upon and avail himself of it.²⁰ Where a person purchases property subject to a mortgage, he is not, by that sole fact, estopped from disputing the validity of, nor consideration for, the mortgage. But, if the mortgagee has been thereby induced to suffer some detriment, or if he forgoes a portion of his money, then the purchaser may be estopped from disputing the mortgage.²¹

17. *Indu Bhushan v. Sudhakar Chowdhury*, 1957 Cal. 106.

18. *Ram Harakh v. Hanumant Ram*, 1930 P.C. 249 (1) : 7 O.W.N. 940 : 32 L.W. 412.

19. *D. Veeraraghava v. D. Kamalamma*, 1951 Mad. 403 : (1950) 2 M.L.J. 575 : 63 L.W. 952 : 1950 M.W.N. 710.

20. Bigelow, op. cit., 6th Ed., 707, 708.

where the question of statements at second hand is discussed; see *Nallappa v. Vridhachala*, 1915 Mad. 36: I.L.R. 37 Mad. 270 : 25 I.C. 889 (equitable estoppel from contract to indemnify).

21. *Bala Parshad v. Sujan Singh*, 1919 Lah. 243: 49 I.C. 997 : 28 P.W.R. 1919.

Where promise of settlement of fisheries was made to A but settlement was made to B, if A had not acted on that promise to his detriment, the plea of estoppel is not tenable.²² When the tenants are unable to show that the landlord by withdrawing the earlier suit made any representation or that the tenant acted on any such representation and changed their position, there is no estoppel against the landlord.²³

Where a provision is enacted for the benefit of a certain person, he can waive it, even though it is mandatory. Thus, Order XXI, Rule 85, C.P.C., is enacted for the benefit of the decree-holder and the judgment-debtor, and they can waive its benefit. Therefore, where the failure to deposit the sale price in Court, on or before the due date, is brought about by consent, express or implied, of the judgment-debtor and the decree-holder, and the order to set aside the sale is obtained by the judgment-debtor himself, the auction-purchaser cannot be made to suffer, if he acts on the faith of the act of the judgment-debtor with the result that the period of fifteen days elapses and he does not deposit the balance of the purchase money. In such a case, the judgment-debtor cannot turn round and claim advantage out of the non-deposit of the purchase money by the auction-purchaser which is occasioned by his own act.²⁴

When the Rent Control legislation itself provides that the landlord is entitled to withdraw the rent deposited by the tenant without prejudice to his right to claim a decree for ejectment, the withdrawal of rent would not amount to a waiver of the cause of action that was available to the landlord.²⁵

38. "Representative". Representatives and also persons claiming by gratuitous title are bound by estoppel.¹ It is necessary to an estoppel that there should be privity between the parties; that is to say, an estoppel is only available between the parties to the representation and those claiming under them. The section only says "neither he (that is, the person making the representation) nor his representative shall be allowed", etc. Therefore only parties and their privies are bound by the representation, and only those whom the representation is made to or intended to influence and their privies, may take advantage of the estoppel. A stranger can neither take advantage of an estoppel nor be bound by it.² Estoppel affecting one plaintiff does not affect the other plaintiffs.³ It will be observed that whatever

22. *F.F. Refugee v. Adl. Dist. Magistrate*, (1975) 1 Cal. L.J. 117 : 79 Cal. W.N. 366.

23. *M/s. Sarvedshak Arya Pratinidha Sabha v. Ranjit Singh*, 1974 Ren. C.R. 58 : 1974 Rajdhani L.R. 233: I.L.R. (1974) 2 Delhi 63.

24. *Sehadri Reddy v. Subrahmanyam*. A.I.R. 1963 A.P. 423 : (1963) 2 Andh. W.R. 241.

25. *Ganesh Lal Sonar v. Mohammad Ismail*, A.I.R. 1976 Pat. 223.

1. *Jagannath Prasad Singh v. Syed Abdullah*, 1918 P.C. 35 : 45 I.A. 97 : I.L.R. 45 Cal. 909 : 45 I.C. 770.

2. *Bigelow*, op. cit., 6th Ed., 617, 618,

Taylor, Ev., s. 99; see *Mohammad Afzal v. Din Mohammad*, 1947 Lah. 117 : I.L.R. 1946 Lah. 300; *Umaram Gogoi v. Puruk Chand Oswal*, 1925 Cal. 993 : 85 I.C. 540; *Lachman Lal v. Munshi Mahton*, 1933 Pat. 708 (2); but see *Nagappa Chettiar v. Ramanatha Ganapadigal*, 1944 Mad. 208 : (1943) 2 M.L.J. 677 : 1944 M.W.N. 37 : 57 L. W. 39, where it has been held that estoppel operates personally against the person who is estopped, not ordinarily against any one claiming through him.

3. *Jethibai v. Chabil Das*, 1935 Sind 142.

be the rule in the case of estoppel by judgment,⁴ this estoppel is not mutual. The party to whom the misrepresentation was made has an estoppel; but the other party though bound has nothing upon which to base an estoppel.⁵ A plea of estoppel cannot be raised by a stranger between whom and the party sought to be estopped there is no privity.⁶ If the act was *inter alia* there can be no estoppel.⁷ But a representation which will bind the person making it as an estoppel will equally bind those who claim through him.⁸ A man is estopped not only by his own representations, but also by those of all persons through whom he claims. Upon the principle *qui sentit commodum sentire debet et onus* if the predecessor-in-title is not at liberty to contradict what he has formerly said or done, his privy is subject to a like disability, for the latter stands in no better position than the party through whom he derives title.⁹ Where the owner of property causes another to transfer the same to a third person and takes an active interest in completing the transfer and assists in getting registration of the conveyance and mutation of names, not only he, the owner, but also his son succeeding by gratuitous title would be estopped from challenging the transfer.¹⁰ As to the meaning of the term "representative", see Section 18, "Persons from whom interest is derived",¹¹ Section 21, "Representative in interest".¹² The word "representative" in this section is not limited to gratuitous transferee or volunteer and to a subsequent transferee for value with notice of the circumstances creating an estoppel. A derivative owner, though not aware of the circumstances creating an estoppel, is included.¹³ The legal representative of a party to the record is as much bound by every estoppel binding on his predecessor.¹⁴ The purchaser of an estate sold for arrears of revenue is not privy in estate to the defaulting proprietor. In the case of a private sale in satisfaction of a decree, the purchaser derives title through the vendor. But a purchaser at an execution sale is not as such the representative of the judgment-debtor within the meaning of this section.¹⁵ A privity exists between an execution-creditor and a purchaser at a court-sale. So, when a plea of estoppel is available to a decree-holder, it is likewise available to the

4. *Spencers v. Williams*, (1871) L.R. 2 P. & D. 230, 237.

5. *Bigelow*, op. cit., 6th Ed., 618 n. (1) e.

6. *Karimuddin v. Mst. Mehrunnisa*, 1948 Nag. 19; I.L.R. 1947 Nag. 341; 230 I.C. 471.

7. *R. v. Ambergate Rail Co.*, (1872) 1 E. & B. 372; *Mowatt v. Castle Steel Co.*, (1886) 34 Ch. D. 58.

8. *Board v. Board*, (1873) L.R. 9 Q. B. 48; *Middleton v. Pollock*, (1876) L.R. 4 Ch. D. 49; *Siva Ram v. Ali Baksh*, (1881) 3 A. 305 (vendor-vendee); *Moonshce Ameer v. Syed Ali*, (1866) 5 W.R. 289 (heir); *Monmohinee Joginee v. Jogobundhoo Sadhookhan*, (1873) 19 W.R. 233 (guardian and minor); *Luchman Chunder v. Kali Churn*, (1873) 19 W.R. 292 (heirs); *Chunder Coomar v. Hurbans Sahai*, (1888) 16 C. 137; *Tilak Rai v. Pargash Rai*, 1935 Pat. 21; 152 I. C. 823.

9. *Taylor*, Ev., s. 90

10. *Jagannath Prasad Singh v. Syed Abdullah*, 1918 P.C. 35.

11. See pp. 651–653, ante.

12. See p. 677, ante.

13. *D. Sivarao v. K. Subbarao*, 1934 Mad. 302; 148 I.C. 612; 39 L.W. 431; *Pareshnath Mukherji v. Anathnath Deb*, I.L.R. (1883) 9 Cal. 265; 9 I.A. 147 (P.C.); *Mahomed Muzaffar Hossain v. Kishori Mohun Roy*, I.L.R. (1895) 22 Cal. 909; 22 I.A. 129; *Kalidas v. Prasanna Kumar*, 1920 Cal. 354; I.L.R. 47 Cal. 446; 55 I.C. 189.

14. *Pethaperumal Ambal v. Chidambaram Chettiar*, 1954 Mad. 760; I. L.R. 1954 Mad. 1206; 1954 M.L. J. 585; 67 L.W. 339.

15. v. ante notes to S. 18 sub voc. "Persons from whom interest is derived", and cases there cited—p. 651–653 et seq of Vol. I. Ref. to latest edition; *Vasanji Haribhai v. Lallu Akhu*, (1885) 9 B. 285, 288; but see *Bance Pershad v. Manu Singh*, (1867) 8 W.R. 67.

purchaser at the execution sale as his representative or as one claiming under him.¹⁶ An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata*; there is no difference in principle between a purchaser in execution of a money decree and a purchaser in execution of a mortgage decree.¹⁷ Where in any question with the person estopped or his representatives, another may be held to have obtained a valid conveyance to himself, then as the latter has himself through the estoppel a valid title, he can give good title to a purchaser from him whatever might be the state of knowledge of the person purchasing.¹⁸ Just as a purchaser at an execution sale may take advantage of an estoppel arising from the deed by which the debtor acquired title¹⁹ so the purchaser in his turn is estopped by the deed made by the debtor before the sale; in other words, the levying creditor is bound by an estoppel against the debtor as grantor. One who can take advantage of an estoppel in his favour should be bound by estoppel.²⁰ Where in execution of a money decree certain property was purchased, and this property was subject to a mortgage transaction, it was held that the purchaser was bound equally with him, inasmuch as the right, title and interest of the "judgment-debtor" has passed to the purchaser, and that the purchase was therefore subject to the mortgage.²¹ And in another case it was held that a purchaser under a title which had been at least partly created by the mortgagor was estopped from raising the plea of non-transferability of the holding.²² In a case in the Allahabad High Court, it was held that where a mortgagee purchased the mortgaged property in execution of a decree in his favour and was afterwards defendant in a suit on a prior mortgage of the said property, he was estopped from pleading that the mortgagor had been incompetent to execute the prior mortgage.²³ An endorser cannot dispute the validity of a Hundi as against the endorsee.²⁴

16. *Krishnabhupati Devu v. Vikrama Devu*, (1894) 18 M. 13; *Swaminatha v. Dharmalinga*, 1917 Mad. 211: 37 I.C. 325; 1917 M.W.N. 88 (the principle that auction-purchaser is not the representative of the decree-holder is restricted to S. 47, C.P.C., and does not apply to the plea of estoppel under S. 115, Evidence Act); *Nandilal v. Jogen-dra Chandra*, 1923 Cal. 53: 70 I.C. 960: 36 C.L.J. 421.

17. *Kali Dayal v. Umesh Prasad*, 1922 Pat. 63: I.L.R. 1 Pat. 174: 65 I.C. 266: 3 P.L.T. 506; *Maharaj Bahadur Singh v. A. H. Forbes*, 1926 Pat. 478: 97 I.C. 205.

18. *Sarat Chunder v. Gopal Chunder*, (1892) 19 I.A. 203, 220: I.L.R. 20 Cal. 296; strictly speaking, it is not the offence of an estoppel to pass a title. The title remains, but it cannot be asserted against the party who acted upon the false representation. *Bigelow*, op. cit., 6th Ed., p. 601.

19. See e.g., the cases in 9 Cal. 265 and 20 Cal. 296 cited above.

20. *Firm Jankiram Sital Ram v. Chota Nagpur Banking Association, Ltd.*, 1937 Pat. 169: I.L.R. 15 Pat. 721:

165 I.C. 98; see also cases cited therein.

21. *Prayag Rai v. Sidhu Prasad Tewari*, (1908) 35 C. 877, followed in *Tota Ram v. Hargobind*, 1914 All. 366: I.L.R. 36 All. 141: 21 I.C. 721: 12 A.L.J. 123; see *Deo Nandan Prasad v. Janki Singh*, 1916 P.C. 227: 44 I.A. 30: I.L.R. 44 Cal. 573: 39 I.C. 346 (sale for arrears caused by representation of minor mortgagee), and see *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892) 19 I.A. 203: I.L.R. 20 Cal. 296 (P.C.) and *Carr v. London North-Western Railway*, (1873) 10 C.P. 316.

22. *Radha Kanta Chakravarti v. Ramnanda Shaha*, I.L.R. 39 Cal. 513: 13 I.C. 698: 15 C.L.J. 369: 16 C.W.N. 475 and *Krishna Lal Shaha v. Bhairab Chander*, (1905) 9 C.W.N. cccxviii.

23. *Tota Ram v. Hargovind*, 1914 All. 366. *Bakshi Ram v. Liladhar*, I.L.R. 35 All. 353: 21 I.C. 619: 11 A.L.J. 371; *Bishambhar Dayal v. Parshadi Lal*, 16 I.C. 629: 10 A.L.J. 112.

24. *Arunachalam Chettiar v. Narayan Chettiar*, 1919 Mad. 282: I.L.R. 42 Mad. 470: 51 I.C. 300.

The mortgagee who has purchased at the sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor.²⁵ It has been held that where a landlord in execution of a money decree causes the sale of an occupancy holding and purchases it himself, he is not estopped from pleading non-transferability without his consent in subsequent suit brought by the mortgagee of the occupancy-*raiyat*; for since this section is exhaustive, the English law of mortgage and a consequent estoppel is not applicable in such a case.¹ In the case cited, it has been held that where a landlord decree-holder applies under Section 162 of the Bengal Tenancy Act, 1885, and obtains an order under Section 163 of that Act there is an assertion by him that the property is at least an occupancy holding and he is bound by such representation.² There is no estoppel when the grantor has only accepted an after-acquired title temporarily and for the purpose of vesting it in another.³ Where a title arose prior to suit, a mortgagee having only an equity of redemption cannot represent the mortgagee.⁴ The reversioners, who consent to an alienation made by a Hindu widow or other limited owner, even though it was made without necessity, are precluded from disputing its validity.⁵ Where the consenting reversioner survived the widow, not only he but his legal representatives are estopped from disputing the alienation.⁶ But the actual reversioner at the death of the widow is not precluded from questioning the alienation even when he happens to be the son or grandson of the consenting reversioner.⁷ Where a reversioner does

25. *Kalidas v. Prasanna Kumar*, 1920 Cal. 354; I.L.R. 47 Cal. 446; 55 I.C. 189.

1. *Asmatunnessa Khatun v. Harendra Lal Biswas*, I.L.R. 35 Cal. 904; 8 C.L.J. 29; 12 C.W.N. 721 (occupancy holdings have, however, been now made transferable by the amended Bengal Tenancy Act of 1929).

2. *Abdul Sobhan Shaikh v. Natabar Mandal*, 16 I.C. 632; 17 C.L.J. 652.

3. *Prasanna Kumar Mookerjee v. Sri Kantha Rout*, I.L.R. 40 Cal. 173; 16 I.C. 365; 16 C.L.J. 202; 17 C.W.N. 137.

4. *Ramchandra Dhondo v. Malkapa*, 1916 B. 204; I.L.R. 40 Bom. 679; 36 I.C. 443; 18 Bom. L.R. 757.

5. *Jiwan Singh v. Misrilal*, 23 I.A. 1; I.L.R. 18 All. 146; *Rup Narain v. Gopal Devi*, 36 I.A. 103; I.L.R. 36 Cal. 780; *Fateh Singh v. Thakur Rukmini Rawanji Maharaj*, 1923 All. 387; I.L.R. 45 All. 339; 72 I.C. 8; 21 A.L.J. 235 (F.B.); *Akkava Ramchandrapa v. Sayad Khan*, 1927 Bom. 260; I.L.R. 51 Bom. 475; 102 I.C. 232; 29 Bom. L.R. 386 (F.B.); *Ramakottaya v. Viraraghavayya*, 1929 Mad. 502; I.L.R. 52 Mad. 556; 119 I.C. 156 (F.B.); *Hare Krishna Dhupi v. Upendra Kumar Bhoomik*, 1941 Cal. 383; 45 C.W.N. 398; *Ram Bharose v. Bhagwan Din*, 1943 Oudh 196; I.L.R. 19 Luck. 37; 204 I.

C. 547; 1943 O.W.N. 5; *Mst. Patan Dei v. Santoo Prasad*, 1944 Oudh 241; I.L.R. 19 Luck. 557; 1944 O.W.N. 150; *Mookka Pillai v. Valavanda Pillai*, 1947 Mad. 205; (1946) 2 M.L.J. 462; 59 L.W. 707; 1947 M.W.N. 33.

6. *Ramgowda Annogowda Patil v. Bhau Saheb*, 1927 P.C. 227; 54 I.A. 396; I.L.R. 52 Bom. 1; 105 I.C. 708; *Dhiyan Singh v. Jugul Kishore*, 1952 S.C. 145; I.L.R. (1953) 1 All. 225; 1952 S.C.A. 417; 1952 S.C.J. 142; 1952 S.C. R. 478; 1952 A.L.J. 324; *Jaganath v. Rup Narain*, A.I.R. 1960 Pat. 564; *Anantam Veeraraju v. V. Venkayya*, I.L.R. 1959 Andh. Pra. 1951 (principle applied to awards also).

7. *Mst. Binda Kuer v. Lalita Prasad*, 1936 P.C. 304; 164 I.C. 340; 38 Bom. L.R. 1256; 41 C.W.N. 161; *Nagi Reddi v. Durairaja Naidu*, 1951 S.C. 109; 1952 S.C.J. 192; 1952 S.C.R. 655; (1952) 1 M.L.J. 746; 65 L.W. 519; *Ram Ratan Lal v. Gangotri Prasad*, 1935 All. 73; 152 I.C. 19; 1934 A.L.J. 632; 4 A.W.R. 770; *Ali Mohammad v. Mst. Mughlani*, 1946 Lah. 180; 223 I.C. 20; 48 P.L.R. 210 (F.B.); *C. Ramamurthy v. C. Bhimashankar Rao*, 1938 Mad. 433; I.L.R. 1938 Mad. 688; 178 I.C. 784.

ot claim through his father, but in his own independent right, he is not bound by an invalid compromise to which he was not himself a party and from which he did not directly derive any benefit. One reversioner does not take his title through another, even if they are related to each other as son and father.⁸ The individual conduct of the reversioner himself may be such as to preclude him from asserting his title as reversioner.⁹ It is settled law that one reversioner does not claim through another so that an estoppel as against the one does not operate against the other.¹⁰ No act or omission committed by the presumptive reversioners during the lifetime of the widow in amount to an estoppel as against the reversioners who actually succeed to the estate. Their conduct may, under certain circumstances, raise a presumption in favour of legal necessity but can never debar the actual reversioners from claiming the estate in assertion of their own rights which they do not claim through the former reversioners. Therefore, the result of a previous litigation by the presumptive reversioners does not amount to an estoppel.¹¹ Where a person in the position of a trustee in respect of property as to which there was no previous dedication obtains from Court a declaration that that property is trust property and acts as such trustee, and subsequently mortgages the property on the footing that it is his private property, the subsequent alienee is not estopped from setting up a defence, in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation, that the property is not trust property.¹²

When a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by anyone except that other person.¹³ An estoppel can be availed of by the parties and their privies. The privy cannot be deprived of such benefit by the fact that since the time the representation was made and the privy of estate commenced, the person to whom the representation was made and the person who made the representation have come to an arrangement contrary to the representation.¹⁴

Not only, as has been already seen, is the representative of person estopped bound by the same estoppel as that which affects his predecessor-in-title, but conversely also, the estoppel enures not only for the benefit of the person to whom the representation was actually made, but also for the benefit of his successors-in-title. Therefore, not only may the heir be bound by an estoppel affecting his ancestor, but he may also claim the benefit of an estoppel which his ancestor might have claimed.

8. Appaswami Pillai v. Thayammal, 1939 Mad. 880 : (1939) 2 M.L.J. 236 : 50 L.W. 166.

9. Mst. Binda Kuer v. Lalita Prasad, 1936 P.C. 304 : 164 I.C. 340 : 38 Bom. L.R. 1256 : 41 C.W.N. 161; Marudanayakam Pillai v. Subramanian Chettiar 1935 Mad. 425 : 158 I.C. 216 : 68 M.L.J. 643 : 41 L.W. 783; see Vellayammal v. Palanivandi Ambalam, 1933 Mad. 856 : 147 I.C. 381 : 65 M.L.J. 772 : 28 L.W. 955.

10. Ramgowda v. Bhau Saheb, 1927 P.C. 227 : 54 I.A. 396 : I.L.R. 52 Bom. 1 : 105 I.C. 708; Mahadeo Prasad v. Mata Prasad, 1922 All.

297 (2) : I.L.R. 44 All. 44 : 63 I.C. 721; Thakur Prasad v. Mst. Dipa Kuer, 1931 Pat. 442 : I.L.R. 10 Pat. 352 : 134 I.C. 129.

11. Muhammed Abdul Karim Khan v. Bishen Sahai, 1930 All. 9 : 121 I.C. 387 : 1929 A.L.J. 741.

12. Venkata Lingama Nayanam Bahadur Varu v. P. Jagannadha Rayanimgar, 1931 Mad. 97 : 130 I.C. 463 : 60 M.L.J. 155 : 33 L.W. 485 (F.B.).

13. Runga Rao v. Bhavayamma, (1894) 17 M. 478.

14. Badri Bishal v. Baijnath, 1918 Oudh 284 : 47 I.C. 934 : 5 O.L.J. 458.

The estoppel by conduct operates by nature, that is, wherever it can so operate, specifically; and gives to the party entitled the rights he would have against the person estopped supposing the representation true. So, if the representation is made on the sale of a security which the seller did not own, the buyer's rights are not limited to the recovery of the consideration paid, but the purchaser will be entitled to recover what he would have received had the representation been true.¹⁵

"There may be also a good title by estoppel to things which do not require any instrument to transfer them, as for instance, goods: if any action is proceeded upon the ground that the property in goods has passed to the vendor of the plaintiff and if that question depends upon whether a particular parcel of goods has been set apart and appropriated to the contract between the vendor of the plaintiff and the defendant, an admission by the defendant, the owner of the goods, that there had been a setting apart of the goods will be effectual as against him to pass a good title to the plaintiff who has paid for the goods; the defendant is estopped from denying that the goods have been set apart, and the plaintiff is entitled to rely upon the admission of the defendant, which, if true, would have given the plaintiff a good title to the goods."¹⁶ If a person is entitled to avail himself of an estoppel, he is entitled to use that estoppel as a matter of proof, that is, as a means of showing that the facts covered by the representation were those which did in fact actually exist.¹⁷ The representation, being a statement made by the other party, is evidence by way of admission of the fact to which it relates. It becomes conclusive evidence because the party claiming the estoppel affirms its truth, which the party estopped is not permitted to deny. The section only says that the party sought to be estopped is not to be allowed to deny the truth of the representation. It is, of course, open to him to deny that he made the representation itself. Lastly¹⁸ this estoppel, arising as it does from misconduct, is not mutual, like other estoppels, and cannot be used against the party in whose favour it has arisen.

39. Illustration. The illustration to the section sets forth that one is bound who intentionally and falsely leads a purchaser to suppose he is taking a perfect title.¹⁹ When a person having a limited interest, namely, a sub-lease, granted a perpetual lease and afterwards acquired the proprietary right, he was held estopped from disputing the perpetual lease.²⁰

15. Bigelow, *op. cit.*, 6th Ed., p. 710.

16. *Simm v. Anglo-American Telegraph Company*, (1879) 5 Q.B.D. 188 at 215, 216; see also *Anglo-Indian Jute Mills Co. v. Omadamul*, I.L.R. 38 Cal. 127, 141; *Bhagwan Das Sitaram v. Albion Jute Mills Co. Ltd.* 1917 Cal. 143.

17. *Luchman Chunder v. Kali Churn*, (1873) 19 W.R. 292, 297, *vide* also *ib.* remarks as to the necessity of pleading an estoppel. In *Shaikh Hanif v. Jogabandhu Shaha*, (1901) 8 C.W.N. cxxxvii, a plea of estoppel was disallowed which had not been pleaded and as to which no issue

was raised in the Court of first instance, and see *Narsingdas v. Rahimanbhai*, 6 Bom. I.L.R. 440.

18. Bigelow, *op. cit.*, 6th Ed., 710.

19. See *Baswantapa v. Ramu*, I.L.R. 9 Bom. 86, 93; *Radhey Lal v. Mahesh Prasad*, I.L.R. 7 All. 864 and S. 45 of the Transfer of Property Act IV of 1882, see also cases cited, notes under the heading "Declaration, act or omission", *supra*.

20. *Kuru Chaubi v. Janki Prasad*, 1 N.W.P. Rep. 165. See *Syed Ammer v. Heera Singh*, (1873) 20 W.R. 291.

40. Estoppel and Fundamental Rights. The rule of estoppel cannot apply in respect of fundamental rights.²¹ The Supreme Court has also held that it is not open to a citizen to waive the fundamental rights conferred on him by Part III of the Constitution.²²

41. Miscellaneous. If a Nagar Mahapalika treated a factory in the past as outside its limits and did not charge octroi duty on goods arriving there for some reason or other, it cannot create an estoppel against the Nagar Mahapalika.²³

Where, in giving delivery of goods to X on the basis of the railway receipt (forged one) which was presented to the Railway Authorities, it could not be said that they were doing something which would induce other people to believe that the person holding the consignment was the real owner thereof or that he had a right to deal with the same, and X pledged the goods to Y on X's representation, the Railway Authorities were not estopped from suing Y for the recovery of the goods even if there was negligence on the part of the Railway Authorities in relation to the delivery of the goods on the basis of the railway receipt.²⁴

Objection regarding estoppel, whether legal or equitable, has to be specifically pleaded.²⁵

Once the employee has accepted pension from the company, the employee is not estopped from questioning the same before the court. It is open to the Union, which takes up the cause of the employees, to raise the dispute by way of collective bargaining on their behalf.¹

Where the Regional Transport Authority while granting a permit to the petitioner imposed the condition that he should produce clearance certificate of payment of transport tax and the petitioner subjected himself to that condition and produced the clearance certificate and did not challenge the condition in appeal and revision, he cannot at a belated stage take up the plea that the condition itself is invalid as being outside the scope of the Motor Vehicles Act, 1939.²

21. *Behram Khurshid Pesikaka v. State of Bombay*, 1955 S.C.A. 1 : 1955 S.C.J. 73 : 1955 Andh. L.T. (Cr.) 1 : 1955 Andh. W.R. (S.C.) 32 : 57 Bom. L.R. 575 : 1955 Cr.L.J. 215 : (1955) 1 M.L.J. (S.C.) 32 : A.I.R. 1955 S.C. 123 ; *Sakbar kherda Education Society v. State of Maharashtra*, A.I.R. 1968 Bom. 91 (97).
22. *Basheshar Nath v. Commissioner of Income-tax*, (1959) Supp. 1 S.C.R. 528 (565) : 1959 S.C.J. 1207 : (1959) 35 I.T.R. 190 : I.L.R. 1959 Punj. 319 : A.I.R. 1959 S.C. 149 (163) (Art. 14) ; *General Manager v. Rangachari*, (1961) 2 S.C.J. 424 : A.I.R. 1962 S.C. 36 (Art. 16) ; *Bhaskar v. Arjun*, I.L.R.

- 1962 Cut. 203 : A.I.R. 1962 Orissa 167 (170) (Art. 16).
23. *Baladin Ram v. State*, 1968 A.W.R. (H.C.) 347 (548).
24. *Purshottam Das Banarsi Das v. Union of India*, I.L.R. (1967) 1 All. 398 : A.I.R. 1967 All. 549 (555).
25. *Jose Joaquim Sebastiao Rodrigues v. Union of India*, A.I.R. 1967 Goa 169 (184).
1. *Namburnadi Tea Co. v. Workmen of Namburnadi Tea Co., Ltd., Estate*, 1968 Lab. I.C. 1386 A.I.R. 1968 Assam 39 (40).
2. *Arbind Kumar Singh v. Nand. Kishore Prasad*, A.I.R. 1968 Pat. 254 (256).

The powers of a person accepted by the Court, either as a next friend or as guardian of the minor, are only limited to that legal proceeding and not beyond that. A person who has been a party to a partition suit cannot be taken to have recognised the mother of a minor son to be a competent guardian for disposing of the properties of the minor son. There cannot be any estoppel against that mother to raise an objection of legal incompetency in respect of transfer of title of the minor by his mother in a sale.³

Where additional evidence was admitted in the Lower Court without objection from the defendant, he cannot, after taking the chance of a decision in his favour, raise in revision before the High Court an objection to the admission of additional evidence.⁴

There is no distinction in principle between the denial of amount in the custody of an officer when an attachment is made under Order XXI, Rule 52, C. P. C. and the denial of a debt under Order XXI, Rule 46, C. P. C.; in either case the provisions of Order XXI, Rules 58 to 63, are not attracted. The public officer, notwithstanding a claim petition which was dismissed, was not prevented from questioning the validity of the attachment even if a suit filed under Order XXI, Rule 58, was later withdrawn.⁵

Owners-claimants cannot be estopped from claiming just compensation under Section 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952, merely because they had given a low figure of annual rent for purposes of taxation.⁶

Objecting to jurisdiction and pleading to the merits cannot be construed as waiver or abandonment of the objection as to jurisdiction.⁷

Where the petitioner claimed excess land only on the ground of its inclusion in the original settlement, no question of estoppel can arise.⁸

The technical plea of estoppel is out of place in an industrial dispute.⁹ Workmen are, therefore, not estopped from challenging a retrenchment order after payment of retrenchment compensation.¹⁰ Even though both the em-

3. Narain Singh v. Sapurna Kuer, 1968 B.L.J.R. 898 : A.I.R. 1968 Pat. 318 (320).
4. Kasturbhai Ramchand Panchal & Bros. v. Firm Mohanlal Nathubhai, 9 Guj. L.R. 729 : A.I.R. 1969 Guj. 110 (120).
5. Hyderabad Co-operative Commercial Corporation, Ltd. v. Syed Mohiuddin Khadii, (1969) 2 Andh. W.R. 185 : A.I.R. 1970 A.P. 162 (172, 175).
6. Satnarain Goenka v. Union of India, A.I.R. 1970 Delhi 232 (239).
7. Bahrein Petroleum Co., Ltd. v. P. J. Pappu, (1966) 1 S.C.R. 461 : (1966) 1 S.C.A. 232 : (1966) 1 S.C.W.R. 98 : 1966 K.I.J. 41 : 1966 K.L.T. 1193 : (1966) 13 Fac. L.R. 136 : (1966) 2 I.L.J. 144 : A.I.R. 1966 S.C. 634 ; Janak Singh v. Raji,

- 1969 Kash. L.J. 90 : A.I.R. 1970 J. & K. 19.
8. Tronglaobi Pisciculture Co-operative Society Ltd. v. Chief Commissioner of Manipur, A.I.R. 1969 Manipur 84 (89).
9. Workmen of Subong Tea Estate v. Subong Tea Estate, (1964) 1 I.L.J. 333, 341 (S.C.) ; Hind Strip Mining Corporation, Ltd. v. Raj Kishore Parshad, (1967) 1 I.L.J. 108 ; S. K. Chatterjee v. Dt. Signal Tele-Communication Engineer, 1969 P.L.J.R. 444 ; Bhanat Collieries Ltd. v. The Presiding Officer, 1968 P.L.J.R. 499 (506).
10. Somu Kumar Chatterjee v. District Signal Tele-Communication Engineer, 1969 P.L.J.R. 444 (445, 446) : 21 Fac. L.R. 37 : (1970) 2 I.L.J. 179 : 1970 Lab. I.C. 629 (Pat.).

ployer and employee give a joint application for reference to labour court under Section 10 of Industrial Dispute Act subsequently the employee can challenge jurisdiction of labour court.¹¹

Where the constitutional provision itself says that no inquiry need be held and no opportunity need be given, the exemption being for the benefit of the administration and public interests, it cannot be forfeited by the administration by estoppel.¹²

A mortgagee, who has been put in possession of property by the mortgagor pursuant to a mortgage is estopped, so long as the relationship between them continues, from denying the mortgagor's title to the property.¹³

The doctrine of attornment implies conscious act on the part of the tenant in acknowledging the title of the transferee from the landlord.¹⁴ Therefore, an attornment made in ignorance of the legal position cannot fasten liability on the tenant or the lessee, as the case may be.¹⁵ It is not open for the same reasons to a mortgagee to dispute the title of mortgagor to redeem the property.¹⁶ But co-mortgagees are not estopped from alleging that the redemption was invalid even though they themselves induced the mortgagor to pay money where consent of other co-mortgagees was not obtained because mortgage contract is indivisible and there can be no estoppel against law.¹⁷

A judgment-debtor, an undischarged insolvent, having allowed an *ex parte* decree to be passed against him, cannot question the validity and enforceability of the decree in collateral proceedings, like execution proceedings.¹⁸

In a suit on a mortgage, the defendant-mortgagor cannot take the defence that there was an oral agreement by which the plaintiff-mortgagee agreed to take a lesser amount than that due on the mortgage, for evidence of such an oral agreement is prohibited by Section 92, *ante*. The plaintiff-mortgagee was, therefore, not estopped from claiming the whole amount, notwithstanding his passing a receipt for part-payment of amount agreed.¹⁹

If a mortgagee in a suit for recovery of mortgage money takes the burden of proving execution of mortgage upon himself and adduces evidence to discharge that burden, he cannot later on complain that the burden was wrongly cast on him.²⁰

11. J. P. Industries v. Workmen, 1973 Lab. I.C. 338.
12. Sunil Kumar Ghosh v. State of W. Bengal, 1970 Lab. I.C. 1243; 1970 Cr. L.J. 1225; A.I.R. 1970 Cal. 384.
13. Appu Goundar v. Munusami, A.I.R. 1962 Mad. 395; Rafiquddin v. Samsuddin, (1971) 37 Cut. L.T. 1257 (1262). See also G. K. Setty v. Abdul Khader, A.I.R. 1956 Mys. 14.
14. Vide Woodfall's Landlord and Tenant, 25th Ed., p. 902.
15. Bhowra Kankaree Collieries Ltd v. Sunil Kumar Roy, 1968 P.L.J.

- R. 486 (489).
16. Rafiquddin v. Samsuddin, (1971) 2 Cut. W.R. 733; 37 Cut. L.T. 1257.
17. Ambe Lal v. Phena, A.I.R. 1974 H.P. 11.
18. B. Guruswamy v. K. Kotayya, (1966) 1 Andh. W.R. 281; A.I.R. 1967 A.P. 188.
19. B. Janikannura v. N. Veerajulu, (1966) 2 Andh. L.T. 198 (204).
20. Ram Kumar v. Bastu Singh, 1971 Raj. L.W. 122; 1970 W.L.N. (Pat I) 430; A.I.R. 1971 Raj. 124.

The mere execution of a promissory note by a purchaser for amount due to a vendor does not extinguish vendor's statutory lien under Section 55, Transfer of Property Act, 1882 and does not estop him from action on such a lien.²¹

Where a petitioner had already made an application for reference under Section 18 of the Land Acquisition Act claiming increased compensation, he could not be permitted to challenge the acquisition of land itself and at the same time claim increased compensation.²²

Where supply of electricity to a petrol pump does not amount to accord- ing sanction for a building and the structure (the petrol pump) was install- ed before the Municipal Corporation sanctioned the electric connection and there was nothing to show how on the representation of the Municipal Cor- poration, the petitioners (the lessees of the petrol pump) acted to their detri- ment, and the Corporation as a statutory body was obliged to conform to the regulations in giving or withholding sanctions, there is no question of estoppel preventing the Municipal Corporation from demolishing the struc- ture.²³

Where an Insurance Co., second defendant in a suit for damages arising out of a fatal accident, was given up in an interlocutory petition to set aside the decree against the first defendant (the owner of the lorry), an endorse- ment was made by the counsel for the first defendant that he did not claim any relief against the second defendant in that application, the endorsement would not operate as an estoppel against the first defendant so as to preclude him from claiming any relief against the second defendant by impleading him as a third party under Order VIII-A of the Civil Procedure Code.²⁴

116. *Estoppel of tenant; and of licensee of person in possession.* No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person, who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

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21. C. Sundararaj Pillai v. Sakthi Talkies (Diindigul), Ltd., A.I.R. 1967 Mad. 127 (129); Krishnaswami Mudaliar v. Vijayaraghava Pillai, A. I.R. 1939 Mad. 590; Somu Achari v. Singara Achari, A.I.R. 1945 Mad. 107; Kampani Pillai v. Harirao, (1911) 21 M.L.J. 849; Dhanika- chala Pillai v. Raghav Reddiar, A.I.R. 1962 Mad. 423.
22. Tirthalal v. State of West Bengal, 66 C.W.N. 115 (121); Moham- mad Habibullah Sahib v. Special

- Deputy Collector for Land Acqui- sition, I.L.R. (1967) 2 Mad. 590 : (1967) 2 M.L.J. 531; (1966) 69 M.L.W. 469; A.I.R. 1967 Mad. 118 (121).
23. United Taxi C. T. & C. Society v. Delhi Municipality, I.L.R. (1966) 2 Punj. 851; A.I.R. 1967 Punj. 82 (84).
24. India Insurance Co., Ltd. v. Kaveri Ammal, (1968) 38 Comp. Cas. 19; 1967 Comp. L.J. 235; 80 M.L. W. 362; (1967) 2 M.L.J. 446.

SYNOPSIS

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12. Licence.

Bigelow on Estoppel, 6th ed., Chap. XVII; Estoppel by Representation and *Res judicata* by A. Caspersz, 4th Ed., XII; Everest and Strode on Estoppel, 268; Taylor, Ev., ss. 101–103; Cababe, Principles of Estoppel.

1. Principle. These are instances of estoppel by agreement based on permissive enjoyment. If A, being in possession of land, delivers the possession to B upon his request and upon his promise to return it, with, or without rent, at a specified time, or at the will of A, B cannot be allowed, while still retaining possession, to dispute A's title, because to allow him to do so would be to allow him to work a wrong against A by depriving him of the advantage which his possession afforded him and with which he would not have parted, but for the promise (or, perhaps to speak more aptly, the implied agreement) of B that he would hold it from him and in his place and stead.²⁵ The estoppel of a tenant is founded upon the contract between him and his landlord. The former takes possession under a contract to pay rent as long as he holds possession under the landlord, and to give it up at the end of the term to the landlord, and, having taken it in that way, he is not allowed to say that the man, whose title he admits and under whose title he took possession, has not a title.¹ In *Cuthbertson v. Irving*,² Baron Martin,

25. *Franklin v. Merida*, 35 Cal. 558 (Amer.) per Sanderson, J., cited in Bigelow, op. cit., 6th Ed., 569–571. The broad principle is that a person who has received property from another will not be permitted to dispute the title of that person or his right to do what he has done. Bigelow, op. cit., 6th Ed., 589, 590. As to setting up of a *jus tertii*, see *Mathura Prasad v. Gokal Chand*, 1919 All. 217 (2) : I.L.R. 41 All. 654 : 51 I.C. 548 : 17 A.L.J. 835.

1. In re *Stringer's Estate*, (1877) L.R. 6 Ch. D. 9, 10 ; see *Duke v. Ashby*, (1862) 7 H. & S. 602 ; Bigelow, op. cit., 506 ; see also *Krishna Prasad Lal Singh Deo v. Baraboni Coal Concern Ltd.*, 1935 Cal. 368 : I.L.R. 62 Cal. 346 : 159 I.C. 98 : 60 C.L.J. 477 ; *B. K. Ghose v. R. K. Joysurendera*, A.I.R. 1959 Manipal 27.
2. (1859) 4 H. & N. 742 at p. 757 : 28 L.J. Ex. 306.

J., observed : "The state of law in reality tends to maintain right and justice and the enforcement of the contract which men enter into with each other (one of the great objects of all law) ; for, so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor or the heir or assignee of his lessor really is? All that is required of him is that, having received the full consideration for the contract he has entered into, he should on his part perform it." And, as pointed out by their Lordships of the Privy Council, it is a useful exposition of the reason which underlies the well-known doctrine of estoppel which has been enacted in Section 116.³ There is no distinction between the relation of a tenant and that of a licensee, in whose case the law itself implies a tenancy and to whom the same principles apply.⁴ This section does not contain the whole law of tenant's estoppel.⁵

The section embodies the principle of estoppel arising from the contract of tenancy. It is based upon a healthy and salutary principle of law and justice that a tenant, who could not have got possession but for his contract of tenancy, admitting the right of the landlord, should not be allowed to launch his landlord in some inequitable situation taking undue advantage of the possession that he got and any probable defect in the title of his landlord. All that is necessary for the application of the above principle is that there was a contract of tenancy and that the tenant took possession of the land under the title, or with the permission of the landlord, or the person then in possession. Possession and permission being established, estoppel would bind the tenant during the continuance of the tenancy and until he surrenders his possession. Evidently, both the landlord and the person in possession, at the time of the contract, are within the protection of the provision. A person in possession, within the meaning of the section, need not be a full owner; he may be a mortgagee, lessee or any other person having right to or in actual possession. However defective the title of such a person or even the landlord may be at the time of the creation of the tenancy, the person inducted under the terms of the contract cannot be permitted to rely on that defect to his advantage, or to perpetuate his possession, or to act in detriment to the landlord's right.⁶

The section is perfectly clear that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor, pending the term of the lease, unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title. A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession. A person, who has lawfully come into possession of land as tenant from year to year, or for a term of years, cannot, during the

3. Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern. Ltd., 1937 P.C. 251 at 254 : 64 I.A. 311 : I.L.R. (1938) 1 Cal. 1 : 169 I.C. 556 : 1937 A.L.J. 1389.

4. Doe d. Johnson v. Baytop, (1885) 3 A. & E. 188.

5. M. Mujibar Rahman v. Isub Sura-

ti, 1928 Cal. 546 : 49 C.L.J. 1 : 32 C.W.N. 867 (tenant's estoppel operates even after termination of tenancy).

6. Bokke Sreeramulu v. Kalipatnapu Venkateswar Rao, A.I.R. 1959 A.P. 92 : I.L.R. 1958 A.P. 836.

continuance of such relation of landlord and tenant by setting up any adverse title to that of the landlord, inconsistent with the real legal relation between them and however notoriously and to the knowledge of the other party, acquire, by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let into possession. In such a case, the landlord's title can be extinguished only at the expiration of the period prescribed by Article 67 of the Limitation Act, 1963 and under that Article such a period will commence to run only when the tenancy is determined.⁷

This section accords statutory recognition to the well-known doctrine that during the existence of the relationship of landlord and tenant, the tenant is estopped from denying his landlord's title or from asserting that another person has a better title than that of the landlord. This doctrine has no application, where the tenant has been evicted by title paramount. Even if not actually evicted, if a judgment of eviction has been passed against the tenant, he can repudiate the title of the immediate landlord. But the mere fact that the tenant is under an apprehension that a suit for eviction might be brought by the paramount landlord, does not justify the tenant in denying the title of his landlord and attorning to the paramount landlord. Payment of rent to the paramount landlord does not absolve tenant from his liability to the immediate landlord.⁸

2. Distinction between estoppel against mortgagee and estoppel against licensee or lessee. A mortgagee is estopped from denying the title of the mortgagor to the mortgaged property at the time of the mortgage. The principle underlying this rule of estoppel is of wider application and extends to licensees and lessees as well. Statutory recognition has been given to this principle by this section which precludes a licensee or lessee who came upon an immovable property by the licence of the person in possession thereof or by a lease given by the landlord, from denying that the person granting the licence or lease had a title to such possession at the time when the licence or lease was given. This estoppel does not, however, prevent either a mortgagee or a licensee or lessee from proving that subsequent to the mortgage or the licence or the lease, the mortgagor or the licensor or lessor lost his title to the property to which the mortgage or the licence or lease related. So far, a mortgagee and a licensee or lessee stand on the same footing. But, it is not correct to say, that the estoppel operating against a mortgagee and the estoppel operating against a licensee or lessee are identical in nature or co-extensive in scope. The mortgagee cannot, for example, by repudiation of the mortgage, convert a possession under the mortgage into one adverse to the mortgagor. He is not permitted by his own unilateral act to bring about an extinction of that legal relationship which was created by the mortgage or reduce the period of limitation prescribed for the redemption of the mortgage. During the period available to the mortgagor for redemption, the possession of the mortgagee is always attributed to the mortgage despite any assertion by him of a claim hostile to the mortgagor. A licensee, however, is not precluded from setting up a claim of adverse possession, even though he has not surrendered possession to the licensor, provided that he has to the knowledge of the licensor, expressly and openly denied the permissive nature of his possession and asserted a claim hostile to the licensor. In this

7. Rampearyalal Khandelwal v. Surajmal Marwari, A.I.R. 1959 Pat. 500.

8. Farngu v. Sant Ram Jaishi Ram, A.I.R. 1959 Punj. 564.

respect, a licensee differs not only from a mortgagee but also from a tenant.⁹ It is open to a person, entering into possession as a licensee, to resist the claim of his licensor to possession on the ground that, subsequent to the licence, he has been ousted from possession by a person exercising a paramount right, and that his possession is no longer under the licence but under a fresh title derived from the person who had ousted him. In this respect, the position of a licensee resembles that of a tenant and the position of both may differ from that of a mortgagee because of the special legal incidents attached to a mortgage.¹⁰ The estoppel under this section is restricted to the denial of the title of the landlord by the tenant at the commencement of the tenancy. It is open to the tenant, even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder, or that, even though there was no actual eviction or dispossession from the property, under a threat of eviction, he had attorned to the paramount title-holder. In order to constitute eviction by title paramount, it is not necessary that the tenant should be dispossessed, or even that there should be a suit in ejectment against him. It is sufficient, if there is a threat of eviction and as a result of such threat, the tenant has attorned to the real owner. In such a case, he can set up such eviction by way of defence either to an action for rent or to a suit in ejectment. If the tenant, however, gives up possession voluntarily to the title-holder, he cannot claim the benefit of this rule.¹¹ It is open to a tenant to raise a defence in a suit for recovery of rent that the landlord's title had expired or been defeated by title paramount. Such a defence is permissible without the tenant having to surrender possession.¹² The principle enunciated in the above decision would be inapplicable to cases where the licensee has, by an act which amounts to breach of contract or breach of faith towards the licensor, wilfully allowed somebody else to take possession of the property which he held under the licence and has thereafter managed to get possession of that property again by taking advantage of his position as a licensee. In such a case, the break in the possession of the licensee would not change the nature of his possession, and rules of equity, such as those embodied in Sections 90 and 94 of the Trusts Act, will compel him to return the property to the licensor. But, where this is not the case and the licensee has been evicted by a person in exercise of a paramount right, the licence will be deemed to have come to an end, and if, at some subsequent time, the licensee regains possession, he is not estopped from denying the title of the licensor or resisting his claim to possession.¹³

3. Estoppel of tenant. As already stated, this and the following section give instances of estoppel by agreement, as the last deals with estoppel by misrepresentation. They are, however, not exhaustive of this form of estoppel.¹⁴

9. *Raja Ram v. Jadunandan*, 88 I.C. 539; A.I.R. 1925 A. 758 (in a suit by the mortgagor to redeem, the mortgagee is estopped from setting up the interest of a third person so long as he has not handed over possession to the mortgagor); *Ajjan Singh v. Maheshanand*, A.I.R. 1932 A. 437; 1932 A.L.J. 474.

10. *Bodhan v. Bhundal Singh*, A.I.R. 1965 A. 309.

11. *Guruswami v. Ranganatham*, I.L.R. 1954 M. 341; A.I.R. 1954 M. 402 cited with approval in *Bodhan v. Bhundal Singh*, supra.

12. *Ram Rakha Mal v. Munna Lal*, A.I.R. 1931 I. 243; 32 P.I.R. 338.

13. *Bodhan v. Bhundal Singh*, supra.

14. *Rup Chand v. Sarveswar Chandra*, I.L.R. 33 Cal. 915; 10 C.W.N. 747; 3 C.L.J. 629; *Parameswar Lal v. Dalu Ram*, 1957 Assam 188.

(a) *Scope of the section.* "The section does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel, and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. Whether during the currency of a term the tenant by attornment to A who claims to have the reversion, or the landlord by acceptance of rent from B who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside this section altogether; and it may well be that, as in English law, the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and in completeness with the case covered by the section. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor anyone, claiming through a tenant, shall be heard to deny that that particular landlord had, at that date, a title to the property. The section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease, and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, though, in such cases, there may be other grounds of estoppel, e.g., by attornment, acceptance of rent, etc. In this sense, it is true enough that the principle only applies to the title of the landlord who 'let the tenant in' as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end."¹⁵

The section does not deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. Under the section, the various categories of persons mentioned are precluded from denying that the lessor had a title at the date of the lease. There is no exception even in respect of a case where the lease itself discloses the defect of title.¹⁶ The section prohibits the tenant from denying the title of his landlord at the beginning of the tenancy. It imposes no bar when the tenant questions the title of his landlord on the ground that, after the commencement of tenancy, it came to an end on account of certain events which happened subsequent to the establishment of the tenancy.¹⁷ So, where a land is attached as service land to a post, the person holding the post can have any right in the land

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15. Kumar Raj Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern, Ltd., A.I.R. 1937 P.C. 251, 254, 255, followed in Parmeswar Lal v. Dalu Ram, 1937 Assam 188.
16. Currimbhoy & Co., Ltd. v. I. A. Creet, I.L.R. 60 C. 980; A.I.R. 1933 P.C. 29; Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern Ltd., I.L.R. (1938) 1 C. 1:

A.I.R. 1937 P.C. 251, 254 255; Laxminarayan v. Durgadevi A.I.R. 1967 Orissa-92; I.L.R. 1966 Cut. 887.

17. Dahi Chand v. Dadam Chand, A.I.R. 1963 Raj. 209; I.I.R. 1963 Raj. 881; Krupasindu Routra v. Purna Chandra Misra, (1972) 38 Cut. L. T. 764 (771).

only so long as he holds that post. If he ceases to hold the post, he does not have any right in the land.¹⁸ And where an owner succeeds in establishing his title against both the tenant and his landlord, the decision in that suit operates as *res judicata*. Thereafter the person who leases the land to the tenant cannot invoke the aid of estoppel.¹⁹

This section embodies the rule that a tenant cannot, during the continuance of the tenancy say that the landlord who let him into possession had no title at the time of his entry, to the premises leased. But it does not follow that a tenant is enjoined to defend the title of the person who let him into possession of the property. The rule of estoppel contained in this section is subject to an important qualification that a tenant is not estopped from contending, either before or after the expiration of the lease, that his landlord's title has terminated by transfer or otherwise, or been lost or defeated by title paramount.²⁰

The doctrine of estoppel which operates between landlord and tenants applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years; and, anyone holding under a tenant, or defending as landlord in an action of ejectment, is bound by it.²¹

This salutary principle applies also to cases of tenancy created under Rent Control Statutes.²²

(b) "*Immovable property.*" The section applies to tenants and licensees only of "immovable property," which does not include standing timber, growing crops or grass.²³ A fishery is an incorporeal hereditament and is real or immovable property for the purposes of this section.²⁴ A "coal land" possesses all the essential attributes of immovable property and therefore the lessee of a mining lease may be estopped under this section.²⁵

(c) *Minors.* It has been held that where a minor has derived a benefit from a lease executed on his behalf by his *de facto* guardian, the minor is estopped under this section from denying the title of the man in whose favour the lease has been executed.¹

(d) *Essentials—Permission and possession.* It has long been a well-settled rule that neither a tenant nor anyone claiming under him can dispute

18. *Ibotom Singh v. Krishna Singh*, A. I.R. 1964 Manipur 33.

19. *Chhotey Lal v. Har Prasad*, A.I.R. 1964 A. 82.

20. *Fida Hussain v. Fazal Hussain*, A.I.R. 1963 M.P. 232 : 1963 M.P.L.J. 248.

21. *Halsbury's Laws of England*, 3rd (Simond's) Ed., Vol. 15, p. 247.

22. *Surajbali Ram v. Dhani Ram*, A.I.R. 1979 Orissa 101 : (1979) 1 C.W. R. 94.

23. Section 3, Transfer of Property Act; see also *Maung Kywe v. Maung Kala*, 1927 Rang. 94 : I.L.R. 4 Rang. 503 : 99 I.C. 996.

24. *Lakshman Nakhwa v. Ramji Nakhwa*, 1921 Bom. 93 : 23 Bom. L.R. 339.

25. *Pashupati Nath v. Sankari Prosad Singh Deo*, 1957 Cal. 128.

1. *Kaniz Mehdi Begam v. Rasul Beg*, 1918 Oudh 379 : 48 I.C. 99; but see notes under Sec. 115 under the heading "Minor not estopped from pleading minority" and the observations of Seshagiri Aiyar, J. in *Venkata Chetty v. Aiyanna Gounden*, 1917 Mad. 789 (2) at 796 : I.L.R. 40 Mad. 561 : 36 I.C. 817 : 31 M. L.J. 712 (F.B.).

the landlord's title.² And a person, who has been let into possession as tenant by a plaintiff, is estopped from denying the latter's title without first surrendering possession.³ This rule was acknowledged and acted upon in India prior to this Act⁴ and is contained in this section, which deals with instances of estoppel by agreement based on permissive enjoyment.⁵ Enjoyment by permission is the foundation of the rule. Two conditions, therefore, are essential to the existence of the estoppel: (i) possession and (ii) permission. When these conditions are present, the estoppel arises.⁶ It follows, therefore, that when there is no permissive enjoyment, where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession, as in the case of the grantee in fee, there can be no estoppel.⁷

(e) *Landlord need not plead title.* In a suit for rent as in a suit for ejectment against a tenant where the relationship of landlord and tenant is alleged to exist, it is not necessary that the plaintiff should set out his own

2. Bigelow, op. cit., 6th Ed., 549; Taylor, Ev. Secs. 101-103; Doe d. Knight v. Smythe, (1815) 4 M. & S. 347; Alchorne v. Gomme, 2 Bing. 54; see cases cited in Williams Saunders, (1824) i. 575. ii. 826; Bigelow, op. cit., Chap. XVII; Casperuz, op. cit., 4th Ed., Chap. XII; Lohoram v. Bidya Ram Mahto, 1920 Pat. 588 : 53 I.C. 43 : 1920 P.H.C.C. 15 (but he may question landlord's status). As to adverse possession see Kristomoni v. Secretary of State, (1898) 3 C.W.N. 99; Kartar Singh v. Bachan Singh, A.I.R. 1972 Punj. 408; Mohammed Idris Mian v. Doman Sah, A.I.R. 1978 Pat. 82.
3. Muthurairayan v. Sinha Samavaiyan, (1905) 28 M. 526 : 15 M.L.J. 419; Currimbhoy & Co., Ltd. v. L.A. Creet, 1933 P.C. 29 : 60 I.A. 297; I.L.R. 60 Cal. 980 : 141 I.C. 209; Chandrika Prasad v. B. B. & C. I. Rly. Co., 1935 P.C. 59 : 154 I.C. 945 : 1935 A.W.R. 459; Bilas Kunwar v. Desraj Ranjit Singh, 1915 P.C. 96 : 42 I.A. 202 : I.L.R. 37 All. 557; Shamsuddin Khan v. Agha, Sayeed Fateh Shah, 1924 Oudh 309 : 84 I.C. 532; Nazroo v. Lalman, 1935 H.P. 44; Ganpat Rai v. Multani, 1916 All. 121 : I.L.R. 38 All. 226 : 35 I.C. 87; Mahan Singh v. Baisakhi Ramshah, 1919 Lah. 354 : 50 I.C. 591; Guruswami v. Ranganathan, 1954 Mad. 492 : I.L.R. 1954 Mad. 341 : (1958) 2 M.L.J. 511; Annamalaichettiar v. Malaiyan, (1970) 2 M.L.J. 562 : 82 M.L.W. 716 : A.I.R. 1970 Mad. 396 [no estoppel where subsequent to commencement of tenancy, landlords right extinguished by the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963)]; Adhav v. Kubal, (1971) 37 Cut. L.T. 1197 (1201).
4. Jainarayan Bose v. Kadambini Dasi, (1869) 7 B.L.R. 723n; Vasudev Daji v. Babaji Ranu, (1871) 8 Bom. H.C.A.C. 175; Banee Madhub v. Thakoor Dass, 1866 B.L.R. Sup. Vol., p. 588 (F.B.); Burn & Co. v. Busbo Mayoee, (1870) 14 W. R. 85; Gouree Dass v. Jagannath Roy, (1867) 7 W.R. 25, 26; Mohesh Chunder v. Gooroo Prasad, 1863 Marsh. 277; Trimbak Ramchandra Pandit v. Sheikh Gulam Zilani Waiker, I.L.R. (1909) 34 Bom. 329 : 5 I.C. 965 : 12 Bom. L.R. 206.
5. Kumar Raj Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern Ltd., 1935 Cal. 368 : I.L.R. 62 Cal. 346 : 159 I.C. 98 : 60 C.L.J. 477, affirmed in 1937 P.G. 251.
6. Bigelow, op. cit., 6th Ed., 550; Bhaiganti Bewa v. Himmat Bidykar, 1917 Cal. 498 : 35 I.C. 7 : 24 C.L.J. 103 : 20 C.W.N. 1935; Raman Das Bhattacharya v. Nilmadhub Saha, 1917 Cal. 515 : I.L.R. 44 Cal. 771 : 35 I.C. 754 : 24 C.L.J. 541 : 20 C.W.N. 1940; Dinabandhu Gan v. Hakim Sardar, 1936 Cal. 93 : I.L.R. 63 Cal. 763 : 161 I.C. 468; but see Venkata Chetty v. Aiyanna Gounden, 1917 Mad. 789 (2) : I.L.R. 40 Mad. 561 : 36 I.C. 817 (estoppel from execution of lease before possession given).
7. Rup Chand v. Sarbeswar Chandra, I.I.R. 83 Cal. 915 : 3 C.L.J. 629 : 10 C.W.N. 747.

title, and this is on the principle that the tenant is estopped from denying that his landlord who put him in possession of the land then had title so to do, or that his landlord, from whom he accepted a lease, then had title to grant the lease, or that the landlord to whom he paid rent then had title to receive the rents.⁸ Court is not bound to go into question of title in such a case.⁹ Once contract of tenancy is proved enquiry about title of landlord is impermissible.¹⁰ But when contract of tenancy is disputed, defence of tenant about want of title in landlord cannot be struck off unless the dispute about tenancy is settled in favour of landlord.¹¹ Tenant cannot deny landlord's title at the commencement of tenancy and in a suit between landlord and tenant title to the leased property is irrelevant.¹² Where the defendant does not accept the position that he was a tenant and, to neutralise the effect of the admission made by him in the lease, he relies on the recitals in another document, of sale of the same date, and he contends that the lease does not embody the whole of the agreement between the parties and the lease was only a part of an agreement, the nature of which can be discovered only by the construction of the sale-deed, the section will not come into play.

(f) *Section presupposes tenancy.* The section presupposes that the person affected by the estoppel is a tenant.¹³ For the purpose of this section, the real question to be decided is not whether the tenant was let into possession by the landlord, but whether a valid tenancy has arisen. The tenant may show that no valid tenancy has been created between the landlord and himself, because the lease was executed under a mistake or in consequence of a fraud, misrepresentation or coercion practised on him by the landlord. But, in the absence of any such circumstance as would avoid a contract, the execution of a lease or a verbal agreement to hold as a tenant, would constitute a valid tenancy and bring in the estoppel.¹⁴

(g) *Alleged lessee may deny lease.* Once a valid and subsisting lease is established between the parties, the lessee may be bound by the principle of estoppel and may be debarred from disputing the question of title of the lessor, but that does not prevent the alleged lessee from denying the lease and from denying his own status as a lessee. He is bound by the rule of es-

8. Kumar Raj Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern, Ltd., 1935 Cal. 368 : I.L.R. 62 C. 346 : 159 I.C. 98, supra, citing Bullen and Leake's Precedents of Pleadings, 8th Ed., p. 63; followed in Mst. Hirabai v. Jiwan Lal Palode, 1955 Nag. 234 : Lekhraj Singh v. Sawan Singh, A.I.R. 1971 M.P. 172.
9. R. L. Sharma v. Sardar Anvik Singh, 1974 R.C.R. 269 : A.I.R. 1974 Pat. 195.
10. Ram Bilas v. Krishna Bai, A.I.R. 1973 Bom. 168.
11. Sheikh Hussain v. Mst. Naubahar Bibi, A.I.R. 1972, Cal. 446.
12. Sri Ram Paschira v. Jagannath, A.

- I.R. 1976 S.C. 2335 : (1976) 4 S.C.C. 184.
13. Lal Chand v. Ram Singh, 1942 N.L.J. 136, Sk. Rashid v. Hussain Bakash, 1943 Nag. 265 : I.L.R. 1943 Nag. 340 : 207 I.C. 472 : 1943 N.L.J. 318 ; Chuttu Gappu v. Ram Singh, 1959 Jab. L.J. 591 ; Chhuttu v. Kayam Khan, 1953 Bhopal 18 ; Lekhraj Diddi v. Sawan Singh, 1917 J.L.J. 545 (549) : 1917 M.P.L.J. 438 : 1971 M.P.W.R. 425 : A.I.R. 1971 M.P. 172 ; Md. Farooq v. Noor Jehan, 1972 Ren. C.J. 584.
14. D. Venkat Rajani v. P. G. Rajiah, 1953 Hyd. 241 : I.L.R. 1953 Hyd. 288 ; Khalil Sufi v. Aziz Bhat, A.I.R. 1960 J. & K. 132.

toppel only when he acts as a lessee and in that capacity tries to refuse the title of his own lessor.¹⁵

(h) *Applicability of the section.* The section does not apply to a case where there is no tenancy and the defendant is a third person who is neither a tenant nor a person claiming through a tenant.¹⁶ The doctrine of estoppel, which operates between landlord and tenant, has no application to the same parties even while the tenancy exists, when the question of title arises between them, not in the relationship of landlord and tenant, but of vendor and purchaser.¹⁷ Where therefore, the lessee obtains an absolute interest in the leased properties to the extent of two-thirds and his title is paramount to that of his lessor, he is no longer in the position of a lessee but of an owner and he is entitled to enforce his rights even against the lessor.¹⁸

(i) *At commencement of tenancy.* The estoppel under the section is also restricted to the denial of the title at the commencement of the tenancy. From this, the exception follows that it is open to the tenant, even without surrendering possession, to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder, or that, even though there was no actual eviction or dispossession from the property, under a threat of eviction, he had attorned to the paramount title-holder.¹⁹ The sub-tenant is not estopped from saying that he is not liable to pay rent to his landlord (the chief tenant) with effect from the date when the order of ejectment against his lessor was passed by the court.²⁰

(j) *Where tenant not put in possession.* It has been held by a Full Bench of the Madras High Court that a tenant who has executed a lease, but has not been put in possession by the lessor, is estopped from denying the lessor's title, unless he can prove that he executed the lease in ignorance of some flaw in such title or through coercion, misrepresentation, or fraud.²¹ "There is in English case-law some authority for the view that a tenant is only estopped from denying his landlord's title, if at the time when he took

15. Shiba Prasad Singh v. Nilabji Bali, 1947 Pat. 45: 223 I.C. 303: 12 B. R. 389; Mst. Nasiban v. Mohammad Sayed, 1936 Nag. 174: 164 I. C. 557: 19 N.L.J. 179; Bai Hari v. Nathu Bhai Parbhu Bhai, 1939 Bom. 353: 41 Bom. L.R. 755; Bhaboot Mal v. Sens Mal, 1972 W.L.N. 451: 1972 Raj. L.W. 469: 1973 Ren C.J. 72: A.I.R. 1973 Raj. 56: I.L.R. (1972) 2 All. 641; M's. Suraj Bhan Kailas Chand v. Hari Shankar, (1972) 74 Punj. L.R. (D.) 14.
16. Maharaja of Jaipur v. Surjan Singh, 1922 All. 333: I.L.R. 44 All. 671: 75 I.C. 495.
17. Nesbitt v. Mable Thorpe, U.D.C., (1917) 2 K.B. 568: 86 L.J.K.B. 1401: 117 L.T. 365: 81 J.P. 289 [reversed (1918) 2 K.B. 1: 87 L.J.K.B. 705: 118 L.T. 805: 82 J.W. 161].
18. Mohammad Hussain Sahib v. Selam Bukara Abdul Gaffoor Saheb, 1945

- Mad. 321: I.L.R. 1946 Mad. 44: (1945) 1 M.L.J. 475: 58 L.W. 200: 1945 M.W.N. 242; Gajadhar Lodhra v. Khan Mohiuddin, I.L.R. 38 Pat. 806.
19. Guruswami Nadar v. Ranganathan, 1954 Mad. 403: I.L.R. 1954 Mad. 341: (1953) 2 M.L.J. 511; B. Gowresu v. K. Subhadramma, 1957 Andh. Pra. 961; India Electric Works Ltd. v. B. S. Mantosh, 1956 Cal. 148; Farnagu v. Sant Ram, A. I.R. 1959 Punj. 564; Khalil Sufi v. Aziz Bhat, A.I.R. 1960 J. & K. 132.
20. R. Dorai Rajan v. Saminathan, (1978) 2 M.L.J. 185.
21. Venkata Chetty v. Aiyanna Gounden, 1917 Mad. 789 (2): I.L.R. 40 M. 561: 36 I.C. 817 (F.B.) (Abdur Rahim, J., dissenting); see also Makhan Singh v. Baisakhi Ramshahi, 1919 Lah. 334; Mela Ram v. Mst. Bholi, 1925 Lah. 60: 76 I.C. 47.

his lease he was not already in possession of the land. But, in this section, the Indian Legislature has formulated no such condition. The words 'at the beginning of the tenancy' give no ground for it. When a demise of land is made and acted on, when the tenant proceeds to occupy and enjoy under the grant, gets the shelter of the grantor's title and the benefit of his covenants, it is difficult to see why 'during the continuance of the tenancy' he should be free of this form of estoppel. 'Tenant who has occupied but not entered' is a difficult notion to thrust into Section 116 and quite impossible to find therein.²² It is, therefore, too much to contend that a tenant in possession, if he has in fact attorned to a landlord, would still be entitled to challenge his derivative title, because at the beginning of the tenancy he was not let into occupation by the landlord in question. The beginning of the tenancy, in such a case, would refer to the beginning of the new tenancy, between the tenant and the landlord by virtue of the attornment, and the tenant's occupation of the land thenceforward would be referable to that attornment.²³ A new tenancy may begin, although the tenant has been in possession prior to that tenancy. It may begin by the granting of a lease by the landlord; it may begin by the tenant attorning to a new landlord. The distinction between the tenant being let into possession by the person whose title he seeks to deny and that in which the person whose title he denies did not let him into possession seems to be this: that, in the first case, the estoppel is complete as provided by the section, that is to say, that, so long as that tenancy continues the tenant cannot deny his landlord's title. In the other, the second class of cases, the estoppel is not complete in the sense that the tenant may evade it by showing any circumstances which would vitiate the agreement which he has entered into with the landlord. Indeed, it is not an exception to the rule laid down in this section but is merely an application of the ordinary principles of law which, in no way, are affected by it.²⁴ When, either through ignorance of title of the landlord or by fraud in the matter of execution of the *kabuliyat*, the tenants attorned to him, then the tenants are not altogether estopped, but can show that the landlord had no title, either when the *kabuliyat* was executed or attornment was made by payment of rent.²⁵ In a Lahore case, the original landlord was the mother and the daughters claimed their leasehold rights as the heirs of their mother. The Court held that the tenants could not dispute the title of the mother at the commencement of the lease, but they could dispute the title of the daughters.¹

(k) *Applicability when lease is void.* The words "during the continuance of the tenancy" make it clear that where there is no legal tenancy or sub-tenancy, the provisions of this section are inapplicable. The relationship of landlord and tenant can be created only by a valid contract of transfer according to the law in force at the time of the execution of the transfer, or by operation of law. The existence of the relationship can also be implied

22. Kriahna Prosad Lal Singha Deo v. Baraboni Coal Concern, Ltd., 1937 P.C. 251 at 255; 64 I.A. 311; 1 I.L.R. 1938 1 Cal. 1; 109 I.C. 556.

23. Parameswar Lal v. Dalu Ram, 1957 Amam 189.

24. Badruddin v. Bhagil Koeri, 1934 Pat. 555; 153 I.C. 759; 15 P.L.T. 519; Sital Prasad v. Badri Prasad, 1923 All. 53; 69 I.C. 647; 20 A.L.

J. 907.

25. John Nadjarian v. E. F. Trist, 1945 Bom. 399; 1 I.L.R. 1945 Bom. 343; 47 Bom. L.R. 209; Chengtu v. Jaheruddin, 1926 Cal. 720; 91 I.C. 669.

1. Prakash Kaur v. Gian Chand, 1940 Lah. 341; 191 I.C. 555; see also Khalil Sufi v. Aziz Bhat, A.I. R. 1960 J. & K. 132.

from the acts of the parties, provided the implied contract is not invalid. If the agreement relating to the execution of the lease is void and unenforceable, it cannot create the relationship of landlord and tenant between the parties. In such cases, where the initial lease is void, the subsequent conduct of the parties may not be used and considered. When there is no legal tenancy, there can be no question of the continuance of the tenancy and a party can, later, challenge the status of the other party.²

But the plea of illegality of original tenancy will not avail a person in a suit to challenge the eviction decree passed against him and the original tenant, when in the earlier suit to which he was also a party, no such plea was taken.³

(l) *Applicability to representatives of tenant.* By the terms of the section, the rule applies not only to the tenant but also to his representatives,⁴ and is operative throughout the continuance of the tenancy. It cannot be disputed that a person suing another for khas possession must show a better title to it than the defendant, and he must establish that he has the present right to get possession of the property.

(m) *Person suing tenant need not be owner.* It cannot be said however that none but an owner can maintain a suit for ejectment.⁵ The rule applies in favour of even a landlord with an equitable title only,⁶ an unnamed landlord letting by means of an agent,⁷ and one of several co-sharers.

(n) *Lease from one of several co-sharers.* If a person takes a lease from one of several co-sharers, he cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment,⁸ but not so, if by partition the exclusive ownership of the property has been transferred to another co-sharer.⁹

(o) *Lessor having no title.* The estoppel will also enure for the benefit of a lessor who has no title whatever, and the person let into possession will not be permitted to set up this want of title.¹⁰

2. Sharnsher Bahadur v. State of U. P., A.I.R. 1964 A. 395.
3. Siraj Uddin v. Abdul Haq Pracha, (1974) 76 Pun. L.R. 200; I.L.R. (1974) 2 Delhi 27.
4. P. G. Venkataswamy v. M. Z. Hussain, A.I.R. 1973 Mys. 145. (The rule applies against agent of tenant).
5. District Board, Tippera v. Sarafat Ali, 1941 Cal 408; 195 I.C. 594; 73 C.L.J. 281; see also Chandrika Prasad v. B. B. & C. I. Railway Co., 1935 P.C. 59; 154 I.C. 945; 1935 A.W.R. 459.
6. Board v. Board, (1873) L.R. 9 Q.B. 48; see Bigelow, op cit., pp. 362, 363, 538, 539.
7. Fleming v. Gooding, (1834) 10 Bing. 549.
8. Jamsedji Sorabji v. Lakshmiram Rajaram, (1888) 13 B. 323; Maung Shwe Gyaw v. Ma Shwe Thet, 1916 L.B. 6; 34 I.C. 71; Alimuddin v. Almaddin Majumdar, 1918 Cal.

220 (1): 38 I.C. 534; Balaram Jairam v. Kewal Ram, 1940 Nag. 396; 191 I.C. 881; 1940 N.L.J. 499.

9. Skattar Singh v. Rawela, 1952 J. & K. 18.
10. Tredman v. Henman, (1893) L.R. 2 Q.B. 168, 170; and this is so, though the tenancy be created by a deed which shows that the landlord possessed no legal estate; Bigelow, op. cit., 6th Ed., 582-585; 609, 610; Jolly v. Arbuthnot, (1859) 4 De G. & J. 224; Morton v. Woods, (1869) L.R. 4 Q.B. 293; Duke v. Ashby, (1862) 7 H. & N. 600; see also Nagindas Sankal Chand v. Bapalal Purshottam, 1930 Bom. 395; I.L.R. 54 Bom. 487; 125 I.C. 695; 32 Bom. L.R. 692. As to objection to validity of lessor's title on the ground of want of registration, see Shums Ahmed v. Goolam Moheemooden, (1871) N. W.P.H.C. 153.

(p) *Trustee*. The question of the lessor's title is foreign to a suit for rent or in ejectment against a lessee. And, this is so, though the ostensible lessor is merely a trustee and liable to account to the *cestui que trust*.¹¹ But, where land belonging to a charity was let out by the manager and after his death the executors under his will sued for rent, it was held that the tenant was not estopped from pleading that the testator had no absolute power of disposition over the land.¹² So also, where a person acting as trustee of a temple assigned part of its lands on *kanam*, and it was afterwards found that he had never been such trustee, it was held that the assignee was not estopped from denying his right to assign, though estopped from denying the temple's title.¹³

Anyone getting possession of property, whether movable or immovable, in a fiduciary capacity, whether as a servant or trustee, is estopped so long as he continues in possession in that capacity from asserting his own title or which comes to the same thing, questioning the title of the person from whom he got the possession.¹⁴

The question of lessor's title is foreign to a suit for rent or in ejectment against the lessee¹⁵ and this is equally true where the ostensible lessee is merely a trustee and liable to account to the *cestui que trust*. The principle of Section 116 applies to such cases.¹⁶

(q) *Mistaken admissions*. If a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law or that the landlord left a will, the tenant, in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *prima facie* evidence. It is, like all *prima facie* evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can.¹⁷

(r) *Benami transactions*. In this country, the principle that a tenant cannot dispute his landlord's title has been made to yield to the influence of the *benami* system. The tenant, when sued for rent due to his lessor, has been allowed to prove that the person from whom, nominally, he accepted a lease, was only a *benamidar* for a third person to whom the rent was really due.¹⁸ And conversely, where a landlord had accepted rent continuously from

11. Jainarain Bose v. Kadimbini Dasi, (1869) 7 Beng. L.R. 723, 724, note; Mst. Punia v. Torab Ali, Wyman's Rep. 14.

12. Vaithyanatha Aiyar v. Subramaniya Ayyar, 1918 Mad. 1044 (2): 38 I.C. 608: 4 L.W. 349.

13. Pattaikara Manakkal v. Munde Kottil, 1914 Mad. 477: I.L.R. 37 Mad. 573: 14 I.C. 168.

14. Balram Chunnital v. Durgalal Shivanarain, 1967 J.L.J. 471: 1967 M. P.L.J. 384: A.I.R. 1968 M.P. 81 (84).

15. Sreenamulu v. Venkateswar Rao, A.I.R. 1959 A.P. 92.

16. Sadasivam v. Rathinasabapathy Chettiar, 85 L.W. 714.

17. Abdul Rajjak v. Promoda Sundari, 1925 Cal. 482: 80 I.C. 22.

18. Donzelle v. Kedarnath Chuckerbutty, 7 B.L.R. 720: (1871) 20 W.R. 352; but see contra; Jainarain Bose v. Kadimbini Dasi, (1869) 7 B.L.R. 723, note. It is to be noted that the first-mentioned case was decided prior to this Act and proceeded on the ground that the technical doctrine of estoppel was not applicable to this country. But that doctrine has been sanctioned by the present section and according to

persons in whose names a lease had been taken for the benefit of their husbands when the *benamidars* were unable to pay, he was allowed to sue the person really interested in the lease.¹⁹ A grantee, accepting a deed of conveyance in fee and getting into possession, is estopped from pleading that he is only a *benamidar* for another.²⁰ A plaintiff, sued to obtain possession of certain land which the defendant held as tenant and in respect of which he had for some years paid rent, the defendant alleged that, prior to the time when he became tenant, the plaintiff had, for good consideration, conveyed to him the premises leased, together with other property. This conveyance was found to be a mere *benami* transaction. It was held that the plaintiff was not estopped from asserting the tenancy, and, under the circumstances, was entitled to recover.²¹ And it was held by the Madras High Court, that where a deed is executed by a tenant in favour of a person *benami* for another, the real owner and not the *benamidar* is the landlord, whose title the tenant is estopped from denying under this section, and that, in a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled, for a *benamidar* as such, has no right to sue unless he can show a legal right to sue under the general law.²² Dissenting from this, it has been held in a Calcutta case that a tenant is estopped from pleading that the person letting him into possession is merely a *benamidar*.²³ A distinction must be made between a case where a person claiming to be the owner of a certain property leases it to a tenant but takes the lease-deed in the name of his *benamidar* and the case where a *benamidar* happening to be in possession of the property on behalf of the real owner grants a lease of it without disclosing his *benami* character. In the former case, it may be correct to say that the tenant's estoppel operates in favour of the real lessor and not the *benamidar* who was not a party to the transaction. But, in the second case referred to

the principle upon which it rests the question of the lessor's title is wholly foreign to a suit instituted against the lessee for rent. See *Mohesh Chunder v. Gooropershed Ghose*, 1863 Marsh. 377; *Cuthbertson v. Irving*, 4 H. & N. 758; *Mst. Purnia v. Torab Ali*, Wyman's Rep. 14. The principle, however, laid down in *Donzelle v. Kedarnath Chuckerbutty*, supra, was reaffirmed in *Mst. Indubait v. Shaikh Mahboob*, (1875) 24 W.R. 44. When there is a *benami* and real tenant, the latter may be sued for the rent. As to suits by landlord when the ostensible tenant is a *benamidar*, see *Heeralal Buxshce v. Raj Kishore Moozooindar*, (1862) W.R. Gap. No. 58; *Judoonath Paul v. Prosunnath Dutt*, (1868) 9 W.R. 71; *Prosunno Coomar v. Koylash Chunder*, (1867) 8 W.R. 428 (F.B.); *Bepinbehari Chowdhury v. Ramchandra Roy*, (1870) 5 B.L.R. 234;

- Haripada Bhowmick v. Kishen*, 64 C.W.N. 199.
19. *Debnath Roy v. Gadadhur Dey*, (1872) 18 W.R. 532; see also *Taharat Karim v. Mst. Bal Kuer*, 1921 Pat. 351: 64 I.C. 515.
 20. *Prabhat Chandra v. Bijoy Chand*, 1924 Cal. 84: I.L.R. 50 Cal. 572: 75 I.C. 89, followed in *Krishna Rao v. Ghamon Ghama*, 1935 Bom. 144: 155 I.C. 249: 36 Bom. L.R. 1074.
 21. *Subuktula v. Hari*, (1882) 10 C.L.R. 199.
 22. *Kuppu Konan v. Thirugnana Sammandam Pillai*, (1908) 31 M. 461, following *Kuthaperumal Rajali v. Secretary of State for India*, (1906) 30 M. 245: 17 M.L.J. 174.
 23. *Dinabandhu Gan v. Makim Sardar*, 1936 Cal. 93: I.L.R. 63 Cal. 763: 161 I.C. 468; see also *Bogar v. Karam Singh*, 141 P.R. 1906: 96 P.L.R. 1907: 13 P.W.R. 1907; *Meer Jango v. Chote Sahib*, 8 I.C. 1124: 6 N.L.R. 161.

above, the *benamidar* clearly comes within the protection of this section as he was the person who in fact leased the property and placed the tenant in possession.²⁴

Where the plaintiff sued for possession of a house, alleging the expiry of the lease on which the defendants held as tenants, and the Lower Court dismissed the suit, being of opinion that the plaintiff had no title to the house when he granted the lease, and that it belonged to the defendants when they passed the lease; it was held, reversing the decree of the Lower Court, that the defendants (tenants), having executed the lease, could not deny the plaintiff's title as a ground for refusing to give up possession and the Lower Court itself, therefore, could not go into the question.²⁵

A lease and other contracts are binding only on parties *ad jure*; and persons under disability, not being bound by the contract, are not estopped from denying its validity.¹ The estoppel of the tenant may rest upon the sole ground that he has received possession from the landlord. It is perforce an admission of some title in him; and by reason of the landlord's change of position, the act is deemed a binding admission that he had sufficient title to make a lease. Where, however, the tenant, being already in possession, has made an attornment or acknowledgment of the tenancy, he may show that he did so through ignorance, mistake or the like.²

The doctrine that a tenant cannot dispute his landlord's title is not confined to the action of ejectment.³ The estoppel applies to all matters connected with, or arising out of, the contract by which the relation of landlord and tenant was created. Where in a suit for rent of land, the plaintiff alleged that he bought the land from the defendant and thereafter leased it to him year by year, and the defendant totally denied the sale and the lease, no question of title was held to arise on pleading, because if the lease was proved, the defendant would be estopped by this section from denying his landlord's title.⁴ The estoppel cannot, however, extend further and affect matters outside that contract.⁵

It has been held that Secs. 115 to 117, Evidence Act, are not exhaustive and the principle of estoppel contained in these sections may be applied by analogy to parties not mentioned therein.⁶

4. The relation. In regard to the relation of mortgagor and mortgagee without attempting to define it, it is sufficient to say that when the mortgagor retains possession, a relation is created similar to that of landlord and tenant, and the mortgagor is estopped from denying the title of the

24. *V. Venkatanarsimhacharyulu v. J. Gangaraju*, 1941 Mad. 607 : (1941) 1 M.L.J. 554 : 55 L.W. 492 : 1941 M.W.N. 404 ; *Bokka Sreeramulu v. Kalipatnapu*, I.L.R. 1958 A.P. 886 : A.I.R. 1959 A.P. 92.

25. *Patel Kilabhai v. Hargovan Mansukh*, (1894) 19 B. 135.

1. Bigelow, op cit., 6th Ed.; 535, 534.

2. Bigelow, op. cit., 6th Ed., 565.

3. *Delaney v. Fox*, (1857) 2 C.B.N.S. 768.

4. *Kaung Hla Pru v. San Paw*, 3 L.B.R. 90.

5. *Madras Hindu, etc. Fund v. Ragava Chetti*, (1895) 19 M. 200, 207.

6. *Rup Chand v. Sarveswar*, I.L.R. 33 Cal. 915 : 3 C.L.J. 629 : 10 C.W.N. 747.

mortgagee,⁷ unless after a distinct disclaimer brought to the knowledge of the latter he has acquired a title by adverse possession,⁸ or unless the mortgage is void by statute.⁹ Thus, except where a mortgage is void by statute, a mortgagor is estopped from asserting that the property in question was trust property which he had no right to mortgage.¹⁰ And this applies to a trustee for a public purpose.¹¹

A mortgagor is estopped from derogating from his own grant. When a Hindu mortgagor becomes solely entitled to the family property including the property mortgaged by him, he is estopped from denying the validity of the mortgage executed by him.¹² A mortgagor is estopped from pleading that he had no power to mortgage, but he is not estopped from objecting to the Court selling the property.¹³ A mortgagor is estopped from contending that he did not intend to mortgage a certain item included in the mortgage,¹⁴ or that he is not in possession of the property mortgaged,¹⁵ or that the property mortgaged by him is not liable to attachment.¹⁶ As between a mortgagor and a mortgagee, neither can deny the title of the other for the purpose of the mortgage.¹⁷ But no such estoppel arises in a suit not based on the mortgage.¹⁸ It is not open to a mortgagee to deny the mortgagor's right to redeem.¹⁹ A mortgagee is no doubt estopped from denying his mortgagor's title, but he is not estopped from contending as a defence in a suit that a sale of the property mortgaged in favour of another is invalid as being opposed to public policy.²⁰ A mortgagee is not estopped from asserting that, on the death of the mortgagor, persons who are his heirs under the Hindu

7. *Bigelow, op. cit.*, 6th Ed., 588; *Mst. Shanta Bai v. Narayana Rao*, 1949 Nag. 81 : I.L.R. 1948 Nag. 290 : 1949 N.L.J. 212 (case-law discussed); *Maherwan Jehangir v. Dhunbhai Kavasha*, 1940 Mad. 785 : (1940) 1 M.L.J. 913 : 52 L.W. 71 (so also persons succeeding to the title of the mortgagor); *Bengal Coal Co., Ltd. v. Sita Ram*, 1935 Cal. 666 : 159 I.C. 159 : 61 C.L.J. 560 (persons coming into possession under mortgagor); *Shiam Lal v. Mata Din*, 1934 Oudh 460 : 151 I.C. 576 : 11 O.W.N. 1097 (neither mortgagee nor his legal representative can deny his own title).

8. *Doe d. Higginbotham v. Barton*, (1840) 11 A. & E. 307, 314; *Partridge v. Bere*, (1822) 5 B. & Ald. 604; *Hichman v. Waltman*, (1838) 4 M. & W. 409; *Moss v. Gallimore*, (1779) 1 Doug. 279, 282; *Birch v. Wright*, (1786) 1 T.R. 378, 383.

9. *Bigelow, op. cit.*, 6th Ed., 588, 589.

10. *Mahamaya Debi v. Haridas Haldar*, I.L.R. 42 Cal. 455 : 20 C.L.J. 183 : 19 C.W.N. 208.

11. *ib.*

12. *Bharat Singh v. Jeobodh Lal*, 1934 All. 891 : 150 I.C. 745 : 1934 A.L.

J. 593.

13. *Tahir Hussain v. Chander Sen*, 1935 All. 678 : 157 I.C. 511.

14. *Jageshwar Prasad v. Mul Chand*, 1939 Nag. 57 : I.L.R. 1939 Nag. 64 : 179 I.C. 933 : 1939 N.L.J. 44 (F.B.).

15. *Bhola Nath Sen v. Balaram Das*, 1922 P.C. 382 : 70 I.C. 932 : 27 C.W.N. 607; *Jadunath Mitra v. Isar Jha*, 1939 Pat. 47 : 178 I.C. 198.

16. *Chittermal v. Mst. Ram Dei*, 1935 Lah. 164 (1).

17. *Hillaya Subbaya v. Narayanappa Timniaya*, I.L.R. 36 Bom. 185 : 12 J.C. 913 : 13 Bom. L.R. 1200.

18. *Deokali v. Ramchor Bux*, 1926 Oudh 253 : 92 I.C. 19; *Mst. Rajana v. Musahib Ali*, 1935 Oudh 387 : 155 I.C. 23 : 1935 O.W.N. 423, affirmed in 1937 Oudh 431 : 167 I.C. 79 : 1937 O.W.N. 237 : 1937 O.L.R. 95.

19. *Ajjun Singh v. Mahesha Nand*, 1932 All. 477 : 138 I.C. 366 : 1932 A.L.J. 474; *Appu Gounder v. Munuswami*, 1962 M.L.J. 229.

20. *Nallaswami Gurukkal v. Sadasiva Gurukkal*, 1935 Mad. 5 (2) : 153 I.C. 464 : 67 M.L.J. 759 : 40 L.W. 799.

Law did not succeed to his occupancy rights in accordance with special rules of succession laid down in N. W. P. Rent Act XII of 1881.²¹ A mortgagee is estopped from denying the title of even a *benamidar* mortgagor and his transferees.²² A mortgagee would not be estopped from enforcing his lien on the property mortgaged, even if he knew of its sale by the mortgagor.²³ Where a prior mortgagee takes an active part in bringing about a sale and by his silence or acquiescence leads the purchaser to believe that he was purchasing an unencumbered property, the mortgagee is estopped from setting up his mortgage to the prejudice of the purchaser.²⁴ Where a person has been put into possession of a certain property as an agent, he and his heirs are estopped from denying the fact that his possession was on behalf of the principal and from pleading that it was on behalf of a third person.²⁵

The same principle applies in the case of trust¹ and to certain relations between vendors and purchasers.² And it may be broadly asserted that the assignee or licensee of any right accepted and acted upon may be estopped from denying the authority from which the right proceeds.³ A landlord is also estopped from asserting that he had no title to let his tenant in. It is an application of the maxim that no man shall derogate from his grant. It must be taken against him that he had power to do what he purported to do. Hence, the estoppel upon a vendor, which precludes him from setting up his own want of title to defeat his own grant or sale, estops the mortgagor of property.⁴

5. Proof of tenancy. The existence of a tenancy may be established by proof of a written or verbal contract under the terms of which the tenant was let into possession,⁵ or it may be inferred from the circumstances of the case, such as the payment of rent,⁶ admission of the relation in a deposition

21. Mahadeo v. Ram Raj, 1930 All., 108 : 122 I.C. 414.

22. Muhammad Sherif Saheb v. Syed Kasim Saheb, 1933 Mad. 635 : 145 I.C. 230 : 38 L.W. 266.

23. Raman Mal v. Nathu Mal, 1934 Lah. 895 : 153 I.C. 1010 : see also Mst. Fazal Nishan v. Hukum Singh, 1936 Lah. 1020.

24. D. Sivarao v. K. Subbarao, 1934 Mad. 302 : 148 I.C. 612 : 66 M.L.J. 563 : 39 L.W. 431.

25. Ajitulla v. Mst. Bilati Bibi, 1932 Cal. 383 (2) : 137 I.C. 556 : 54 C.L.J. 151 : 35 C.W.N. 652.

1. Bigelow, op. cit., 6th Ed., 580, 590.

2. ib., 6th Ed., 590—597 ; Caspersz, op. cit., 4th Ed., Chap. XI ; Contract Act. Sections 98, 108, 234 ; Biddomoye Dabee v. Sitaram, (1878) 4 C. 497 ; Shankar Murlidhar v. Mohan Lal, (1887) 11 B. 704 ; Ganges Manufacturing Co. v. Surajmull, (1880) 5 C. 669 ; Greenwood v. Holquette, 12 B.L.R. 42 ; Le Geyt v. Harvey, I.L.R. (1884) 8 Bom. 501 ; G.I.P. Ry. v. Hanuman-das Ramkison, (1889) 14 B. 57 ;

Premji Trikamdas v. Madhawji Munji, 4 B. 447 ; Bir Bhaddar v. Sarju Prasad, (1887) 9 A. 681 : 20 I.A. 108 ; Purmanundass Jivandass v. Cornack, (1881) 6 B. 326.

3. Bigelow, op. cit., 6th Ed., 597, 598 ; Caspersz, op. cit., 4th Ed., s. 190 ; see Leavergne v. Hooper, (1884) 8 M. 149.

4. Cababe. Estoppel, 43, 44.

5. See the judgment of Field, J., in Lodai Mollah v. Kally Das, (1881) 8 C. 238, 241, where the various ways in which the relation may exist are fully discussed ; as also the defences to an action for rent.

6. Rajkishore Surma v. Girja Kant, (1875) 25 W.R. 66 ; Vasudev Daji v. Babaji Ranu, (1871) 8 Bom. H. C.R. 175 ; Bance Madhub v. Thakoor Dass, 1896 B.L.R. Sup. Vol., pp. 588, 590 (F.B.) ; Durga v. Jhinguri, (1885) 7 A. 511, 515 ; Vithaldas v. Secretary of State, (1901) 26 B. 410 : 4 Bom. L.R. 28 ; Gravenor v. Woodhouse. (1822) 1 Bing. 38, 43 (payment of rent in all cases furnishes a strong presumption against the tenant, and it

in a former suit,⁷ submission to a distress,⁸ attornment⁹ or other like circumstances. The terms of a tenancy can be proved by oral evidence except in three cases governed by Sec. 107 of the Transfer of Property Act: a lease from year to year, a lease for any term exceeding a year and a lease reserving a yearly rent.¹⁰ The fact that a rent is reserved at a stated sum per year does not conclusively prove that the tenancy is from year to year.¹¹ No difficulty arises where an actual demise is proved and it is shown that the tenant has taken possession thereunder. The permissive occupation raises an estoppel. A verbal lease for more than one year accompanied by delivery of possession is valid for the first year. If the tenants hold on after that year, they cannot be held liable under the terms of the verbal lease, but they cannot be allowed to escape payment for the years during which they were in occupation as tenants on the ground that the verbal lease is not binding as a lease for the period agreed upon.¹² Though a lease, which is compulsorily registrable but is not registered, is inadmissible in evidence as a lease, it can be referred to in order to show the nature of the alleged lessee's possession, and if it shows his possession to be that of a tenant, neither he nor persons claiming through him can be permitted to deny the title of the landlord.¹³ A tenancy may be proved otherwise than by producing a lease.¹⁴ But other acts of the tenant, such as payment of rent, stand on a different footing. Though such an act operates as an admission, it is like all other admissions rebuttable and not conclusive.¹⁵ And though the tenant is often required to make out a strong case, he may show that the payment

is always a good *prima facie* case for the landlord); Rogers v. Pitcher, (1815) 6 Taunt. 202; Cooper v. Blandy, (1834) 1 Bing. N.C. 45; Harvey v. Francis, (1813) 2 Maclean & Robinson's Sc. App. 57; Lodai Mollah v. Kally Dass, (1881) 8 C. 238, 241; see as to the establishment of tenancy by acceptance of rent; Durga v. Jhinguri, (1885) 7 A. 511; Mohesh Chunder v. Ugra Kant, (1875) 24 W.R. 127; The Government v. Greedharee Lall, (1865) 4 W.R. 13; the acceptance of rent must be with notice and knowledge to bind the landlord; Mirtunjaya Sircar v. Gopal Chandra, (1868) 2 B.L.R. A.C.J. 131; Gour Lal v. Rameshwar Bhaumik, (1870) 6 B.L.R. App. 92, but a landlord will be estopped by acceptance of rent with full knowledge of the facts. Ganga Bishen v. Ram Gut, (1867) 2 Agra 48. Contract to pay a certain rent may be implied from payment for a number of years; Venkata Gopal v. Rangappa, (1883) 7 M. 365. The service of notice of ejectment under Section 36, Act XII of 1881, is a conclusive admission of the existence of a tenancy; Baldeo Singh v. Imdad Ali, (1893) 15 A. 189; see N.W.P. Act III of 1901.

7. Obhoy Gobind v. Beejoy Gobind.

(1868) 9 W.R. 162.

8. Lodai Mollah v. Kally Dass, (1881) 8 C. 238, 241; Cooper v. Blandy, (1834) 1 Bing. N.C. 45.
9. Lodai Mollah v. Kally Dass, *supra*; Fenner v. Duplock, (1824) 2 Bing. 10; Trimbak Ramchandra Pandit v. Sheikh Gulam Zilani Waiker, 34 B. 329; 5 I.C. 965; 12 Bom. L.R. 208.
10. Sarat Chandra Dutt v. Jodal Chandra Goswami, 1918 Cal. 906; I.L.R. 44 Cal. 214; 37 I.C. 956; per Sanderson, C.J., and Mookerjee, J.
11. Durgi v. Goberdhan, 1915 Cal. 64; 24 I.C. 183; Gobinda v. Dwarakanath, 1915 Cal. 313; 26 I.C. 962; 20 C.L.J. 455; 19 C.W.N. 489.
12. Alauddin v. Aziz Ahmad, 1934 Pat. 369; 148 I.C. 684; Mohammad Mossa v. Jaganand Singh, 20 I.C. 715.
13. Ata Muhammad v. Shankar Das, 1925 Lah. 491; I.L.R. 6 Lah. 519; 88 I.C. 872.
14. Maiman Nisa v. Pateswari Prasad, I.L.R. 19 Luck. 204; 207 I.C. 552.
15. Bance Madhub v. Thakoor Dass, (1866) B.L.R. Sup. Vol. p. 583 (F.B.); see also Abdullah v. Moideen Kutty, 1937 Mad. 865; Maung Ba Than v. Maung Sein Win, 1929 Rang. 170; 120 I.C. 662.

of rent or other act on his part was done through ignorance, fraud, misrepresentation, mistake or coercion, and thus rebut the inference arising from his acts which tend to prove the existence of the relation asserted. He may show on whose behalf the rent was received; and when it has been paid under a mistake or misrepresentation, the tenant is not estopped from resisting further payment after discovery of the misrepresentation or mistake.¹⁶

Payment of rent. In order to make the payment of rent operate as an estoppel, it is essential to show that the payments have been made as for rent due in respect of land held as a tenant; and if, upon the facts of the case, it is plain that the payments have been made not for rent but on another account, the doctrine of estoppel arising from payment of rent has no place.¹⁷ A tenant may always explain, and thereby render inconclusive, acts done through mistake or misapprehension.¹⁸

So, a person is not estopped from showing that a person to whom he has paid rent is not the legal representative of the person from whom he took possession.¹⁹ But a person will be precluded by the unexplained payment of rent from disputing the title of the person to whom rent has been so paid.²⁰

6. Adverse possession. (a) *General.* Mere non-payment of rent or discontinuance of payment of rent, has not, by itself, been held to create adverse possession.²¹ The relation of landlord and tenant, once created between certain parties, continues as between them and their representatives in title until it is proved to have ceased.²² In order to terminate the tenancy,

16. See cases cited in the following four pages; *Harvey v. Francis*, 2 Mood. and R. 57; *Doe d. Barlow v. Wiggins*, (1843) 4 Q.B. 367; *Cooper v. Blandy*, (1834) 1 Bing. N.C. 45; *Banee Madhub v. Thakoor Dass*, (1866) B.L.R. Sup. Vol., p. 588 (F.B.); 6 W.R. 71 (F.B.); *Collector of Allahabad v. Suraj Baksh*, (1874) 6 N.W.P. 333. (A person accepting a lease under coercion is not bound by such acceptance, nor do payments of rent by him to the person granting the lease estop him from questioning the title of the payee, unless the payee let him into possession. Even then the effect of the payment as estoppel would be confined to the title of the payee at the time the possession was given.) As to the somewhat analogous case of payment of taxes raising no estoppel, see *Pitamberdas v. Jambusar Municipality*, (1892) 17 B. 510.
17. *Attorney General v. Stephens*, (1855) 6 De C. M. & G. 111, 136.
18. *Banee Madhub v. Thakoor Dass*, (1866) B.L.R. Sup. Vol., p. 588 (F.B.); *Doe d. Plevin v. Brown*, (1837) 7 A. & E. 447, 450.
19. *Banee Madhub v. Thakoor Dass*,

supra.

20. *Vasudev Daji v. Babaji Ranu*, (1871) 8 Bom. H.C. R.A.C. 175, citing *Cooper v. Blandy*, (1834) 1 Bing. N.C. 45; *Doe d. Barlow v. Wiggins*, (1843) 4 Q.B. 367. A landlord accepting rent even after the expiry of the period of grace, is not estopped from pleading determination of the tenancy. *Majji Parsuram v. Suryanarayan*, (1961) 2 Andh. W.R. 322.
21. *Jagdeo Narain Singh v. Baldeo Singh*, 1922 P.C. 272; 49 I.A. 399; I.L.R. 2 Pat. 38; 71 I.C. 984; *Ram Pearyalal v. Surajmal*, A.I.R. 1959 Pat. 500 (open assertion of hostile title is necessary).
22. Section 109, ante; *Rungo Lall v. Abdool Guffoor*, (1878) 4 C. 314, 316, 317; *Krishnaji Ramchandra v. Antaji Pandurang*, (1893) 18 B. 256, 258; see *Zamorin of Calicut v. Narayana Mussad*, (1899) 22 M. 323; *Abdul Ghafoor v. Kunj Behari Lal*, 1957 All. 346. As to adverse action by third party, see *Eledath Thavazhi v. Eliangattil Sankara Valia Rajaha Avargal*, 1918 Mad. 285; 45 I.C. 656; 1918 M.W.N. 376.

there must also be some act on the part of the lessor or his transferee showing his intention to determine the lease.²³ The landlord is not bound to insist on a forfeiture, when the occasion arises, and, unless he elects to do so, the tenancy remains unaffected.²⁴ The ordinary case of a tenant holding over after the expiry of his tenancy is not in itself, and in the absence of special circumstances, treated as a case of adverse possession.²⁵ The Privy Council has held that the estoppel applies to a tenant holding over after notice to quit.¹ The possession of a tenant not being adverse to the title of his landlord, limitation cannot be applied in a suit by the latter against the former.² But, if there is nothing to show that the landlord assented to the tenant continuing in possession, so as to enable the Court to find that the tenant had been holding over, limitation will be applied.³ The burden is on the landlord to prove the continuation of the tenancy.⁴ Where, after the expiry of the period fixed in a lease, the tenant continues in possession as tenant on same terms as those expressed in the lease, he cannot claim adverse possession, and the lessor can recover the property back.⁵ A person who has lawfully come into possession as tenant from year to year or for a term of years, cannot, by setting up, however notoriously, during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them, acquire, by limitation, title as owner or any other title inconsistent with that under which he was let into possession.⁶ But, where that tenant continues in possession of the leased property for more than 12 years, even after the expiry of the tenancy and it is not proved that he paid rent or that the plaintiff (the landlord) assented to the possession of the defendant after the period of the lease, or that the defendant accepted the title of the landlord, the suit is barred under Art. 139 of the

23. *Sidik Haji Yacub v. Md. Faruq*, 1926 Sind 71 : 90 I.C. 1007.

24. *Ittappan v. Manavikrama*, 21 Mad. 153 : 8 M.L.J. 92.

25. *Krishnaji Ramchandra v. Antaji Pandurang*, (1893) 18 B. 256, 258 ; *Tatia v. Sadashiv*, (1882) 7 B. 40 ; *Chandrika Prasad v. B. B. & C. I. Rly.*, 1935 P.C. 59 : 154 I.C. 945 : 1935 A.W.R. 459.

1. *Bilas Kunwar v. Desraj Ranjit Singh*, 1915 P.C. 96 : 42 I.A. 202 : I.L.R. 37 All. 557 : 30 I.C. 299 (P.C.). Also see *Mohd. Ali Akhtar v. Mohd. Abbas*, 1975 B.B.C.J. 90 : 1975 Ren. C.R. 182 : A.I.R. 1975 Pat. 177.

2. *Shristedhar v. Kalikant*, (1864) 1 W.R. 171 ; *Rajkishore Surma v. Grija Kant*, (1876) 25 W.R. 66 ; *Watson & Co. v. Ramee Shurut*, (1867) 7 W.R. 395 ; *Lakaco Khan v. Wise*, (1872) 18 W.R. 443 ; *Baboo Doolee v. Sham Beharee*, (1875) 24 W.R. 133 ; *Haradhum Roy v. Hulodhur Chunder*, (1876) 25 W.R. 56. But the rule is applicable to those cases only in which the parties are really related to each

other as landlord and tenant ; *Dinomoney Dabca v. Doorga Pershad*, (1873) 12 B.L.R. 274 ; *Maidin Saiba v. Nagapa*, (1882) 7 B. 96.

3. *Banwari Lal v. Mst. Hussaini*, 1939 Lah. 455 : 185 I.C. 858.

4. *S. Sitharamiah v. N. Ramaswamy*, 1938 Mad. 73 : 176 I.C. 84 : 46 L.W. 848.

5. *Chandrika Prasad v. B. B. & C. I. Rly.*, 1935 P.O. 59 : 154 I.C. 945 : 1935 A.W.R. 459 ; *Balasubramania v. Saraboji*, A.I.R. 1973 Mad. 305.

6. *Rajah of Venkatagiri v. M. Narasaya*, 1914 Mad. 564, 568, I.L.R. 37 Mad. 1 : 7 I.C. 202 ; *Seshamma v. Chickaya Hegde*, I.L.R. 25 Mad. 507 : 12 M.L.J. 119 ; *Madhavrao v. Raghunath*, 1923 P.C. 205 : 50 I.A. 255 : I.L.R. 47 Bom. 798 : 74 I.C. 362 ; *Nainapillai v. Ramanathan Chettiar*, 1924 P.C. 65 : 51 I.A. 83 : I.L.R. 47 Mad. 337 : 82 I.C. 226 ; *Gopal Chandra Das v. Satya Bhanu*, 1926 Cal. 634 : 92 I.C. 963 ; *Adhar Malik v. Kan-hoo*, 37 Cut. L.T. 1197 : A.I.R. 1972 Orissa 131.

old Act or Art. 67 of the present Limitation Act.⁷ Where a plaintiff suing to eject a defendant alleges that he had been a tenant but was holding over and fails to prove the tenancy which the defendant denies, the possession is adverse and the suit is barred by limitation.⁸ But, in a case in the Calcutta High Court, where the plaintiff sued to eject the defendant as a trespasser holding over after notice to quit, and the defendant alleged a settlement under which he had been in possession for fourteen years, it was held that, on this plea, his possession had never been adverse to the extent of the entire interest of the owner.⁹ An alleged tenant, who is, in fact, a trespasser, may set up a case of tenancy and also raise the issue of limitation.¹⁰ The possession of a tenant is, in the eye of the law, the possession of his landlord.¹¹ Where land is leased to a person for life, and upon the latter's death, his heirs continue in possession without obtaining a fresh lease or paying any rent to the landlord, the heirs, though not in possession as tenants, are not trespassers. Their possession is permissive and not adverse, until they expressly set up a title of ownership in the property.¹² And, in the undermentioned case,¹³ it was held by the Allahabad High Court that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor, until, at any rate, such time as when the lessor becomes entitled to possession. When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased; the tenant is bound to prove that fact by some affirmative proof, and more especially is he so bound when he does not expressly deny that he still continues to hold the land in question as tenant in the suit.¹⁴ Mere discontinuance of payment of rent does not constitute a dispossession within the meaning of Section 6 of the Specific Relief Act, 1963.¹⁵ The mere resumption of a *lakhiraj* tenure by Government does not dissolve the contract between the *zamindar* and tenant. The latter has the

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7. *S. Sitharamiah v. N. Ramaswamy*, 1938 Mad. 75 : 176 I.C. 84 : 46 L. W. 848, relying on *Sudalaimuthu v. Sappani Thevar*, A.I.R. 1925 Mad. 446 : 86 I.C. 933 : see also *Abdul Razak Bhurekhan v. Nandlal Sheolal*, 1938 Nag. 506 : 1938 N.L.J. 317 ; *Sheo Gobind v. Sujan Mahto*, A.I.R. 1960 Pat. 156, adverse possession by tenant.
 8. *Haji Khan v. Baldeo Das*, (1901) 24 A. 90.
 9. *Moti Lal v. Kalu Mandar*, 1914 Cal. 173 : 19 I.C. 253 : 19 C.L.J. 321, per *Mookerjee, J.*
 10. *Dinomonee v. Doorga Pershad*, (1873) 12 B.L.R. 274.
 11. *Girish Chunder v. Bhagwan Chunder*, (1869) 13 W.R. 191.
 12. *Krishanji Ramchandra v. Anantaji Pandurang*, (1893) 18 B. 256 : *Hellier v. Silcock*, 16 L.J. Q.B.N. 295. Disclaimer of a landlord's title after suit brought in the pleading does not of itself determine the tenancy and render notice to quit unnecessary ; *Ambabai v. Bhu*
 - Bin*, (1895) 20 B. 759 ; see *Venkaji Krishna v. Lakshman Devji*, (1895) 20 B. 354.
 13. *Thamman Pande v. Maharaja of Vizianagram*, (1907) 29 A. 593 : 4 A.L.J. 726, following *Muhamad Husain v. Mul Chand*, (1904) 27 A. 395 : 1 A.L.J. 725, dissenting from *Gobindo Nath Shaha Chowdury v. Surja Kanta Lahiri*, (1899) 26 C. 460.
 14. *Rungo Lall v. Abdool Guffoor*, (1878) 4 C. 314 : 3 C.L.R. 119 ; *Tiruchurna Perumal v. Sanguvien*, (1881) 3 M. 118 ; *Tutia v. Sadasiv*, (1882) 7 B. 40 ; *Troyluckho Tarinee v. Mohima Chundra*, (1867) 7 W.R. 400 (the mere omission to pay rent does not constitute adverse possession) ; *Poresh Narain v. Kassi Chunder*, (1878) 4 C. 661.
 15. *Tharini Mohun v. Gunga Prasad*, (1887) 14 C. 649 ; *Dhunput Singh v. Mahomed Kazim*, (1896) 24 C. 296, 304 : 1 C.W.N. 185.

option to determine his tenancy, or he may consent that the amount of revenue which the landlord must pay to Government or a portion of it, shall be added to his original *jumma*.¹⁶ Where a tenant has, by the direction of his landlord, paid rent to a third person, the landlord is estopped from recovering so much of the rent as the tenant has paid or made himself liable to pay in consequence of that representation.¹⁷ A landlord may also be estopped from treating him as his tenant whom he has required to enter into that relation with another instead of himself.¹⁸ In the undermentioned case¹⁹ it was held that the landlord, after having accepted rent from all the heirs, had no right to ignore some of them. According to English law, a tenant, by accepting a lease for a new term, even less than the existing one, is held impliedly to surrender the previous tenancy, and, by the acceptance of the new lease, he estops himself from setting up the old one.²⁰ It has been said²¹ that such a rule has no application in this country out of the Presidency towns, it being notoriously customary for tenants who hold protected tenures to accept fresh leases upon every change of proprietorship, whether by inheritance, private sale, or auction-purchase. The new lease is generally regarded as confirmatory of the tenure, and the fact of the tenure being an old one is occasionally, though not always, mentioned therein. Surrender, however, both express and implied, has been recognised by the Transfer of Property Act (IV of 1882, Sec. 111), and it is conceived that what may amount to a surrender in any particular case, will always in this country be a question of intention, and that if, in fact, the tenant, by his acceptance of a fresh lease, intended to, and did, surrender his old lease, the ordinary rule of estoppel will apply; but there will be no estoppel, if the fresh lease be, and was intended to be, confirmatory only of the preceding one.²²

(b) *Non-payment of rent by tenant whether amounts to adverse possession.* If the relationship of landlord and tenant has once been proved, the mere non-payment of rent, though for many years, is not enough to show that the relationship has ceased to exist.²³ Nor does mere non-payment of rent create a rent-free title. But long possession may be used to support an inference of legal origin or lost grant.²⁴ In order to claim adverse possession, the tenant must have done something more to deny the landlord's title than mere non-payment of rent for a number of years.²⁵ Where rent was never

16. *Mst. Farzahara Bano v. Azizunis*, 1866 B.L.R. Sup. Vol., p. 175 (F. B.) : 3 W.R. 72.

17. *White v. Greenish*, (1861) 11 C. B.N.S. 209; as to conduct not sufficient to bar landlord's rights, see *Rambhat v. Bababhat*, (1893) 18 B. 250.

18. *Downs v. Cooper*, (1841) 2 Q.B. 256.

19. *Ananda Kumar v. Hari Dass*, (1900) 4 C.W.N. 608 : I.L.R. 27 Cal. 545.

20. As to surrender, see Bigelow, op. cit., 6th Ed., 567, 568; *Reed v. Lyon*, 13 M. & W. 285.

21. *Ram Chunder v. Jugeshchunder*, (1873) 12 B.L.R. 229; *Roy Odooyte*

v. Ubhrun Roy, (1865) 4 W.R. (Act X) 1; *Puddo Monee v. Jholla Polly*, (1867) 7 W.R. 283.

22. See Caspersz, op. cit., 4th Ed., p. 253.

23. *Jagdev Narain Singh v. Baldeo Singh*, A.I.R. 1922 P.C. 272 : 49 I.A. 399 : 71 I.C. 984; *Lal Singh v. Wadhawa*, A.I.R. 1927 Lah. 759 : 100 I.C. 78.

24. *Jagdev Narain Singh v. Baldeo Singh* supra; *Mohanlal Jha v. Kameshwar Singh*, A.I.R. 1933 Pat. 175 : 145 I.C. 527.

25. *Mahommad v. Makhu* A.I.R. 1933 Lah. 776 : 144 I.C. 726; *Mst. Bhani v. Ujagar Singh*, A.I.R. 1936 Lah. 741 : 166 I.C. 607.

paid at all for nearly 30 years and no serious attempt was ever made to recover rent, and over and above this there was denial on oath by the defendant that he ever intended to pay rent or regard himself as lessee, the defendant's possession was treated as adverse.¹ Mere non-payment of rent or discontinuance of payment of rent does not by itself constitute adverse possession.²

A tenant or *inamdar*, claiming rent-free title by adverse possession on the ground of non-payment of rent to the landlord (*zamindar*), has the burden on him of proving by clear and cogent evidence that rent-free title was asserted to the knowledge of the *zamindar* for a period of 12 years. Non-payment of rent for several years may be a piece of evidence but by itself is not sufficient to prove rent-free title by adverse possession. While protest against the *zamindar's* demands for rent may reasonably imply a challenge of the landlord's right to demand, mere non-payment does not imply such a challenge.³

(c) *Entry in the record-of-rights does not stop running of time.* Registration of the owner's name does not *per se* operate to check the running of limitation in favour of an adverse holder.⁴ Entry in the record-of-rights raises a presumption in the plaintiff's favour and shifts the onus on the defendant.⁵ The general rule of evidence, in favour of presuming the continuity of things shown to exist at a prior date, cannot be availed of, by relying upon an entry in the record-of-rights made beyond the statutory period. Actual presumption of correctness which the record-of-rights carries is merely that the plaintiff was in possession when the record was made.⁶ An entry in the record-of-rights that the land was subject to the rights of the plaintiff does not amount to a tacit recognition of the plaintiff's rights on the part of the defendant.⁷

(d) *Proof of symbolical possession would be enough.* Proof of symbolical possession would be sufficient in case where such possession amounts to actual possession in the eye of law. Thus, in case of a vacant site, symbolical possession obtained by the plaintiff is equivalent to actual possession. Where the plaintiff purchased a land which was a vacant site in court sale in 1900, and obtained symbolical possession through court in 1904, and he alleged that he was ousted therefrom in 1914 and he brought a suit in March, 1916, it was held that the symbolical possession was equivalent to actual possession, and the defendant could defeat the claim only by showing adverse possession for more than 12 years.⁸ In a suit for ejectment, the entry in the record-of-rights raises a presumption in favour of the plaintiff, and the defendant has to establish affirmatively that the plaintiff has been out of possession for more than 12 years.⁹

1. Umar Baksh v. Baldeo Singh. 32 I. C. 35 : A.I.R. 1916 L. 353.
2. Kameshwar Singh v. Shaikh Sakhawat Ali, A.I.R. 1937 Pat. 96 : 167 I.C. 258.
3. Padmanabho Singh v. Arjuna Panigrahi. 30 Cut. L.T. 33 ; (M. Krishnaswami : Law of Adverse Possession, 9th Ed., p. 340. Law Book Co., Allahabad).
4. Jay Kali Roy Chaudhary v. Heman-gini Debi, 1 I.C. 363 ; Muthu Karuppan v. Muthu Samban. 38 Mad. 1158 : 25 I.C. 772 : A.I.R. 1915 M. 573.

5. Barkat Ali v. Basant, A.I.R. 1917 Cal. 79 : 39 I.C. 356 : 21 C.W.N. 175.
6. Ghogar Raut v. Jagannath Prasad, A.I.R. 1947 Pat. 475.
7. Jnanendra Narain v. Sarda Sundari, A.I.R. 1931 Cal. 25 : 57 Cal. 796 : 129 I.C. 355 (M. Krishnaswami : Law of Adverse Possession, 9th Ed., p. 500, Law Book Co., Allahabad).
8. Kaman v. Umra. 47 I.C. 411.
9. Barkat Ali v. Basant, 39 I.C. 356 (M. Krishnaswami : Law of Adverse Possession, 9th Ed., p. 83, Law Book Co., Allahabad).

(e) *Adverse title by tenant.* *Onus.* Where in a suit for possession, the commencement of possession is as tenant, the tenant must prove when and how the nature of that possession changed and it became adverse.¹⁰ The relation of landlord and tenant is not necessarily determined by mere non-payment of rent or repudiation of the landlord's title, unless the circumstances show that the landlord acquiesced in the tenant's act of repudiation. In such cases, it is the landlord's acquiescence and not the mere denial of his title by the tenant, which puts an end to the original relation of the parties.¹¹ The possession of the tenant which is lawful does not become adverse by the mere fact of his repudiating the tenancy, unless his repudiation is accepted by the landlord.¹² To prove adverse possession, it is not necessary that there must have been litigation on the subject between the *talukdar* and the claimant. It is sufficient, if it is proved that the title is entirely opposed to the interests of the *talukdar* and that the latter, being aware of the title, has stood by and done nothing. Where the claimants establish that they got under-proprietary rights under a sale which was not contested by the *talukdar*, they are entitled to the rights claimed.¹³

Whether the tenancy is for a definite period or from year to year, the mere denial of title of the landlord by the tenant does not operate as a forfeiture; but the tenancy subsists until the landlord indicates that he intends to exercise his option to determine it and it is from this period that limitation against him commences to run.¹⁴ Time runs not from the repudiation but when the landlord acquiesces in the act of repudiation.¹⁵

A lease is not determined on a forfeiture, until the landlord does some act showing his intention to determine the lease. It is the privilege of a landlord to take advantage of a forfeiture or not, and adverse possession of the tenant does not commence against the landlord necessarily from the date on which the tenant renounces the tenancy.¹⁶

Where, in a suit for ejectment on the ground that the defendant was a tenant, the defendant denies that he is a tenant and pleads adverse possession but the plaintiff's title is established, it is for the defendant to prove adverse possession for 12 years, and, if he fails to prove that, the plaintiff can succeed merely on his *prima facie* title as landlord. It is not necessary for him to go further and prove that he had been in actual possession at some period within 12 years previous to the commencement of the suit.¹⁷ *Posses-*

10. *Ramdas v. Chandi*, 69 I.C. 363; *Mahomed Faruq v. Sadik*, 79 I.C. 59; *Sadik Haji v. Mahomed Faruq*, 90 I.C. 1907.

11. *Umar Baksh v. Baldeo Singh*, 32 I.C. 35; A.I.R. 1916 L. 353; *Bhendra Kishore v. Mahomed Daulat Khan*, 49 I.C. 59; *Harekanta v. Bibi Mehruunnisa*, 53 I.C. 625; *Sidik Haji v. Mahomed Faruq*, 90 I.C. 1007.

12. *Mahomed Hassan v. Sohare*, 71 I.C. 805; *Karimulla Khan v. Bhanu Pratap Singh*, I L.R. 1948 Nag. 978; A.I.R. 1949 Nag. 265; *Ma-*

thura Prasad v. Uma Dutt, 179 I.C. 958; A.I.R. 1939 Oudh 106; *Kamla Prasad v. Ramnarain*, A.I.R. 1948 Oudh 7.

13. *Sat Narain v. Dy. Commissioner*, A.I.R. 1929 Oudh 433; 6 O.W.N. 829.

14. See *Sanjiva Row's Transfer of Property Act (1972)*, 3rd Ed., Vol. II; pp. 1820, 1821.

15. *Gopika Ram Rai v. Atal Singh*, 5 I.C. 678.

16. *Ibid.*

17. *Santa Singh v. Narain Singh*, 91 I.C. 1047; A.I.R. 1927 Lah. 32.

sion, which is permissive at its inception, cannot be converted into adverse possession, unless some overt acts had been done by the tenants, which would have the effect of their denying the title of the landlord.¹⁸ Where, in a suit for possession of a building in the occupation of defendants, the latter claimed that they were occupying it as co-sharers but plaintiff failed to prove the relationship of landlord and tenant, as no payment of rent was proved, and, from a certain statement filed in another case, it appeared that the defendants were occupying the house with the consent of the plaintiff, it was held that the proper inference was that the defendant's possession was permissive and not adverse to the plaintiff and the plaintiff must, therefore, be held to have been in constructive possession all along. The fact that the plaintiff overstated his case in alleging that he was realising his rent from defendants should not be considered to be sufficient to defeat his claim.¹⁹

(f) *Possession of trespassers. Tenants under void leases.* Where in a suit for ejectment the plaintiff admits possession of the defendant and avers that that possession is either permissive or as a tenant, he must establish the fact so asserted by him in order to entitle him to a judgment in his favour before the defendant is called upon to adduce rebutting evidence. If he discharges that onus and makes out a case which entitles him to the relief claimed, the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

The position will be different, where the plaintiff does not admit the defendant to be a *raiyat* and sues as a proprietor to recover the land and the defendant sets up a tenancy right. In such a case, the plaintiff has not to prove anything because the admitted paramount title carries with it a presumption that the plaintiff is entitled to hold and possess the land, and therefore, the person seeking to defeat that right and claiming to hold under him must establish the right so asserted by him.

In a suit for ejectment the initial burden lies on the plaintiff to prove that he has the title to immediate possession by ejectment of the defendant. If the suit is based on the ground of dispossession or discontinuance of possession and the defendant is in possession and asserts a title independent of the title alleged by the plaintiff, then barring certain cases, where no proof of plaintiff's title to possession is presumed on the principle that possession follows title, the plaintiff must prove in addition that he was in possession within 12 years of the suit. Where, however, it is admitted or found as a fact that the plaintiff has title to the suit land and is entitled to recover *khas* possession and the defendant asserts tenancy rights, permanent or temporary, and claims to hold the land in suit under the plaintiff by grant, contract, custom, prescriptive possession or by other means, the burden is on the tenant-defendant to prove that he has the right of occupancy which he claims, and to such case the rule of law enunciated by the Full Bench in the case of *Shiva Prasad Singh*²⁰ has no application.²¹

18. *Amru v. Santa*. A.I.R. 1935 Lah. 441.

19. *Md. Yakub v. Abdul*, 160 I.C. 1033; A.I.R. 1936 Lah. 673 (M. Krishnaswami: *Law of Adverse Possession*, 9th Ed., p. 349, Law

Book Co., Allahabad).
20. 62 I.C. 1; A.I.R. 1921 Pat. 237 (F.B.).

21. *Jaldhari Mahto v. Rajendra Singh*, A.I.R. 1958 Pat. 386; I.L.R. 37 Pat. 373.

The presumption that possession follows title cannot be called in aid by the plaintiff to prove his case of possession within 12 years before the institution of the suit in two cases: (1) where he has not adduced any evidence of possession at all, and (2) when his evidence is quite unworthy of credit, and is tantamount to his not having adduced any evidence at all. But where the evidence adduced on behalf of the plaintiff is not altogether valueless, the probabilities of the case and the presumption can be called in aid for the purpose of holding that the plaintiff has succeeded in proving his case of possession within 12 years before suit.²² Where the lessee's title begins under a genuine deed of perpetual lease which is subsequently found to be void for want of registration, his title will be perfected by adverse possession, if he continues in possession for more than 12 years.²³ A person who enters on land under an invalid lease is in the position of a trespasser, and if he holds it for a period of 12 years in open assertion of permanent tenancy rights therein, he acquires the right asserted by him and cannot be ejected. The fact that, during this time, he has been paying rents is no bar to the acquisition of such rights.²⁴ If a man enters under a void lease, he is not a disseisor but a tenant-at-will under the terms of the lease in all other respects except the duration of the time, and when he pays or agrees to pay any of the rents therein expressed to be reserved, he becomes a tenant from year to year upon the terms of the void lease so far as they are applicable to and not inconsistent with a yearly tenancy.²⁵ So also, a person in possession under an agreement to lease is in the position of a tenant-at-will, or something of that nature, pending the execution of the registered lease. He has no defence to a claim for ejectment other than a right to insist upon specific performance of the contract to lease. It must, therefore, follow he is not a mere trespasser and is not holding adversely to the proposed lessor. The fact that the proposed lessor did not interfere but on the contrary stood by and permitted him to erect structures does not bar suit for ejectment by reason of any doctrine of estoppel, acquiescence or waiver.¹ So, in the case of a void deed of sale, the possession of the so-called purchaser is adverse to his vendor from the date of the sale.² Where a lessee's title begins under a genuine deed of perpetual lease which is subsequently found to be void for want of registration, his title is perfected by adverse possession, if he continues in possession for more than 12 years.³

Clause (a) of Sec. 111, Transfer of Property Act, provides that a lease of immovable property is determined by efflux of the time limited thereby. But clause (q) of Sec. 108, Transfer of Property Act, lays down that on the determination of the lease, the lessee must put the lessor in vacant possession

22. Ranyad Singh v. Mst. Pan Kuer: A.I.R. 1958 Pat. 562.

23. Bank of Upper India v. Hanath Kanwar, A.I.R. 1926 Oudh 410: 93 I.C. 852.

24. Kala Devi v. Khelu Rai. A.I.R. 1949 Pat. 124; Rani Bhuvaneswari v. Secretary of State, 169 I.C. 756: A.I.R. 1937 Pat. 374.

25. Rabindra Chandra v. Mahtha Gauri. A.I.R. 1937 Pat. 554: 171 I.C. 818.

1. Ariff v. Jadunath, 58 I.A. 91: I. L.R. 58 C. 1235: 131 I.C. 762: A.I.R. 1931 P.C. 79; Shiva Prasad

Singh v. Manindra. A.I.R. 1940 Pat. 438: 190 I.C. 581.

2. Gnanasambanda v. Velu, 23 Mad. 271 (P.C.): 27 I.A. 69.

3. Varadapillai v. Jeevaratnammal. 43 Mad. 244: 46 I.A. 285: 53 I.C. 901: A.I.R. 1919 P.C. 44; Padma Kumari v. Nanda Padhan, 195 I.C. 203: A.I.R. 1941 Pat. 219 (M. Krishnaswami: Law of Adverse Possession, 9th Ed., p. 353, Law Book Co., Allahabad); Ponnusami Mudaliar v. Papammal Annachatram, A.I.R. 1958 Mad. 497 at p. 498.

of the property. Therefore, when the term of a lease has expired the lessee can determine the lease by fulfilling his obligation of putting the lessor into possession of the property. But, if he does not put the lessor into possession of the property, and, on the contrary, remains in possession thereof, then he does not become a trespasser in relation to the property but his status becomes that of a tenant on sufferance. Such a case is governed by Sec. 116 of the Transfer of Property Act. In such a situation, it is open to the lessor to determine the lease by a notice as provided in clause (h) of Sec. 111. But so long as the lessor does not exercise his option in the matter and assents to the lessee continuing in possession, the relationship of landlord and tenant does not legally come to an end. By virtue of Sec. 116, the lease is renewed from year to year, or from month to month, as the case may be, not only where the lessee is continuing in possession of the property and pays rent to the lessor which the latter accepts, but also where the lessor otherwise assents to the lessee continuing in possession. The relationship of landlord and tenant does not automatically come to an end, so as to convert the possession of the lessee into his possession as trespasser. The lessee cannot, merely by payment of taxes and rates, even as owner, lawfully put an end to the relationship of landlord and tenant, until he has offered to put the landlord in possession of the property in accordance with Section 108 (q) of the Transfer of Property Act. So long as the relationship of landlord and tenant subsists by virtue of Sec. 116 of the Transfer of Property Act, it is not open to the lessee to deny the title of the landlord. The rule of estoppel laid down in this section also applies to a tenant, so long as he does not openly restore possession by surrender to his landlord.⁴ It is well established that so long as the relationship of landlord and tenant has not been lawfully determined by the tenant by discharging the obligation which rests upon him under Sec. 108 (q) of the Transfer of Property Act, he cannot claim a higher right in the leasehold property by prescription against his landlord.⁵ But if, after the determination of the tenancy, the tenant remains in possession as trespasser for the statutory period, he acquires, by prescription, a right as owner or such limited estate as he prescribes for.⁶ In *Madhavrao v. Raghunath*⁷ and *Naina Pillai v. Ramanathan*,⁸ it is laid down that no tenant can obtain any right to a permanent tenancy by prescription against his landlord from whom he holds the land.

7. "Persons claiming through such tenant". As in other cases, the estoppel binds the tenant's privies as well as the tenant.⁹ So, if the tenant sublets the premises the sub-lessee cannot dispute the title of the original lessor.¹⁰ "The section applies against the lessee, any assignee of the term and

4. *Surajmal v. Rampearayal*, A.I.R. 1966 Pat. 8; see *Bilas Kunwar v. Desraj*, L.R. 42 I.A. 202; A.I.R. 1915 P.C. 96.

5. *Seshamma v. Chickaya*, I.L.R. 25 M. 507.

6. *Ibid.*

7. I.L.R. 47 B. 798; A.I.R. 1923 P. C. 205.

8. I.L.R. 47 M. 537; A.I.R. 1924 P.C. 65.

9. *Bigelow*, op. cit., 6th Ed., 534; the doctrine of privity is illustrated by *Doc d. Bullen v. Mills*, 2 A. &

E. 17; *Rennie v. Robinson*, 1 Bing. 147; *London & N. W. Ry. Co. v. West*, (1867) L.R. 2 C.P. 553.

10. *Parwick v. Thomson*, 7 T.R. 488; *Mohammad Hussain v. Uberoi & Co. Ltd.*, 1925 Oudh 694; 89 I.C. 590; 2 O.W.N. 576; 12 O.L.J. 501; *Damodar Prasad v. Masoodan Singh*, 1928 Pat. 89; 105 I.C. 172; *Sheikh Yusuf v. Jyotish Chandra Banerjee*, 1932 Cal. 241; I.L.R. 59 Cal. 739; 137 I.C. 159.

my sub-lessee or licensee."¹¹ Where the possession of the defendants is attributable to the possession given to one of them by the plaintiff, all the defendants are estopped from questioning the plaintiff's title until they have surrendered the possession to the plaintiff.¹² But although a tenant who has been let into possession of land by a lessor is estopped from disputing his lessor's title, as are also persons claiming through him whether as assignee of the lease¹³ or as undertenant¹⁴ or as licensee,¹⁵ or coming in by collusion with the tenant,¹⁶ yet third persons, not claiming possession of the land under the tenant, are not so estopped. A person, therefore, who lets premises, to which he has no title, to a tenant, cannot distrain for arrears of rent due from the tenant the goods of a third person which happen to have been brought on to the premises by the tenant's licence.¹⁷

8. "Persons claiming through landlord". The question, whether the relation of landlord and tenant exists may have to be decided under one of two possible cases: (i) where the plaintiff has let the defendant into possession of the land; (ii) when the plaintiff is not himself the person who let the defendant into possession; but claims under a title derived from the person who did. This section applies to the first case and estops the tenant from denying the landlord's title. In the second case of derivative title (that is, by assignment, including gift, sale, devise, lease or by inheritance, including adoption amongst Hindus), when the plaintiff claims by derivative title, the defendant is not estopped from showing that the title is not really in the plaintiff, but in some other person.¹⁸ As the estoppel is available against the representatives of the lessee, so it enures for the benefit of those claiming under the original lessor.¹⁹ Thus, in the case cited below,²⁰ the defendant hired apartments from one *W*, who afterwards let the entire house to the plaintiff. In an action by the latter against the defendant for use and occupation, it was held that the defendant, having used and occupied the premises under a lease from *W*, was not competent to impeach his title or that of the plaintiff who claimed through him. Further an attornment to one claiming under the original lessor leaves the tenant ordinarily in precisely the same position (so far as the question of the estoppel to deny the title of the lessor is concerned) as he was with the original landlord; he cannot

11. *Kumar Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern, Ltd.*, 1937 P.C. 251; 64 I.A. 311; I.L.R. (1938) 1 C. 1: 169 I.C. 556.
12. *Currimbhoy & Co. Ltd. v. A. A. Creet*, 1938 P.C. 29; 60 I.A. 297; I.L.R. 60 Cal. 980; 141 I.C. 209.
13. *Deo d. Bullen v. Mills*, 2 A. & E. 17; *Taylor v. Needham*, 2 Taunt 278; *Thakur Dayal Singh v. Promatha Nath Mitra*, 1936 Pat. 493; I.L.R. 15 Pat. 673; 164 I.C. 811; 17 P.L.T. 502.
14. *Doe d. Spencer v. Beckett*, 4 Q.B. 601.
15. *Doe d. Johnson v. Baytop*, 3 A. & E. 188.
16. *Asupati v. Narayana*, (1889) 13 M. 335.
17. *Tadam v. Iluman*, (1893) 2 Q.

- B. 168; see I.Q.R. Vol. IX. 309.
18. *Lodai Mollah v. Kelly Dass*, (1881) 8 C. 238, 241, 243; see *Mahanaja of Jaipur v. Surjan*, 1922 All. 333; I.L.R. 44 All. 671; 75 I.C. 495; 26 A.L.J. 615; *Maung Po Shin v. Mohammed Thambi*, 1915 L.B. 47; 30 I.C. 753; *Daulat Ram v. Haveli Shah*, 1939 Lah. 49; 182 I.C. 533; 41 P.L.R. 346; *Nar Bahadur Gurung v. Anil Krishna Bhattacharya*, 1957 Manipur 25.
19. *Tirbhuwan Bahadur Singh v. Mukta Prasad*, 1914 Oudh 157; 22 I.C. 125; *Met. Manphul Bai v. Ladhu Ram*, 1952 Raj. 115; I.L.R. 1952 Raj. 58; 3 Raj. L.W. 51.
20. *Rennie v. Robinson*, (1823) 1 Bing. 147.

dispute title in one case more than in the other.²¹ Where the tenant has attorned to the transferee of original owner, the principle of estoppel will apply in favour of the transferee also.²² Whether, however, there be an attornment or not, the tenant may always show that the claimant has no derivative title from his original lessor or that the derivative title is defective, or that an attornment made by him to the person claiming under the original lessor was made under the influence of fraud or mistake, or the like.²³ Thus, though the lessee of *A* will be estopped to deny the title of *A* from whom he received possession, he will not be so estopped, should *A* assign the premises to *B*, from disputing *B*'s title by showing either that *A*'s title was not such a one as would enable him to pass a legal estate to *B*, or that, even if it was such, *A*'s title had determined.²⁴ In such cases, the title of the landlord who let the tenant into possession is not impeached, but only the title of him who claims to be the successor of the landlord. Without denying the landlord's title, the derivative title of his alleged successor may be impeached in several ways. It is clear, first, that if a man takes land from one person and afterwards pays rent to another believing that other to be the representative of the person from whom he took; for example, if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law; or that the landlord left a will, the tenant in a suit for subsequent arrears of rent would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title.²⁵ It may be shown that the claimant is a stranger to the title of the original lessor.¹ So again, the tenant in possession will not be estopped from showing that, however valid the title of his original landlord may have been, there has been in fact no transfer thereof to the claimant.² So also it may be shown that the original lessor's title was not such a one as would enable him to pass the legal estate to the plaintiff,³ or that the original lessor's title had

21. *Trimbak Ramchandra Pandit v. Shekh Gulam Zilani Waiker*, (1909) 34 B. 329 : 5 I.C. 965 : 12 Bom. L. R. 208 ; *Motilal Bhatia v. Yusuf Ali*, 1972 Ren. C.R. 475 : 1972 Ren. C.J. 225 : 1972 M.P.W.R. 263 : 1972 M.P.L.J. 187.
22. *R. L. Sharma v. Sardar Amrik Singh*, 1973 Ren C.R. 269 : A.I.R. 1974 Pat. 195 ; *Madanlal v. Manakchand*, 1970 Raj. L.W. 250 : 1969 W.L.N. (Part I) 482 : A.I.R. 1971 Raj. 55.
23. Bigelow. op. cit., 6th Ed.; 577—579. 580; *Gouree Das v. Jagannath Roy*, (1867) 7 W.R. 25, 26; *Lal Mahomed v. Kallanus*, (1885) 11 C. 519; *Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern. Ltd.*, 1937 P.C. 251 : 64 I.A. 311 : I.L.R. (1938) 1 Cal. 1 : 169 I.C. 556 : 1937 A.L.J. 1389 : 1937 A.W. R. 961.
24. *Doe d. Higginbotham v. Barton*, (1840) 11 A. & E. 307; the tenant may always show that the assignment was ineffectual to pass the lessor's title; *Hilbourn v. Fogg*, 99 Mass.

- 1 (Amer.), citing the last and other cases. Bigelow, op. cit., 6th Ed., 580. 581. note.
25. *Benne Madhub v. Thakur Dass*, (1866) B.L.R. Sup. Vol., pp. 588, 590 (F. B.) ; *Gouree Das v. Jagannath Roy*, (1867) 7 W.R. 25, 26; *Kailash Kumar v. Banarsi Das Gupta*, 1961 J. & K. 34.
1. Bigelow. op. cit., 6th Ed., 578. 579. 580; cf. *Cornish v. Searell*, (1828) 8 B. & C. 471; *Tika Ram v. Moti Lal*, 1930 All. 290 : I.L.R. 52 All. 464 : 126 I.C. 29 : 1930 A. L.J. 564.
2. *Accidental Death Insurance Co. v. Mackenzie*, (1861) 5 L.T. 20 : 9 W.R. 783; *Rancee Tillessuree v. Rancee Asmedh*, (1875) 24 W.R. 101. (A tenant is not prevented from questioning the title of the alleged assignee of his admitted landlord.) *Kailash Kumar v. Banarsidas Gupta*, 1961 J. & K. 34; *Pritam Singh v. Parmeshwari Devi*, 1974 Rajdhani L.R. 257.
3. *Doe d. Higginbotham v. Barton*, (1840) 11 A. & E. 307.

determined.⁴ It has been held that, if a tenant, being already in possession of the premises, executes a lease in favour of a stranger to the title, or a person claiming a derivative title from the last owner, he is not estopped from disputing the title of the stranger to the title of that person⁵ and that the words "at the beginning of the tenancy" in this section, only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession.⁶ But, their Lordships of the Privy Council have since held that this section has formulated no such condition and that the words "at the beginning of the tenancy" give no ground for it. "When a demise of land is made and acted on, when the tenant proceeds to occupy and enjoy under the grant, gets the shelter of the grantor's title and the benefit of his covenants, it is difficult to see why during the continuance of the tenancy he should be free of this form of estoppel."⁷ A tenant further is not estopped from alleging that he was let into possession under a title since acquired by him, under which subordinately the landlord claims.⁸ When, moreover, the tenant being already in possession has attorned or paid rent, or otherwise acknowledged the tenancy, he may show that he did so through ignorance,⁹ fraud,¹⁰ misrepresentation,¹¹ mistake¹² or coercion,¹³ and, if induced to attorn and take a lease by these means, he may dispute the title of the person claiming to be his lessor.¹⁴ An attornment under mistake, or coercion, or misrepresentation

4. Deo d. Higginbotham v. Barton, (1840) 11 A. & E. 307; Lal Mahomed v. Kallanus, (1885) 11 C. 519 : in this last case it was alleged, that the title of the person under whom the jote had originally been held had expired owing to the execution of a deed of mimangsapatra.
5. Lal Mahomed v. Kallanus, (1885) 11 C. 519.
6. Lal Mahomed v. Kallanus, (1885) 11 C. 519 ; see Seetharama Raju v. Bayanna Pantulu, (1894) 17 M. 275 ; Bigelow, op. cit., 6th Ed., 569, 571. As to what constitutes a letting into possession, see Taylor, Ev., 5, 109.
7. Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern, Ltd., 1937 P.C. 251 : 64 I.A. 311 : 169 I.C. 556.
8. Ford v. Ager, (1865) 2 H. & C. 279.
9. Jew v. Wood, (1841) Cr. & Ph. 185; Fenner v. Duplock, (1824) 2 Bing. 10 ; Gregory v. Doidge, (1826) 3 Bing. 474, followed in Ketu Dass v. Surendra Nath, (1903) 7 C.W.N. 596; see Jesingbhai v. Hataji, (1879) 4 B. 79 ; Brijonath Chowdhury v. Lall Meah, (1870) 14 W.R. 391.
10. Bigelow, op. cit., 6th Ed., 569 ; Franklin v. Merida, 35 Cal. 358

- (Amer.) ; Doe d. Marlow v. Wiggins, (1843) 4 Q.B. 367.
11. Doe d. Plevin v. Brown, 7 A. & E. 447 ; Gravenor v. Woodhouse, (1822) 1 Bing. 38, 43.
12. Jew v. Wood, supra ; Rogers v. Pitcher, (1815) 6 Taunt 202, followed in Ketu Dass v. Surendra Nath, (1903) 7 C.W.N. 596 ; Doe d. Plevin v. Brown, (1837) 7 A. & E. 447 ; Cornish v. Scarell, 8 B. & C. 471 ; Gravenor v. Woodhouse, (1822) 1 Bing. 38 ; Vithaldas v. Secretary of State, (1901) 26 B. 410 : 4 Bom. L.R. 28 (admission of payment of rent raises a *prima facie* presumption of title and throws the onus on the other party of showing that it was made by mistake). For a case under Section 60 of the Bengal Tenancy Act, see Durga Das v. Samash Akon, (1895) 4 C.W.N. 606.
14. Bigelow, op. cit., 6th Ed., 565, 569. Buksh, (1874) 6 N.W.P. 333 ; Lal Mahomed v. Kallanus, (1885) 11 C. 519.
14. Bigelow, op. cit., 6th Ed., 565, 569. The tenant or his assignee, it may then be broadly stated, is not estopped to explain the circumstances under which being already in possession, he has made an attornment to the plaintiff, ib., 6th Ed., 565, 569, 570 ; see also John Nadjarian v. E.

or fraud or such other grounds which are available for showing that a contract is invalid is really no attornment so as to create an estoppel. But the tenant will have to set up such a plea and prove it.¹⁵ In a case in the Bombay High Court, where the defendant had purported to resign his occupancy rights in a *khotki* to the plaintiff who was one of the *khots*, and had at the same time attorned to him, accepting a lease for five years, it was held that the resignation and lease were part of the same transaction and tainted with illegality and that the parties were in *pari delicto* and the plaintiff could not estop the defendant from showing the illegality of his title, since there is no estoppel against an Act of Parliament or against an Act of the Legislature.¹⁶

9. "Continuance of the tenancy". According to the section, the rule of estoppel is limited not only in extent but also in time. The time to which it is limited is the continuance of the tenancy.¹⁷ The expression "during the continuance of the tenancy" has been held to mean "during the continuance of the possession that was received by or under the tenancy in question;"¹⁸ and it has accordingly been held that the tenant's estoppel operates even after the termination of the tenancy, so that a tenant who had been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.¹⁹ It may be noted here that under clause (q) of Section 108 of the Transfer of Property Act, "on the determination of the lease, the lessee is bound to put the lessor into possession of the property". It has, however, been held that, if a tenant leaves the premises without placing the landlord in possession thereof, that may entitle the landlord to claim rents or profits from him, if he proposes to exercise his rights under the lease, but, in a case, where he acquiesces in the act of the tenant, even though he has not been placed in physical possession of the tenement, it cannot be said that the tenancy is still subsisting.²⁰ In a case it has been held that the term "during the continuance of the tenancy" means "so long as the tenant continues to enjoy the benefits of the tenancy".²¹

F. Trist, 1945 Bom. 399 : I.L.R. 1945 Bom. 343 : 47 Bom. L.R. 209 ; Badruddin Khan v. Bhagloo Koeri, 1934 Pat. 555 : 153 L.C. 759 : 15 P.L.T. 519.

15. B. Dey v. N. D. Kundu, 77 C.W.N. 817 : 1974 Ren. C.J. 311.

16. Shridhar Balkrishna v. Babaji Mulia, 1914 Bom. 248 : I.L.R. 38 Bom. 709 : 28 I.C. 134 : 16 Bom. L.R. 586.

17. Mst. Munia v. Manohar Lal, 1941 Oudh 429 : 194 I.C. 161 : 1941 O.W.N. 648 ; Jayantilal Chunilal v. Ashabhai, (1974) 15 Guj. L.R. 675.

18. Bhaiganti Bewa v. Himmat Bidyakar, 1917 Cal. 498 : 35 I.C. 7 : 24 C.L.J. 103 : 20 C.W.N. 1335, relying on the observation of Tindal, C.J., in Doe Dem Joseph Manton v. Austain, 9 Bing. 41 to the effect, "The principle is that the tenant

shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession."

19. Charubala Basu v. German Gomez, 1934 Cal. 499 : 152 I.C. 212 : 59 C.L.J. 66, relying on Mujibar Rahman v. Isub Surat, 1928 Cal. 546 : 49 C.L.J. 1 : 32 C.W.N. 867 and Bilas Kuer v. Desraj Ranjit Singh, 1915 P.C. 96 : 42 I.A. 202 : 30 I.C. 299 ; Gajadhar Lodha v. Khan Mohiddin, I.L.R. 38 Pat. 806 ; Jaikaran Singh v. S. R. Agarwal, 1974 B.L.J.R. 338 : 1974 B.B.C.J. 742 : A.I.R. 1974 Pat. 364.

20. Mehromal v. T. N. Bahel, 1954 Nag. 305 : I.L.R. 1954 Nag. 414 : 1954 N.L.J. 625.

21. Uday Pratap Singh Deo v. Krushna Padhano, 1952 Orissa 95 ; Cf. Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern Ltd., 1937 P.C. 251 : 64 I.A. 311 : 169 I.C. 566.

As already observed elsewhere, the relation of landlord and tenant once created between parties continues as between them and their representatives in title until it is proved to have ceased.²² During the continuance of the tenancy, the tenant is not permitted to deny the title of the landlord at the beginning of the tenancy. And the tenant cannot, during the continuance of the tenancy, acquire by prescription a permanent right of occupancy, or absolute ownership, in derogation of landlord's title by mere assertion of such a right to the knowledge of the landlord.²³ Although a tenant may not, during the continuance of the tenancy, deny that his landlord had a title at the beginning of such tenancy, he may show that his landlord's title has expired, or determined,²⁴ as by proving eviction by title paramount or attornment,²⁵ for this section only refers to the title at the beginning of the tenancy¹ and operates as an estoppel during the continuance of the tenancy.² If the land subsequently vested in Government the tenant can show that his landlord has no right to evict him.³ In such a case, he does not dispute the title, but confesses and avoids it by matter *ex post facto*. Justice requires that the tenant should be permitted to raise this plea, for a tenant is liable to the person who has the real title and may be forced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence.⁴ In a case in the Madras

22. Section 109, note; Rango Lall v. Abdool Guffoor, (1878) 4 Cal. 314, 316, 317; Krishnaji v. Antaji Pandurang, (1893) 18 Bom. 256, 258. As to how a lease is determined, see Section 111; as to waiver of forfeiture, Section 112 and waiver of notice to quit, Section 113 of the Transfer of Property Act, 1902.
23. See Veeraraju v. Venkanna, (1906) 1 S.C.R. 831; (1966) 1 S.C.A. 323; A.I.R. 1966 S.C. 629.
24. Nakchedi Bhagat v. Nakchedi Mistr, 18 All. 329; (1896) 16 A.W.N. 90; Dalip Singh v. Tilak Singh, 1927 All. 270 (2); 99 I.C. 561; Pritam Singh v. Parmeshwari Devi, 1974 Rajdhani L.R. 257.
25. Ramchandra Chatterjee v. Pramathanath Chatterjee, 1922 Cal. 237; 63 I.C. 754; 35 C.L.J. 146 and see Jogendra Lal v. Mahesh, 1920 Cal. 22; I.L.R. 55 Cal. 1013; 112 I.C. 172; 47 C.L.J. 387; Ram Rakha Mal v. Munna Lal Meidhan, 1981 Lah. 243; 133 I.C. 95; 32 P.L.R. 398; and Lodai Mollah v. Kally Das Roy, (1887) 8 Cal. 238; 10 C.L.R. 581, where the various defences open to a tenant in a suit for rent are set out.
1. Velayudhan Pillai v. Ouseph, 1953 T.C. 574.
2. Ammu v. Ramkrishna, (1879) 2 M. 226; Subbaroya v. Krishnappa, (1888) 12 M. 422; the English authorities are numerous; see Mountnoy v. Collier, (1853) 1 E.

- & B. 630, 640; Hopcraft v. Keys, (1835) 9 Bing. 615; Gravenor v. Woodhouse, (1832) 1 Bing. 36; Neave v. Moss, (1823) 1 Bing. 360; England d. Syburn v. Slade, (1792) 4 T.R. 682; Claridge v. Mackenzie, (1842) 4 M. & Cr. 145; Doe d. Marriot v. Edwards, (1895) 5 B. & Ald. 1065; Downs v. Coopers, (1841) 2 Q.B. 256 and Burn & Co. v. Bushomoyee Dosee, (1870) 14 W.R. 85; Mohan Mahtoo v. Meert Shunwool, (1879) 21 W.R. 5. The defendant may show that the plaintiff's title has expired or has been defeated by title paramount; as for example, that the plaintiff's tenure has been avoided by sale for arrears of revenue. Lodai Mollah v. Kally Das Roy, (1881) 8 C. 238, 240, 241, or eviction by title paramount. Ram Chandra Chatterjee v. Pramathanath Chatterji, 1922 Cal. 237; 63 I.C. 754; (1922) 35 C. L.J. 146 and see last note; Krupasingha v. Purna Chandra, 36 Cut. L.T. 764; (1972) 2 Cut. W. R. 1218; 1972 Ram. C.J. 765; A.I.R. 1973 Orissa 44.
3. Raghvendra v. Marhu, A.I.R. 1971 M.P. 142.
4. Mountnoy v. Collier, (1853) 1 E. & B. 630, 640; see Gopabund Jha v. Lala Gobind, (1880) 12 W.R. 109 (when a tenant is sued for rent he can set up eviction by title paramount to that of his lessor as an

High Court, where a person, purporting to be the *dharmakarta* of a temple, granted a lease of the temple property and, during the tenancy, was held, in a separate suit, not to be the rightful *dharmakarta*, but the tenant did not attorn to his successor and was not evicted by him, it was held in a suit by the lessor for rent that the tenancy had not been determined and this section estopped the tenant from denying his title.⁵ A tenant may dispute his landlord's title if he has been evicted by title paramount; or if under threat of eviction by a party having a title paramount, he has attorned as tenant. But, if the tenant has attorned voluntarily he is estopped from denying his landlord's title.⁶ Where the landlord obtained a decree for ejectment of tenant and his sub-tenant, the sub-tenant is not liable to pay rent with effect from the date of order of eviction.⁷ In order to constitute eviction by title paramount, no physical dispossession is necessary. If the true owner is armed with a legal process for eviction, which cannot be lawfully resisted, even though the tenant is not put out of possession, the threat to put him out of possession amounts in law to eviction. If, in such circumstances, the tenant openly and to the knowledge of his landlord attorns to the true owner, the estoppel is gone. The attornment, however, must be under compulsion. The party evicting must have a good title, and the tenant must have quitted against his will.⁸ The mere institution of a suit for possession by a person having title paramount in law does not amount to such eviction.⁹ An unexecuted decree for possession obtained by a third party does not *per se* operate as an eviction of the tenant by title paramount, liberating him from the estoppel against pleading *jus tertii*.¹⁰

But even symbolical possession under Order XXI, Rule 36, Civil Procedure Code, delivered in execution of an *ex parte* decree against the landlord, effectively terminates the possession of the landlord and his tenant,¹¹ and the tenant continuing in possession with the permission of the decree-holder and attorning to him is not estopped from denying the title of the judgment-debtor-landlord.¹² Although a tenant may show that his landlord's title has expired, yet if he enters on a new tenancy, he shall be bound; but before he can be so bound, it must appear that he was acquainted with all

answer; and if evicted from part of the land an apportionment of the rent may take place); *Lodai Mollah v. Kally Das Roy*, (1881) 8 C. 298, 241, 242. As to what constitutes eviction, see *Dhunput Singh v. Mahommed Kazim*, (1896) 24 C. 296, 300.

5. *Devaraju v. Mamommed Jaffar Saheb*, (1913) 36 Mad. 53 : 19 I. C. 555; but see *Pattaikara Manakkal Kupper v. Munde Kottil*, (1914) 37 Mad. 373: 1914 Mad. 477: 14 I.C. 168 (tenant held not estopped).
6. *Vayyapruth K. Vallia Muhammad v. C. O. Sevakutshi Keyi*, 1934 Mad. 197 : 147 I.C. 1218 : 66 M.L.J. 535 : 39 L.W. 116; *Gajadhar Lodhra v. Khan Mohiddin*, I.L.R. 38 Pat 306; I.L.R. (1973) Cut. 772.
7. *R. Dorairajan v. Sami Nathan* (1978) 2 M.L.J. 185.
8. *Krishna Prasad Singh v. Adyanath*

Ghatak, 1944 Pat. 77, 84 : I.L.R. 22 Pat. 513 : 216 I.C. 111; *Alaga Pillai v. Ramaswami Thevan*, 1926 Mad. 187 : 91 I.C. 1024 : 28 L.W. 296; *Jogendra Lal v. Mohesh*, 1929 Cal. 22.

9. *Amrit Lal v. Uttam Lal*, 1939 Cal. 216 : I.L.R., (1938) 2 Cal. 559 : 181 I.C. 529; *P.V. Chinnaraj v. P. Pounusamy*, (1976) 2 M.L.J. 393.
10. *Bhagwatula Krishna Rao v. Mangara Sanyasi*, 1932 Mad. 298 : I.L.R. 55 Mad. 601 : 158 I.C. 34: 62 M.L.J. 319 : 35 L.W. 288.
11. *Radha Krishna v. Ram Bahadur*, 1917 P.C. 197 (2) : 49 I.C. 268 : 16 A.L.J. 33.
12. *Adyanath Ghatak v. Krishna Prasad Singh*, 1949 P.C. 124 : 53 C.W.N. 383 : 50 P.L.T. 1 : I.L.R. 28 Pat. 207, reversing *Krishna Prasad v. Adyanath Ghatak*, 1944 Pat. 77 : I.L.R. 22 Pat. 513 : 216 I.C. 111.

the circumstances of the landlord's title. The landlord, before he enters into a new contract, must explain to the tenant that his former title is at an end.¹³ It is well settled that a tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without actually and openly surrendering possession to him, or being evicted by title paramount, or attorning thereto, or at least giving notice to his landlord that he shall claim under another and a valid title.¹⁴

A tenant in possession cannot, even after the expiration of the tenancy, deny his landlord's title without actually and openly surrendering possession to him. The fact, that the tenancy came to an end by reason of forfeiture, and the landlord served a notice asking the tenants to vacate the house, does not make any difference to the applicability of the rule of estoppel which is grounded on the tenant being still on the premises which he had obtained from the landlord. The estoppel continues so long as the tenant does not surrender possession to the landlord.¹⁵ A tenant, who has executed a lease but has not been let into possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title, or that his execution of the lease was procured by fraud, misrepresentation or coercion.¹⁶ It is no doubt the general rule that a tenant is estopped from disputing the title of the landlord from whom he received possession, the principle being that he ought not to be permitted to deny the state of facts which he has agreed and which shall be taken as the basis of the arrangement under which he got possession. This rule is also extended, even to cases where the tenant has not been actually let into physical possession but entered into an agreement with the assignee of his original landlord or his legal representative so as to operate as a fresh demise or a fresh taking of the lease, in such cases, the tenant is deemed to have got into possession under him, but the law has always permitted the tenant to show that the attornment was under a mistake, or misrepresentation, or in ignorance of the defect in the title of such assignee or representative. But, in cases, where the facts do not amount to a fresh taking of the

13. *Fenner v. Duplock*, 2 Bing. 10.
14. *Bigelow*, op. cit., 6th Ed., 562; *Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern, Ltd.*, 1935 Cal. 368; I.L.R. 62 C. 346; 159 I.C. 98, *Currimbhoy & Co. v. Creet*, 1935 P.C. 29; 60 I.A. 297; I.L.R. 40 Cal. 980; 141 I.C. 209; *Chandrika Prasad v. B.B. & C.I. Rly.*, 1935 P.C. 59; 154 I.C. 943, *Charubala Basu v. German Gomez*, 1934 Cal. 499; 152 I.C. 212; 59 C.L.J. 65; *Daya Lal v. Kolon*, 1930 Rang. 15; I.L.R. 6 Rang. 637; 117 I.C. 60; *J. A. Vertunnes v. J. C. Robinson*, 1923 Rang. 162; see *Mujibur Rahman v. Isab Sultan*, 1923 Cal. 346; 49 C.L.J. 1; 33 C.W.N. 367; *Md. Azim Khan v. Md. Sadat Ali Khan*, 1931 Oudh 177; 8 C.W.N. 349; *Panna Lal v. Abdul Wahid*, 1931 Jab. L.J. 1292.
15. *Mst. Hirabai v. Jivan Lal Palode*,

- 1935 Nag. 234; I.L.R. 1934 Nag. 447; *National Jewellery Works v. Diana Printing Works*, 63 C.W.N. 192; *Bokka Sriramulu v. Kalipatnapu*, I.L.R. 1938 Andh. Pra. 856; A.I.R. 1939 A.P. 92; *Jaikaran Singh v. S. R. Agarwal*, A.I.R. 1974 Pat. 364.
16. *Makhan Singh v. Baisakhi Ram Shah*, 1919 Lah. 334; 128 P.R. 1919; see also *Bilas Kunwar v. Desraj Ranjit Singh*, 1915 P.C. 96; 42 I.A. 202; 30 I.C. 299, *Mst. Hirabai v. Jivan Lal*, 1935 Nag. 234, *Arumilli Surayya v. P. Venkataramanamma*, 1940 Mad. 701; 192 I.C. 47; (1940) 1 M.L.J. 891; *Mst. Sajjoo v. Basdeo Prasad*, 1937 Oudh 505; 171 I.C. 84; 1937 O.W.N. 1030; 1937 O.L.R. 518; *Ramzan v. Bansidhar*, 1935 Oudh 385; 154 I.C. 1029; 1935 O.W.N. 449; 1935 O.L.R. 240.

lease, and the old lease subsists, and payment of rent is made to another in pursuance of the terms of the old lease, to a person who has got authority to collect the rent from the landlord, either by virtue of an assignment of the reversion or otherwise, mere payment of rent in such cases will not operate as an estoppel but will only amount to an admission which will be capable of explanation.¹⁷ The tenant must give up possession to the landlord, and then, if he has any title *aliunde*, that title may be tried in a suit for ejectment brought by him against his former landlord.¹⁸ A sub-tenant, who is already in possession, is not estopped from questioning the title of a new *pattadar*.¹⁹ A tenant who has been let into possession by a landlord under a lease for a term of years is bound to surrender it to such landlord at the expiration of such lease, even apart from any covenant by the tenant to surrender. He cannot set up a *jus tertii* in a third person having a title paramount, unless during the period of the tenancy there has been an ouster by the person having the title paramount, so as to determine the original lessor's right at the date of the lease.²⁰ But in the case of eviction by title paramount, actual physical ouster by title paramount is not necessary to prove eviction. If there is clear proof of the person claiming paramount title, it constitutes cessation of title in the lessor.²¹ As laid down in *Jogendra Lal v. Mohesh Chandra*,²² actual physical ouster by title paramount is not necessary to prove eviction. If there is clear proof of the person claiming paramount title, it constitutes cessation of title in the lessor.²³ In *Guruswami Nadar v. Ranganathan*,²⁴ after an exhaustive review of the case-law bearing on the subject, Satyanarayana Rao and Rajagopalan, JJ., summarised their conclusions as follow²⁵: "From this, the exception follows that it is open to the tenant, even without surrendering possession, to show that since the date of the tenancy the title of the landlord came to an end or that he was evicted by a paramount title-holder, or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder."¹ Adverse action taken by a third party, whether that party be the Government or some other rival claimant, cannot

17. *Abdullah v. Moidin Kutty*. 1937 Mad. 865-66.

18. *Vasudev v. Daji Babaji*. (1871) 8 Bom. H.O.R. 175; *Bilas Kunwar v. Desraj Ranjit Singh*. 1915 P.C. 96 : 42 I.A. 202 : I.L.R. 37 All. 557 : 30 I.C. 299; *Beli v. Beli Ram*, 1934 Lah. 445 : 154 I.C. 52; *Munna Lal Modi v. Balakchand*. 1961 Jab. L.J. 221.

19. *Parmeshwar Pandey v. Ramdhari*. 1937 Pat. 27 : 167 I.C. 141

20. *Bankala Vittal v. Chidriamokkasa*, (1906) 15 Mad. L.J. 863; *Arumugham Chetti v. Subramaniam Chetti*. 1937 Mad. 362 : I.L.R. 1937 Mad. 638 : 171 I.C. 444 : (1937) 1 M. L.J. 679 : 46 L.W. 818; *Alaga Pillai v. Ramaswami Thewari*. 1926 Mad. 187 : 91 I.C. 1024; *Ramzani v. Bansidhar*. 1935 Oudh 385 : 154 I.C. 1029; *Munna Lal Modi v. Balakchand*. 1961 Jab. L.J. 221.

21. *Ram Ranjan Roy v. Jayanti Lal*.

1926 Cal. 906 : 96 I.C. 11 : 44 C. L.J. 449 : 30 C.W.N. 710.

22. 1929 Cal. 22 : I.L.R. 55 C. 1013 : 112 I.C. 172.

23. *Hanumanthaiya v. Thavakal San*, 1950 Mys. 9; *Adyanath Chatak v. Krishna Prasad*. 1949 P.C. 124.

24. 1954 Mad. 402 : I.L.R. 1954 Mad. 341 : (1953) 2 M.L.J. 511.

25. At p. 404 of 1954 Mad.

1. *Bohilli Gowreau v. Kuttu Subhadramma*. 1957 Andh. Pra. 961; *Shankar v. Jagannath*. 1928 Bom. 265 : 111 I.C. 911 : 30 Bom. L.R. 741; *Nagindas Sankalchand v. Bapa Lal Panchottam*. 1930 Bom. 395 : I.L.R. 54 Bom. 487 : 125 I.C. 685 : 33 Bom. L.R. 692; *Parmeshwar Pandey v. Ramdhari*. 1937 Pat. 27 : 167 I.C. 141; *Ram Chandra Chatterjee v. Pramathanath Chatterjee*. 1922 Cal. 237 : 63 I.C. 754 : 35 C. L.J. 146.

have the effect of terminating the relationship of landlord and tenant, and the tenant will be estopped by this section from denying the landlord's title.²

A tenant inducted into possession of land by one person cannot alter the character of his possession and make it adverse to the landlord by going over to another person and paying rent to him.³ In all cases of *jus tertii*, the person who sets up the rights of a third party is bound to prove that the third party has or had the rights alleged, and it is always open to the other party to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*.⁴ A very important qualification of the rule of the tenant's estoppel prevails in the case of an actual disclaimer. If the tenant disclaims to hold of his lessor, and notice of the fact is brought home to the lessor, the tenant's possession then becomes adverse; the lessor may at once eject him from the premises; and if he fails to do so, before the period of limitation has expired, the tenant may then set up his own title acquired by adverse possession, or the title of any other person under whom he claims to hold. But he cannot set up such title in an action brought by the lessor before the expiration of the period of limitation.⁵ The section is no bar to a tenant showing that his landlord had no title at a date previous to the commencement of the tenancy, or that, since its commencement, it has expired or has been defeated, because the bar operates only during the continuance of the tenancy.⁶

10. "At the beginning of the tenancy". The estoppel contemplated by the section is confined to the time when the tenancy commenced. It has always been held both in England as well as in India that questioning of the landlord's or lessor's title with reference to the time prior to the commencement of the tenancy and subsequent thereto is not covered by the well-known principle of estoppel as between the landlord and the tenant.⁷ The bar of estoppel does not come into operation when the tenant's denial of the landlord's title is related to facts subsequent to the commencement of the tenancy.⁸ A tenant can always plead that the landlord who had originally title to the property had lost such title by any act of his or by operation of any law.⁹ It is open to the tenant, even without surrendering possession, to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title-holder, or that, even though there was no actual eviction or dispossession from the property, under a

2. *Eledath Thavazhi v. Eliangattil Sankara Valia Rajah*, 1918 Mad. 285; 45 I.C. 686 : 1918 M.W.N. 376.

3. *Abdul Hakim v. Pana Mia Miaji*, 1919 Cal. 293 : 51 I.C. 494.

4. *Secretary of State v. Syed Ahmad Badshah*, 1921 Mad. 248 : I.L.R. 44 Mad. 778 : 47 I.C. 971 (F.B.), followed in *Krishnan Nair v. Kambl*, 1937 Mad. 544 : 172 I.C. 268 : 1937 M.W.N. 299.

5. *Bigelow*, op. cit., 6th Ed., 578.

6. *Ramaswami Thevan v. Alaga Pillai*, 1925 Mad. 143 : 79 I.C. 881 ; *Ammu v. Rama Krishna*, 2 Mad.

226.

7. *Uday Pratap Singh Deo v. Krishna Padano*, 1952 Orissa 95 ; *India Electric Works, Ltd. v. Mrs. B. S. Mantosh*, 1956 Cal. 148; *Velayudhan Pillai v. Ouseph*, 1953 T.C. 574.

8. *Rev. Luckman Chaplain v. Pearey Lal*, 1939 All. 670 : 1939 A.L.J. 913 : 1939 A.W.R. 546 ; *Banna v. Jetha*, 1950 Ajmer 53 ; *Brij Bhusan Lal v. Govindlal*, 1971 W.L.N. (Part II) 21 (Raj.).

9. *India Electric Works, Ltd. v. Mrs. B. S. Mantosh*, 1956 Cal. 148.

threat of eviction he had attorned to the paramount title-holder.¹⁰ The tenant is not estopped from showing that, after the commencement of the tenancy, the estate of the landlord devolved upon some other person.¹¹ It is settled law that, although a tenant who had been inducted on the land cannot say that his landlord had no title to the land at the time of letting, he can show that subsequent thereto his title to the land had come to an end either by transfer or otherwise.¹² But he cannot deny the landlord's power to grant the lease.¹³

Where a person claiming to be the holder of landlord L gave notice to his tenant T and T questioned the genuineness of the gift maintaining that L was the real landlord, the tenant has denied the relationship of landlord and tenant so as to entail forfeiture of estoppel.¹⁴

A tenant cannot be permitted to deny the derivative title of a reversioner if he has attorned to him.¹⁵ Though a tenant cannot question landlord's title, he may ordinarily question derivative title of successor of landlord. But when the title in the demised property devolves on a person by virtue of a lawful decree against the landlord, such derivative title cannot be questioned by the lessee.¹⁶

In cases where there is a contractual relationship of landlord and tenant and the defendant-tenant has been inducted into possession of the suit property as tenant by the plaintiff and the rule of estoppel contained in this section operated against the tenant, no question of impleading a third party as setting up title to the suit property can arise because an inquiry about the title of a third party would be completely shut out by reason of the rule of estoppel and in such cases the third person would not be a party within the meaning of Order I, Rule 10 (2), C. P. C.¹⁷

10. *Guruswami Nadar v. Ranganathan*, 1954 Mad. 402; *B. Gowresu v. K. Subhadramma*, 1957 Andh. Pra. 961; *Krishna Rao Raghunath Yardi v. Ghamon Ghama Valad Chima*, 1935 Bom. 144; 155 I.C. 249; 36 Bom. L.R. 1074; *Ram Chandra Chatterjee v. Pramathanath Chatterjee*, 1922 Cal. 237; 68 I.C. 754; 35 G.L.J. 146; *Ramaswami Thevan v. Alaga Pillai*, 1925 Mad. 143; 79 I.C. 881; see also *Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern, Ltd.*, 1937 P.C. 251; 64 I.A. 911; 169 I.C. 556; *Hamid Abed v. Gubamaul*, (1969) 35 Cut. L.T. 580 (583); *Fida Hussain v. Fazal Hussain*, A.I.R. 1963 M.P. 222; *Chidambara Vinayagar Devasthanam v. Duraiswamy*, (1967) 2 M.L.J. 181; *S. A. A. Annamalal v. Molaiyan*, (1970) 2 M.L.J. 562; 82 M.L.W. 716; A.I.R. 1970 Mad. 396 (398) (dissenting from *Thavazhi v. Sankara*, A.I.R. 1918 Mad. 285); *Raghavendra Singh v. Marhu*, 1970 M.P.W.R. 789; 1970 J.L.J. 943

- (947).
11. *Ganpat Rai v. Multan*, 1916 All. 121; I.L.R. 38 All. 226; 33 I.C. 97; 14 A.L.J. 263; *Raghubir Saran v. Ram Saran*, 1928 All. 651; 26 A.L.J. 825; *Manindra Chandra Dev & Bros. v. Gita Sen*, 73 C.W.N. 856 (870).
12. *Mahendranath v. Mahendra Nath*, 1948 Cal. 141; 52 C.W.N. 1.
13. *Chandoo v. Parbhoo*, 1921 Nag. 118 (1); 59 I.C. 707.
14. *Bhagwati Devi v. Surenderajit Singh*, A.I.R. 1969 Pat. 257 (262).
15. *Sugga Bai v. Hiralal*, 1969 J.L.T. 227; 1968 M.L.J. 840; 1968 P.W.R. 11; A.I.R. 1969 M.P. 82.
16. *Sudhir Chandra Guha v. Jogesh Chandra Das*, Assam L.R. (1970) Assam 54; A.I.R. 1970 Assam 102 (109 and 110).
17. *Labour Improvement Trust v. Raj Kumar*, I.L.R. (1969) 19 Raj. 515; 1969 Raj. L.W. 121; 1969 Ren. C.R. 821; A.I.R. 1969 Raj. 131 (134 and 135).

The estoppel contemplated by the present section is restricted to the denial of title at the commencement of the tenancy and by implication it follows that a tenant is not estopped from contending that the landlord had no title before the tenancy commenced or that the title of the lessor has since come to an end.¹⁸

Where the true owner evicts the tenant, the tenant could attorn to the true owner and set up his title in answer to a suit for ejectment filed by the landlord who let him into possession, the only limitation is that so long as the tenancy is subsisting, the tenant is not entitled to set up a *jus tertii* in a third person. But if the tenant is evicted from possession by the true owner, the tenancy comes to an end and there is nothing in law to prevent them from attorning to the true owner.¹⁹

A defendant, who has attorned to the plaintiffs and paid rent to them, is estopped under the present section from denying their title to landlord.²⁰

Estoppel between landlord and tenant continues so long as the tenant is in possession under the earlier tenancy and the leasehold has not been surrendered to the landlord. If the tenant enters into an arrangement with a third person claiming paramount title, that will not terminate the earlier tenancy nor will it relieve the tenant from operation of the rule of estoppel under Section 116. Estoppel would disappear when landlord's title is extinguished by events subsequent to the commencement of the tenancy, one of which may be by eviction by title paramount. But even if the tenant is not evicted from the property, he can contend that the rule of estoppel as between landlord and tenant is no longer enforceable if he has entered into a new arrangement of tenancy with the holder of the paramount title under a threat of eviction of title paramount, but subject to certain conditions.²¹

In a suit for ejectment and arrears of rent, the defendant can legitimately plead that he is the landlord so that no question of ejectment may arise.²²

Where the defendant-tenant has attorned to the plaintiff, transferee of the defendant's landlord, by paying him rent and by showing his willingness to pay rent falling due after purchase of the property by the plaintiff and to execute a rent note in his favour, the defendant had attorned to the transferee and was estopped from questioning his title.²³

Neither Section 116 nor any analogous principle of estoppel stands in the way of the tenant to take up the plea that subsequent to the commencement of the tenancy, there has been an extinction of the title of the landlord.²⁴

18. S. A. A. Annamalai v. Molaiyan, (1970) 2 M.L.J. 562 : 82 M.L.W. 716 : A.I.R. 1970 Mad. 396 (398); Susrutha Pharmaceutical Corporation v. Mathai Iype, (1974) 1 Ker. L.J. 13.

19. Krishnamurthy v. Thambaram Pan-chayat, 82 M.L.W. 683 : (1970) 1 M.L.J. 444 (448).

20. Motilal v. Yusuf Ali, 1972 J.L.J.

532 : 1972 M.P.W.R. 263 : 1972 M.P.L.J. 187 (193).

21. Mammoo v. Kunhiraman, 1970 K.L.T. 763 (766) : 1970 K.L.J. 763.

22. Ranchod v. Dashrath, 1972 M.P.L.J. 164 (165) : 1972 M.P.W.R. 76.

23. Madanlal v. Manakchand, 1970 R.L.W. 250 (252).

24. M. Hamid Ahd v. Gubamani Be-herd, 35 Cut. L.T. 580 (583).

Under the English law, a tenant is estopped from denying his landlord's title only, if, at the time when he took his lease, he was not already in possession of the land, and following this it has been held in several Indian cases that the words "at the beginning of the tenancy" only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession.²⁵ Where, however, in a suit for rent, the tenant denies the execution of the *kabuliyat* propounded by the plaintiff, and pleads that it was forged and denies payment of rent under it to the plaintiff, but fails to establish his pleas, the tenant is not entitled to prove that the plaintiff was not his landlord, although he had not been inducted into the land by the plaintiff.¹ It was pointed out, in this case, that in *Lal Mahomed v Kallanus*,² no question was raised or decided as to what, if any, limitation there are on the tenant's privilege to deny the title of the lessor after attornment, when he was not inducted by such lessor; and that it was not intended to lay down that a person in occupation of land may select his rent receiver and execute a solemn agreement promising to pay him rent and pay him rent for a time with full knowledge that he had no right to the land, and thereafter, at any time, decline to pay him rent, pleading want of title in him, and without attempting to show any other circumstances which would invalidate the contract of tenancy. Certain property was mortgaged in 1884. In 1889, the appellant took from the mortgagors and another person a lease of certain lands which included a portion of the mortgaged property. In a suit by the mortgagee on his mortgage, to which the appellant was made party defendant, it was held that though, as between the lessors and lessee under that lease, it might well be that the lessee, who was represented by the appellant, was estopped from saying that, at the date of that lease, the share mentioned in it was not the share of the lessors; yet that the appellant was not, owing to the lease taken by him in 1889, estopped from showing that the mortgagors were not entitled to the whole of the mortgaged property at the time the mortgage was executed in 1884, i.e., five years before the lease was taken by the appellant. A Full Bench of the Madras High Court has held that the tenancy and the estoppel under it begin at the execution of the lease before possession is given.⁴

It has now been definitely held that the words "at the beginning of the tenancy" give no ground for the contention that when a person already in possession attorns to another, there is no estoppel. When a demise of land is made and acted on, when the tenant proceeds to occupy and enjoy under the grant, gets the shelter of the grantor's title and the benefit of his covenants, it is difficult to see why "during the continuance of the tenancy

25. *Lal Mahomed v. Kallanus*, 11 C. 519; see *Seetharama Raju v. Bayanna Pantulu*, (1894) 17 M. 275; *Faqir Mohammad v. Bhagga Khan*, 1925 All. 244; 79 I.C. 371; *Rikhi-kesh v. Mela Ram*, 1923 Lah. 483; 73 I.C. 450; *Laxmi Bai v. Devi*, 1924 Nag. 62; 72 I.C. 855; *Ajitulla v. Bilati Bibi*, 1952 Cal. 383 (2); 137 I.C. 556; 54 C.L.J. 151; 35 C.W.N. 652.

1. *Ketu Dass v. Surendra Nath*, (1903)

7 C.W.N. 596.

2. 11 C. 519.

3. *Prosunnoo Kumar v. Mahobhar Saha*, (1905) 7 C.W.N. 75; as to adverse possession, see *Fatch Singh v. Bamanji*, I.L.R. 27 Bom. 515; 5 Bom. L.R. 374.

4. *Venkata Chetty v. Aiyanna Gounde* 1917 Mad. 789 (2); I.L.R. Mad. 561; 36 I.C. 817 (*Abdur Rahim, J.*, dissenting).

he should be free of this form of estoppel. "Tenant who has occupied but not entered" is a difficult notion to thrust into Section 116 and impossible to find therein.⁵ If the relation of the landlord and the tenant is established, the tenant is estopped from denying the landlord's title, even though he was not put into possession by the landlord. For the purpose of this section, the real question to be decided is not, whether the tenant was let into possession by the landlord but whether a valid tenancy had arisen.⁶ Whatever may have been the nature of the user of the land before the lease was executed, if the lessee clearly attorned to the lessor when he executed the lease, he is clearly estopped.⁷ A new tenancy may begin, although the tenant had been in possession prior to that tenancy. It may begin by the granting of a lease by the landlord, it may begin by the tenant attorning to a new landlord.⁸ As pointed out by Mukerji, J., in *Jogendra Lal v. Mohesh Chandra*,⁹ "attornment", in the sense in which the word is used and understood in English law, is not a mere agreement in favour of a third party to pay rent, but has been defined as "the act of the tenant's putting one person in the place of another as his landlord".¹⁰ It is clear that a mere attornment does not create a new tenancy. The only effect of a mere attornment is the substitution of a new landlord in place of the old, and the tenancy continues on the same terms. It may be that, in some cases, the attornment is not a mere attornment and as a result of the attornment a new tenancy is created. It is a question to be determined, in each case, whether, as a result of attornment, a new tenancy has been created.¹¹ There is, however, a distinction between a case where the tenant has been let into possession by the person whose title he seeks to deny and that in which the person whose title he denies did not let him into possession. In the former case, estoppel is complete as provided by the section, that is to say that, so long as that tenancy continues, the tenant cannot deny the landlord's title. But, in the second case, the estoppel is not complete in the sense that the tenant may evade it by showing any circumstances which would vitiate the agreement which he has entered into with the landlord.¹² Thus, it is no doubt the general rule that a tenant is estopped from disputing the title of the landlord from whom he received

5. *Kumari Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern, Ltd.*, 1937 P.C. 251 : 64 I.A. 311 : I.L.R. (1938) 1 C. 1 : 169 I.C. 556.
6. *D. Venketrajam v. P.G. Rajiah*, 1953 Hyd. 241 : I.L.R. 1953 Hyd. 288 : Krishna Rao Raghunath Yardi v. Ghamon Ghama Valad Chima, 1935 Bom. 114 : 155 I.C. 249 : 36 Bom. L.R. 1074 ; *Shankar v. Jagannath*, 1928 Bom. 265 : 111 I.C. 911 : 30 Bom. L.R. 741 ; *Nagin Das Shankar Chand v. Bapa Lal Purshottam*, 1930 Bom. 395 : I.L.R. 54 Bom. 487 : 125 I.C. 693 : 32 Bom. L.R. 595 ; *Mun. Sajoo v. Baidoo Prasad*, 1907 Oudh 305 : 171 I.C. 84 ; *Ramzani v. Ramzidhar*, 1935 Oudh 335 : 154 I.C. 1029 ; *Shambhu Lal Bhai Chand v. Chahal Lal Ratamji*, 1952 Kutch 16 (2) ; *Kanvi Bhagwan Pancha of Gondal v. A.S. Nayankunvarba*, 1953 Sau. 55 ; *Venkata Chetty v. Aiyanna*

- Gounden*, 1917 Mad. 789 (2) (F.B.) : 36 I.C. 817 (Abdur Rahim, J., dissenting.) ; *Mela Ram v. Bholi*, 1925 Lah. 60 : 76 I.C. 47 ; *Badraddin Khan v. Bhagloo Koeri*, 1934 Pat. 555 : 153 I.C. 759 : 15 P.L.T. 519 ; *U Po Shin v. Edward*, 1934 Rang. 159 : 156 I.C. 898.
7. *Sital Prasad v. Badri Prasad*, 1923 All. 53 : 69 I.C. 647 : 20 A.L.J. 907.
8. *Badraddin Khan v. Bhagloo Koeri*, 1934 Pat. 555 : 153 I.C. 759.
9. 1929 Cal. 32 at 24 : I.L.R. 56 Cal. 1013 : 112 I.C. 172.
10. *Cornish v. Searell*, (1923) 3 B. & C. 471 : 1 M. & Ry. 705 : 5 L.J. (O.S.) K.B. 254, per Hohnoyd, J.
11. *John Nadjarian v. E. F. Trias*, 1945 Bom. 399 : I.L.R. 1945 Bom. 343 : 47 Bom. L.R. 200.
12. *Badraddin Khan v. Bhagloo Koeri*, 1934 Pat. 555 : 153 I.C. 759.

possession, the principle being that he ought not to be permitted to deny the state of facts to which he has agreed, and which must be taken as the basis of the arrangement under which he got possession. This rule is also extended, even to cases where the tenant has not been actually let into physical possession but entered into an agreement with the assignee of his original landlord or his legal representative, so as to operate as a fresh demise or a fresh taking of the lease; in such cases, the tenant is deemed to have got into possession under him, but the law has always permitted the tenant to show that the attornment was made under a mistake or misrepresentation or in ignorance of the defect in title of such assignee or representative. But, in cases, where the facts do not amount to a fresh taking of the lease, and the old lease subsists and payment of rent is made to another in pursuance of the terms of the old lease, to a person who has got authority to collect the rent from the landlord, either by virtue of an assignment of the reversion or otherwise, mere payment of rent, in such cases, will not operate as an estoppel, but will only amount to admission which will be capable of explanation.¹³

When a tenant in possession has, by payment of rent, attorned to the successor-in-interest of the deceased landlord, he would be estopped under this section from denying the title of the successor.

The section does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with only one kind of estoppel. The section postulates that there is a continuing tenancy, that it had its beginning at a given date from a given landlord, and it provides that neither a tenant nor anyone claiming through a tenant, shall be heard to deny that that particular landlord had at that date a title to the property.

The words "at the beginning of tenancy" in this section do not give a ground for the contention that when a person already in possession of land, becomes tenant of another, there is no estoppel against his denying his landlord's title. It is, therefore, too much to contend that a tenant in possession, if he has in fact attorned to a landlord, would still be entitled to challenge his derivative title, because at the beginning of the tenancy he was not let into occupation by the landlord in question. -

The beginning of the tenancy, in such a case, would refer to the beginning of the new tenancy between the tenant and the landlord by virtue of the attornment, and the tenant's occupation of the land thenceforward would be referable to that attornment.¹⁴

11. Case where tenant purchases the share of the landlord's co-sharer. The section bars the tenant from denying the title of his landlord at the time of the creation of the tenancy. Where a person acquires the title to the property later on by purchasing the share of a co-sharer of his landlord, this section cannot be pleaded as a bar. If the co-sharer of the landlord had a share in the property, there is no bar to the tenant purchasing

13. *Abdullah v. Moiddin Kutty*, 1937 Mad. 865.

14. *Kumar Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern, Ltd.*,

A.I.R. 1937 P.C. 251 : (1937) 2 Mad. L.J. 286 : 169 I.C. 556, foll. *Parameshwarlal Agarwala v. Dalu Ram Jalan*, A.I.R. 1937 Assam 188.

the share of that co-sharer and thus claiming title to a part of the property. This does not constitute a denial of the title of the landlord on the date of the tenancy.¹⁵

12. Licensee. The rule of the tenant's estoppel prevails against one who is in possession of land under a mere licence.¹⁶ The rule as to claiming title, applied to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger or as a servant. There is no distinction between the case of a tenant and that of a common licensee. Both have been let into possession by the act of the landlord, and the licensee by asking permission admits that there is a title in the landlord, and the law under such circumstances implies a tenancy.¹⁷

The case last cited was of an ejectment in which it appeared that the defendant applied to the plaintiff then in possession of the premises for the privilege of getting vegetables from the garden, and that having obtained the keys, he fraudulently took possession and set up a claim to the land. The Court refused to hear it.¹⁸

117. Estoppel of acceptor of bill-of-exchange, bailee or licensee. No acceptor of a bill-of-exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

Explanation. (1) The acceptor of a bill-of-exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

(2) If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

Bigelow on Estoppel, 6th Ed. (1913), 519-539, 592-597; Estoppel by Representation and Res Judicata, 4th Ed., (1915), Chap. VII-X; Taylor, Ev., Secs. 850-853; Everest and Strode; Law of Estoppel, (1884), 2nd Ed. (1907), 308, 309; Story on Bills-of-Exchange, Secs. 113, 114, 115, 252, 262, 412; Act XXVI of 1881 (Negotiable Instruments) by M. D. Chalmers (1913); Cababe, Principles of Estoppel (1888).

15. Ramas Chandra v. Gour Alias Char-bayan Gur, A.I.R. 1962 Assam 137.
16. Bigelow, op. cit., 6th Ed., 586; Doed Johnson v. Baytap, (1835) 3 A. & E. 188; Mulhonaian v. Sinna Samaiyan, (1905) 28 M. 526; 15 M. L.J. 419; see for the position of licensee, Moti Lal v. Kalu Mondar, (1913) 19 C. L. J. 321; Uttam

- Gobharai v. Champa Rao, I.L.R. 1958 Bom. 1356.
17. Doed Johnson v. Baytap, (1835) 3 A. & E. 188.
18. See also for another example of the licensee's estoppel, Gour Hair v. R. Amirunnissa Khatoon, (1881) 11 C.L.R. 9; see as to licences, Act V of 1882 (Easements), Sec. 52-56.

SYNOPSIS

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Principle. 2. Estoppel of acceptor of a bill-of-exchange. | <ol style="list-style-type: none"> 3. Explanation 1. 4. Estoppel of bailee and licensee. 5. Licensees' trade-marks. |
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1. **Principle.** These are further instances of the estoppel by agreement. The acceptance of a bill amounts to an undertaking to pay to the order of drawer, but the transaction would be idle, if, after having so undertaken, the acceptor were allowed to set up that the drawer had no authority to draw the bill. He is, therefore, precluded from doing so for to allow him to do so would be to allow him to contradict that which his act of acceptance really imports.¹⁹ The estoppel of bailee and licensee is analogous to that of landlord and tenant and is based on similar principles.²⁰

2. **Estoppel of acceptor of a bill-of-exchange.** Estoppels in the case of negotiable instruments are instances of estoppel by agreement or contract. Rules such as those contained in the section may be called 'estoppels', but they are estoppels springing from the nature of the transaction founded upon mercantile custom, and may now be regarded as statutory estoppels.²¹ This section is in accordance with English law,²² except as to the first Explanation. Under the terms of the latter, the acceptor may show that the signature of the drawer is a forgery, while in England he is not allowed to do so; for it is held that he is bound to know his own correspondent's signature.²³ And in the undermentioned case,²⁴ it was held by the Calcutta High Court, that no person can claim a title to a negotiable instrument through a forged endorsement, for such an endorsement is a nullity. This section is supplemented by Secs. 41 and 42 of the Negotiable Instruments Act (XXVI of 1881), which provide for the liability of the acceptor in the case of a forged endorsement and of a bill drawn in a fictitious name.²⁵ Other sections define the position of the maker of a note,¹ or cheque,² an acceptor before maturity,³ the drawer until acceptance,⁴ the acceptor⁵ and endorser.⁶

Sections 118-122 of Act XXVI of 1881 (as amended by Acts V of 1914 and VIII of 1919) enact special rules of evidence with regard to negotiable instruments. There are certain presumptions as to consideration, date, time of acceptance, time of transfer, order of endorsement, stamp, and as to the

19. *Cababe*, Estoppel, 44; *Rup Chand v. Sarveswar Chandra*, I.L.R. 33 Cal. 913: 10 C.W.N. 474: 3 C. L.J. 629.

20. *Rup Chand v. Sarveswar Chandra*, *supra*.

21. *Bigelow*, op. cit., 6th Ed., 519-539; *Caspersz*, op. cit., 4th Ed., Chap. VII; *Chalmers on Bills-of-Exchange*, 8th Ed., 210-211.

22. See *Taylor*, Ev., s. 851.

23. *Sanderson v. Collman*, (1842) 4 M. & Gr. 209: as to estoppels arising out of adoption of forged signatures, see *Brook v. Hook*, (1871) L.R. 6 Ex. 89, 99; *Ashpitel v. Bryan*, (1863) 3 B. & S. 474, 492; *Mac-*

kenzie v. British Linen Co., L.R. (1881) 6 App. Cas. 82: 44 L.T. 431: 29 W.R. 477.

24. *Banku Behari Sikdar v. Secretary of State for India in Council*, (1908) 36 C. 299, following *Hunsraj Permand v. Ruttonji Walji*, 24 B. 65, and dissenting from *Chandra Kali Dabee v. Chaman*, 32 C. 799.

25. See *Chalmers' Negotiable Instruments Act*, p. 49.

1. Act XXVI of 1881, Ss. 32, 37.

2. *ib.*, s. 37.

3. *ib.*, s. 32.

4. *ib.*, s. 32.

5. *ib.*, Ss. 37, 88.

6. *ib.*, s. 88.

holder being a holder in due course.⁷ On proof of protest, the Court will also presume the fact of dishonour.⁸ The same Act then proceeds to enact three cases of estoppel against the maker of a note, the drawer of a bill or cheque, the acceptor of a bill, and the endorser, which are here reproduced :

"No maker of a promissory note, and no drawer of a bill-of-exchange or cheque, and no acceptor of a bill-of-exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn."⁹

"No maker of a promissory note, and no acceptor of a bill-of-exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to endorse the same."¹⁰

In a suit for damages due to the dishonour of a bill-of-exchange accepted by the defendant, it is not open to the defendant to plead that the acceptance was conditional and that the condition was not fulfilled.¹¹

No endorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.¹² But where a *hundi* is invalid under Sec. 26 of the Paper Currency Act, 1910, the endorser of it is not estopped from denying the validity of it, for there can be no estoppel against a clear injunction of a statute.¹³

Section 20 deals with inchoate instruments.¹⁴ As to estoppels arising out of negligence and agency in connection with negotiable instruments, see note below, they are but instances of the general estoppel by omission, to which reference has been made in Sec. 115. ante.¹⁵

7. Act XXVI of 1881 S. 118.

8. *ib.*, S. 119.

9. *ib.*, S. 120.

10. *ib.*, S. 121.

11. *Phoenix Trading Co., Ltd. v. Diwan Chand Sibal*, 1929 Sind. 172 (1) : 117 I.C. 160 : 23 S.L.R. 479.

12. Act XXVI of 1881, S. 122 ; *Thicknessee v. Bromilow*, 2 Cr. & J. 425 ; *McGregor v. Rhodes*, 6 E. & B. 266 ; the above sections appear generally to represent the English law upon the same subject ; see *Chalmers' Neg. Inst. Act*, pp. 113, 114.

13. *Alagappa Chetty v. Alagappa Chetty*, 1921 Mad. 382 : 1 I.L.R. 44 Mad. 187 ; 60 I.C. 130.

14. See *Foster v. Mackinnon*, (1868) L. R. 4 C.P. 704, 712 ; *Russell v. Langstaffe*, (1789) 2 Doug. 496 ; *Wahidunnessa v. Surgadasa*, 5 C. 39 ; *Bigelow*, op. cit., 6th Ed., 493,

534, 612, 613. It has been said to be doubtful whether the liability in these cases rests on estoppel or on the law-merchant ; *Ex parte Swan*, 7 C.B.N.S. 446 ; as to instruments lost or stolen, see Act XXVI of 1881, S. 58 ; *Baxendale v. Barnett*, (1878) L.R. 3 Q.B.D. 525.

15. *Everest and Strode : Estoppel*, 2nd Ed., 315 ; *Caspersz*, op. cit., 4th Ed., ss. 124—130, pp. 133—140 ; *Young v. Grote*, (1827) 4 Bing. 53 ; *Ingham v. Primrose*, (1859) 7 C.B. N.S. 82 ; *Arnold v. Cheque Bank*, (1876) L.R. 1 C.P.D. 578 ; *Schofield v. Earl of Lonsborough*, (1896) A.C. 514 (H.L.) ; *Bank of England v. Vagliano Bros.*, (1876) L.R. 23 Q.B.D. 243 ; *Bhupturam v. Hari Prsa*, (1900) 5 C.W.N. 313.

3. Explanation 1. A *bona fide* holder for value of a forged *hundi*, to whom, after it had been dishonoured, it had been transferred by endorsement by the payees, who at the time of endorsement knew that the *hundi* was forged, sued the payees on the *hundi* to recover the amount he had paid them for it. It was held that the payees were estopped from setting up the forgery of the *hundi* as a bar to the suit.¹⁶ The liability of an acceptor who pays a bill with erasures in the name of the payee is clear, as he is guilty of negligence and carelessness in paying the amount without scrutiny.¹⁷ Under the English law, on the principle, that the acceptor is bound to know the signature of his correspondent, i.e., the drawer, the acceptor is estopped from denying the signature of drawer; but, under the Indian law, there is no such estoppel against the acceptor.¹⁸

4. Estoppel of bailee and licensee. The relation between bailor and bailee is analogous to that of landlord and tenant. He will not be permitted to deny his bailor's title any more than the tenant may deny the title of his landlord (see Sec. 116 ante). But by the second explanation to this section, the same exception applies to his case as to that of the tenant, namely, that where something equivalent to title paramount has been asserted against the bailee, he is discharged as against those who entrusted the goods to him. The bailee has no better title than the bailor, and consequently if a person entitled as against the bailor to the property claims it, the bailee has no defence against him. The true ground on which a bailee may set up the *jus tertii* is that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person, nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an inter-pleader suit.¹⁹ A bailee can set up the title of another only, if he depends upon the right and title and by the authority of that person.²⁰

When a car received for repairs is damaged, and a suit for damages is brought against the repairer, he is estopped from challenging the title of the person from whom he had received the car as a repairer.²¹

As between a bailor and bailee, the latter, in an action for non-delivery of goods upon the demand of his bailor, must take one of the following courses: (a) he may show that he has already delivered the goods upon a delivery order authorized by the bailor, or (b) he may institute a suit of

16. *Bishen Chand v. Rajendro Kishore*, (1889) 5 A. 302.

17. *Lallubhai v. Ratanchand*, 1940 Bom. 82; 187 I.C. 419; 41 Bom. L.R. 1237.

18. *Bhashyam & Adiga's Negotiable Instruments Act*, 8th Ed., pp. 224, 225.

19. As to the procedure in inter-pleader suits, see Order XXXV, Woodroffe and Ameer Ali, *Civil Procedure Code*, 2nd Ed., pp. 1172–1174. *Rogers Sons & Co v. Lambert*, L.R.

(1891) 1 Q.B. 318.

20. *Biddle v. Bond*, 6 B. & S. 231, followed in *Rogers Sons & Co. v. Lambert*, *supra*; see *Contract Act*, S. 166; and generally as to bailments *ibid.* ss. 148–173; *Coggs v. Barnard*, Sm. L. Cas; *Bigelow*, *op. cit.*, 6th Ed., 592–598; *Casperaz*, *op. cit.*, 4th Ed., Chap. X; *Everest and Stode*, 2nd Ed., 293, 294.

21. *Calcutta Credit Corporation, Ltd. v. Prince Peter of Greece*, A.I.R. 1964 C. 374; 68 C.W.N. 554.

inter-pleader; or (c) he may defend the action on behalf of the real owner, alleging and proving the title of the real owner, depending expressly upon that title.²²

The same principle applies in the case of a wharfinger who agrees to hold goods for the plaintiff under a delivery order from a purchaser of the defendant wharfinger; he cannot resist trover for them on the ground, e.g., that they have never been separated from bulk and that, therefore, no property passed to the person delivering.²³

The rule with regard to principal and agent is that an agent must account to his principal and cannot set up the *jus tertii* against him, except when the principal has been acting under a *bona fide* misapprehension as to the rights of some third person, or has been fraudulently acting in derogation of those rights.²⁴

5. Licensees' trade-marks. It is well settled that the rule of estoppel, which binds landlords and tenants, mortgagors and mortgagees, bailors and bailees, applies to employees and contracting parties generally who cannot accept the benefits of the contract and yet when called upon to perform their duties under it repudiate it, as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void. The assignee or the licensee of any right, accepted and acted under, is accordingly estopped to deny the authority from which the right proceeds.²⁵ The position of a licensee who, under a licence, is working a right for which another has not a patent is analogous to the position of tenant and landlord and the licensee is bound in the same way; he cannot question the validity of the patent during the continuance of the licence, though he may show what the limits of the patent are.¹ A right to use a trade-mark may be created by licence or assignment, in which case the licensee will be in the same position as the licensee of a patent; he is estopped from denying the licensor's title or the validity of the licence, even though he attempts to repudiate the contract.² A trade-mark represents the origin of the goods to which it is attached or their trade association, and cannot be transferred apart from the goodwill, which has been defined as the benefit

22. *Rogers Sons & Co. v. Lambert*. L. R. (1891) 1 Q.B. 318, per Lord Esher; as to estoppel by election to support title either of bailor or third party, see *Ex parte Davis*, L.R. (1881) 19 Ch. D. 80.

23. *Woodley v. Coventry*, (1863) 2 H. & C. 164; *Knights v. Wiffen*, (1870) L.R. 5 Q.B. 660; see remarks on this latter case in *Simn v. Anglo-American Telegraph Co.*, L.R. (1879) 5 Q.B.D. 188; see *Ganges Manufacturing Co. v. Sourujmal*, (1880) 5 C. 669; *Henderson & Co. v. Williams*, L.R. (1895) 1 Q.B. 521.

24. *Everest and Strode*, op. cit., 2nd Ed., 292; *Smith Mercantile Law*.

1122, 10th Ed.; see *Yadgar Hussain v. Md. Ibrahim Raza*, 1936 Nag. 71: 163 I.C. 179.

25. *Lakhan Jena v. Arjun Naik*, 1914 Cal. 202: 24 I.C. 387: 19 C.L.J. 313: 18 C.W.N., 1194.

1. *Clark v. Adie*, (1877) 2 App. Cas. 423; In the matter of *D.H.R. Moses*, (1888) 15 C. 244; as to estoppel against patentee, see *Cropper v. Smith*, (1884) 26 Ch. D. 700; *Proctor v. Bennis*, (1887) 38 Ch. D. 740.

2. *Jagannath v. Cresswell*, (1913) 40 C. 814: 22 I.C. 372, affirmed in *Hannah v. Jagannath*, 1915 Cal. 520: I.L.R. 42 Cal. 262: 27 I.C. 483: 19 C.W.N. 1.

and advantage of the good name, reputation and association of a business. A name may be registered as a trade-mark, if it is a distinctive mark; and no one can use his own name to pass off his goods as the goods of another who has the same name.⁴ A distinctive mark may be used by an importer as indicating the fact that all goods bearing it have been imported by him. Though, in strictness, the representation of a trade-mark may be only true of its original owner, the ordinary usage of commerce has extended it to his successors in business. This section casts on the licensee the onus of proving that the goodwill did not pass to the licensor.⁵

3. *Inland Revenue v. Mullers Margerin*, 1901 A.C. 217.

4. *Toofani & Co.'s Trade-mark, Re*, (1913) 2 Ch. 545.

5. *Latif v. Emperor*, 1917 All. 429 (2); I.L.R. 39 All. 123; 36 I.C.

583; 14 A.L.J. 1080; 17 Cr. L.J. 535.

6. *Hammah v. Jagannath*, 1915 Cal. 520; I.L.R. 42 Cal. 262; 27 I.C. 483; 19 C.W.N. 1.

CHAPTER IX OF WITNESSES

SYNOPSIS

1. Competency.
2. Compellability.
—Privilege.
3. Grounds of exclusion.
4. Difference between privilege and incompetency.

1. **Competency.** The present chapter deals mainly with competency⁷ and compellability⁸ of witnesses. A witness is said to be incompetent to give evidence when the Judge is bound, as a matter of law, to reject his testimony.⁹ The motives to prevent the truth are so much more numerous in judicial investigations than in the ordinary affairs of life that the danger of injustice arising from this cause, has, till modern times, been thought to justify the observance of rules by virtue of which large and numerous classes of persons were rendered incompetent witnesses, and their testimony was uniformly excluded.¹⁰ A recognition of the artificial character of these rules of exclusion, which has no foundation or justification in actual experience, and which led to frequent injustice, and of the necessity of increasing, as much as possible, the media of investigation led gradually to the conversion of questions of competency into questions of credibility. The tendency of modern legislation has been rather to allow witness to make his statement, leaving its truth to be estimated by the tribunal than to reject his testimony altogether.¹¹ Competency thus becomes the rule; incompetency the exception, and incompetency is reduced within a narrow compass. Proceeding on this principle (more thoroughly than the English law, which still retains traces of the older judicial system), this Act declares all persons to be competent witnesses except such as are wanting in intellectual capacity. Granted this capacity, all persons become admissible as witnesses, it being left to the Court "to attach to their evidence that amount of weight which it appears to deserve, from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to

7. Sections 118–120, 133, post.

8. Sections 121–132.

9. Best, Evidence, 132.

10. See Taylor. Ev., Sec. 1342; Sichel's Practice Relating to Witnesses. 1–16; Wharton, Ev., Secs. 391–420; Burr. Jones, Ev., Secs. 780–786. Stewart Rapalje's Law of Witnesses. 1–307; Phillip and Ames, Evidence, 3–142; see the statutes affecting qualifications in Wigmore. Ev., Sec. 488.

11. See Taylor. Evidence, Section 1345,

et. seq; Best, Evidence. Section 132. et. seq; Wigmore, Ev., Sec. 501; see remarks in Blake v. Albion Life Assurance Society, (1878) 4 C. P. D. 94; R. v. Gopal Das, (1881) 5 M. 271. 282. As to the credibility of and other general remarks as to witnesses, see Norton, Ev., p. 33. et. seq; Best, Ev., pp. 11, 13, 15, 111. As to credibility, see Stewart Rapalje, op. cit., 305, 379.

justify a man of ordinary prudence in acting upon those statements. Thus, neither want of religion, nor physical defect, not involving intellectual incapacity,¹² nor interest, arising from the fact that the witness is a party to the record, or wife or husband of such party,¹³ or otherwise; nor the fact that the witness is an accomplice in the commission of a crime¹⁴ form any ground for the exclusion of testimony. Sections 118 to 121 and Sec. 133 of this Act deal with competency of witnesses.

Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness—Observation, Recollection and Communication. Whatever rules, therefore, limit the acceptance of testimonial assertions must have reference to some or more of these elements.¹⁵

2. Compellability. But the competency of a witness to give evidence is one thing, and the power to compel him to give evidence another.¹⁶ A competent witness is usually compellable to give evidence. Some competent witnesses, however, are not compellable by virtue of their special status; thus Sovereign is not subject to coercive process; so, too, a foreign diplomatic agent (a head of mission or member of diplomatic staff) is not obliged to attend to give evidence, nor are other members of a consular post.¹⁷ And this compellability may be either—

- (i) compellability to be sworn or affirmed; thus, ordinarily in matrimonial proceedings the parties are competent but not compellable; they may, if they choose, offer themselves as witnesses,¹⁸ and under the Bakers' Books Evidence Act,¹⁹ an officer of the Bank is not, in any proceeding to which the Bank is not a party, compellable to produce, or to appear as witness to prove, any banker's books without the orders of a Judge made for special cause; or
- (ii) compellability when sworn to answer questions; thus a witness, who may be generally compellable to give evidence, may yet be protected or privileged in respect of particular matters concerning which he may be unwilling to speak.²⁰

Privilege. Further, there are certain cases in which the law will not permit the witness to speak, even if he be willing.²¹ Sections 121–132 declare exceptions to the general rules that a witness is bound to state the whole truth, or to produce any document in his possession or power relevant to the matter in issue.²² These rules of privilege and prohibition rest on grounds of public policy which are shortly set forth in the notes to the sections which enact them.²³ But, as a general rule, all witnesses competent to

12. See Secs. 118, 119, post.

13. Section 120, post.

14. Section 133, post.

15. Wigmore, Ev., Sec. 478.

16. *De Bretton v. De Bretton and Holme*, (1881) 4 A. 49, 52. As to the meaning of the word "compelled" in the following sections, see *R. v. Gopal Dass*, (1881) 3 M. 271. 276, et. seq.; *Moher Sheikh v. R.* (1893) 21 C. 392, 400; *Emperor v. Banarasi*, 1924 All. 381; I.L.R. 46 All. 254; 77 I.C. 829; 25 Cr. L.J.

477; 22 A.L.J. 144.

17. *Halsbury's Laws of England*, 4th. Ed., para 284.

18. See Act IV of 1869, Secs. 51, 52 (*Indian Divorce*), and notes to Sec. 120, post.

19. Act XVIII of 1891, Sec. 5.

20. See Secs. 122, 124, 125, post.

21. See Secs. 122, 123, 126, 127, post.

22. *R. v. Gopal Dass*, (1881) 3 M. 271. 277.

23. v. post.

give evidence are compellable to do so. The procedure to be followed in order to compel the giving of evidence is regulated by the Civil and Criminal Procedure Codes.²⁴ Lastly, Sec. 134 declares that no particular number of witnesses are required for the proof of any fact.

3. Grounds of exclusion. The exclusionary rules in the present Chapter are based either directly on general considerations of public policy, such as the rules relating to affairs of State and official communications,²⁵ information given for the detection of crime¹ and judicial disclosures,² or on grounds of privilege, such as the rules relating to professional³ and matrimonial⁴ communications, and title-deeds and other documents.⁵ In connection with these rules should be read the provisions of the Civil Procedure Code relating to discovery.⁶ In fact, questions of privilege arise as frequently on applications for discovery or inspection before trial as with reference to testimony in the witness-box, but the principles are substantially the same.⁷ Whatever difference may exist between the case of evidence asked for or tendered at the trial, and that of an application for discovery or inspection, the law is altogether in favour of a refusal to order discovery in the earlier stages of the case.⁸ A person interrogated under Order XI, Rule 6, or ordered to produce under Order XI, Rule 11 of the Civil Procedure Code, may plead his privilege in terms of this Act. When it was contended for the defendant that even if a case submitted by the plaintiff to his counsel could not be used in evidence under Sec. 129 of the Evidence Act, yet the defendant was entitled to have inspection of it under Order XI, Rule 11 of the Civil Procedure Code, such contention was disallowed by West, J., who said: "The argument that *albeit* the document may not be such that the Court can properly order its production as evidence, yet the opposite party may demand a perusal of it is, I think, opposed to all principles. If a communication is protected by its confidential character, it is protected in an especial degree as against an adversary in litigation."⁹ A person cannot be indirectly compelled to disclose what he cannot be directly called upon to state.¹⁰ Under the law of privilege, it is necessary to set it up, because it is only an excuse which the Judge may or may not recognise as good, and it is his decision that either accords the privilege or withholds it.¹¹

4. Difference between privilege and incompetency. There is a great difference between privilege and incompetency. An incompetent witness cannot be examined, and if examined inadvertently, his testimony is not legal evidence; but a privileged witness may be examined and his testimony is legal, if the privilege be not insisted on.¹² Again the admissibility is not

24. Civ. P. C. Order XVI; Cr. P. C., Secs. 174, 175, 217, 219, 231, 244, 250, 252, 256, 257, 485, 540; see also Penal Code, Secs. 174, 175 *ib.*, and Secs. 172—180, *ib.* passim; see Introduction to Chap. X, post.

25. Sections 123 and 124, post.

1. Section 125, post.

2. Section 121, post.

3. Sections 126—129, post.

4. Section 122, post.

5. Sections 130—131, post.

6. Civ. P. C. Order XI Rule 1.

7. See *Greenough v. Gaskell*, (1833) 1

M. & K. 98. 116; *Hennessy v. Wright*, (1888) 21 Q. B. D. 509, 521.

8. *Hennessy v. Wright*, *supra*, per *Wills, J.*, 521.

9. *Munchershaw Bezonjee v. The New Dhurumsey S. W. Co.*, (1880) 4 B. 576.

10. *Ryrie v. Shivashankar*, (1890) 15 B. 7, 10.

11. *R. v. Gopal Dass*, (1881) 3 Mad. 271, 286, but see also Sections 123, 124, post.

12. *Roscoe, Cr. Ev.*, 16th Ed., 158.

solely dependent on the competency of the witnesses. A witness may be competent in view of Sec. 18; yet his evidence may be inadmissible, if it does not speak to facts but to opinions, inferences and beliefs (Sec. 45), or if it refers to what the witness had not seen and heard (Sec. 60), i.e., hearsay, or when the witness happens to be a police officer and he seeks to prove a confession made to him (Sec. 25).¹⁸

118. *Who may testify.* All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Section 3 ("Court").

Section 119 (Dumb witness).

Section 120 (Parties, Husbands and Wives).

Section 133 (Accomplice).

Act 44 of 1969 (Oaths Act); Cr. P. C. 1973, Secs. 306, 313, 315; Act 39 of 1925 (Succession Act); Sec. 68; Taylor, Ev., 1342, et seq.; Best, Ev., Sec. 132, et seq.; Powell, Ev., 9th Ed., 196-219; Phipson, Ev., 11th Ed., 601-612; Steph. Dig., Chap. XV; Phillip and Arnold, Ev., 3-142; Wharton, Ev., Secs. 391-420; Burr. Jones, Ev., Sec. 730, et seq.; Stewart Rapalje's Law of Witnesses, 1-301; Sichel's Practice Relating to Witnesses, p. 16; Wigmore, Ev., 483, et seq.

SYNOPSIS

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1. Principle. See notes, post.

2. Scope. This section lays down the general rule as to the competency of witnesses.¹⁴ It suggests, what numerous Judges have observed, that in India the rule generally is in favour of the admission of evidence, though the weight to be attached to it will, of course, be a matter for the Court's consideration.¹⁵ The Indian rule is certainly not less liberal as to the admission of evidence than the rule in England. Every witness is competent unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact unless the Court considers otherwise.¹⁶ The sections make no distinction between prosecution and defence witnesses.¹⁷

3. Competency. Understanding is the sole test of competency.¹⁸ The Court has not to enter into enquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next.¹⁹ It has to ascertain, in the best way it can, whether from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years, or of very advanced age, can satisfy these requirements, his competency as a witness is established.²⁰

Oath, administration of. The question whether a deliberate omission to administer an oath or affirmation makes evidence inadmissible has been the subject of conflicting decision.²¹ Section 5 of the Indian Oaths Act, 1873 (now

14. Akhoy Kumar Mukerjee v. Emperor, 1919 Cal. 1021: I.L.R. 45 Cal. 720: 45 I.C. 999: 19 Cr. L.J. 668.
15. Govind Balvant Laghate v. Emperor, 1916 Bom. 229: 34 I.C. 976: 17 Cr. L.J. 256: 18 Bom. L.R. 266.
16. Rameshwar v. The State of Rajasthan, 1952 S.C. 54: 1952 S.C.A. 40: 1952 S.C.J. 46: 1952 S.C.R. 577: 53 Cr. L.J. 547: (1952) 1 M.L.J. 440: 65 L.W. 351: 1952 M.W.N. 150.
17. A. V. Joseph v. King-Emperor, 1925 Rang. 122: I.L.R. 3 Rang. 11: 85 I.C. 236.
18. Ram Jolaha v. Emperor, 1927 Pat. 406: 102 I.C. 949: 28 Cr. L.J. 541: S. Rasul v. Emperor, 1930 Sind. 129: 120 I.C. 514: 31 Cr. L.J. 114.
19. As to the necessity in English law in the case of a child-witness of belief in punishment for lying in a future state, see Steph., Dig., Note XL, and Whitley Stokes, 831.
20. R. v. Lal Sahai, (1888) 11 A. 183; R. v. Ram Sewak, (1900) 23 A. 90; as to the age and degree of intelligence, see Taylor, Ev., Sec. 1977,

- and Roscoe, Cr. Ev., 115, 116, 10th Ed., cited in R. v. Maru, (1888) 10 A. 207, 210, 212, in which the history of legislation in India relating to oaths and affirmations is discussed; R. v. Shava, (1891) 16 B. 359.
21. R. v. Mst Itwarya, (1874) 14 B. L.R. 54: 22 W.R. Cr. 14, s.c.; R. v. Sewa Bhogta, 14 B.L.R. 294 (F.B.): 23 W.R. Cr. 12 (overruling R. v. Anunto Chukerbutty, (1874) 22 W.R. Cr. 1; Bal Chand v. Tarak Nath, 1915 Cal. 105: 27 I.C. 215: 16 Cr. L.J. 151: 18 C.W.N. 1323; Emperor v. Shasi Bhusan Maity 1920 Cal. 414: 58 I.C. 817: 21 Cr. L.J. 817: 32 C.L.J. 31: 24 C.W.N. 767; Hussain Khan v. The Crown, 1923 Lah. 332: 76 I.C. 1037: 25 Cr. L.J. 317; R. v. Shava, (1891) 16 B. 359; Hari Ramji v. Emperor, 1918 Bom. 212: 45 I.C. 497: 19 Cr. L.J. 593: 20 Bom. L.R. 365; R. v. Maru, supra; and Quacre, R. v. Viraperumal, (1892) 16 M. 105; In re Dasi Viraya, 1938 Mad. 490: 175 I.C. 422: 39 Cr. L.J. 585; Ah Phut v.

Sec. 4 of the Oaths Act, 1969) is imperative; yet under Sec. 13 of that Act (now Sec. 7 of the Oaths Act, 1969), no omission to make any oath or affidavit and no irregularity in the form in which an oath is administered, invalidates a proceeding or renders evidence inadmissible. In some rulings, Sec. 13 has been held interpreted as permitting the Court to disobey Sec. 5 and refrain deliberately from administering any form of oath or affidavit. In other rulings it has been held that 'omission' in Sec. 13 (now Sec. 7 of the Oaths Act, 1969), plainly refers to one made by the witness, and that since, in accordance with the rules for construction of statutes, a later section, if ambiguous, should be construed, if possible, so as to avoid contradicting a former one, this section should be taken as referring only to²² an unintentional irregularity on the part of the Court. In a case in the Calcutta High Court, where two children aged four and six years, respectively, were witnesses and the Judge had intentionally refrained from administering an oath or affirmation to them (apparently on account of their age), and did not seem to have considered their competency during the examination, the conviction was set aside as partly based on this evidence, the admissibility of which was in doubt.²³ In a similar case in the Allahabad High Court, a child's evidence was held admissible.²⁴ The question was considered by their Lordships of the Privy Council in *Mohamed Sugul Esa Mamasan Rer. Alalah v. The King*,²⁵ in which their Lordships held that Sec. 13, Oaths Act, 1873 (now Sec. 7 of the Oaths Act, 1969) is unqualified in its terms and there is nothing to suggest that it is to apply only, where the omission to administer the oath occurs *per incuriam*. If that had been the intention of Legislature, it would have been simple to insert words in the section to that effect. No doubt, however, it was recognised that in some backward communities there may well be persons capable of understanding the necessity and duty of speaking the truth without appreciating the religious or moral obligations imposed by taking an oath. It is not to be supposed that any Judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness. It may be observed that this question can no longer arise in India because in 1939, the Legislature passed the Oaths (Amendment) Act (Act XXXIX of 1939), which settles the law in accordance with the Bengal and Oudh decisions referred to above.¹ Under Sec. 4 of the Oaths Act, 1969, oath shall be administered only to those witnesses who may be lawfully examined which means who can understand the sanctity of oath. A witness may be a competent witness and yet he may not be in a position to understand the sanctity of an oath. In such a case Sec. 13

The King, 1939 Rang. 402 : 185 I. C. 205; 41 Cr. L.J. 129; *Fatu Santal v. King-Emperor*, 1921 Pat. 109 : 61 I.C. 705 : 22 Cr. L.J. 417; *Nundo Lal v. Nistarini Dassi*, 27 C. 428 : 4 C.W.N. 178; see Act X of 1873, Sections 5, 13, now respectively Secs. 4 and 7 of the Oaths Act, 1969.

22. *Rangacharya v. Dasacharya*, I.L.R. 37 Bom. 231 : 19 I.C. 387 : 15 Bom. L.R. 178 (later statute).

23. *Nefar Sheikh v. R.*, 1914 Cal. 276.

24. *Dhani Ram v. Emperor*, 1915 All. 437, followed in *Sahdeo Ram v. Em-*

peror, 1935 All. 579 : 156 I.C. 849.

25. 1946 P.C. 3 at p. 5 : 222 I.C. 304: 1946 A.L.J. 100: 50 C.W.N. 98.

1. i.e. *R. v. Sewa Bhogta*, 14 Beng. L.R. 294 (F.B.) and *Ram Samujh v. Emperor*, 10 O.C. 337. The decisions there were that the section being unqualified in terms, did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature.

Oaths Act, 1873 (now Sec. 7 of Oaths Act, 1969) comes into play. A witness of this type can be examined, without an oath and his testimony is as good as that of a witness to whom oath has been administered.² The Oaths Act does not deal with competency. Its main object is to render persons who give false evidence liable to prosecution. It is true that a subsidiary object is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, but in view of this section these matters only touch credibility and not admissibility.

Section 13, Oaths Act, 1873 (now Sec. 7 of the Oaths Act, 1969) places this beyond doubt. It states :

"No omission to take any oath or make any affirmation.....and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever....."

The aforesaid provision is unqualified in its terms³ and applies to all cases of irregularity, whether accidental or otherwise.⁴ Any defect in recording the statement of a child witness must be ignored by virtue of this section.⁵

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed.⁶ If a witness, after being sworn, is shown to be incapable of understanding, the Judge should strike out all his evidence.⁷ The modern practice is to interrogate the witness before swearing him, or to elicit the facts upon the examination-in-chief, when if his incompetency appears, he will be rejected.⁸

If the child has capacity to understand questions and give rational answers, his evidence would be admissible even though no oath was administered to him.⁹

4. Voir dire: Preliminary examination to test competence of witness. Questions as to the competency or incompetency of witness are decided by the Judge, generally on a preliminary examination called the *voir dire*; but if the incompetency of a witness is not discovered till after he is sworn and has given evidence, his evidence may none the less be objected to

2. Ghasi Ram v. State, 1952 Bhopal 25.

3. Mohammed Sugul Esa v. The King, A.I.R. 1946 P.C. 3 at p. 5.

4. Rameshwar v. State of Rajasthan, 1952 S.C.R. 377; 1952 S.C.J. 46; 1952 Cr. L.J. 547; (1952) 1 M.L.J. 440; 65 M.L.W. 351; 1952 M.W.N. 150; A.I.R. 1952 S.C. 54.

5. State of Rajasthan v. Vijairam, 1968 Raj. L.W. 1; 1968 Cr. L.J. 270 (275); see also Dhansai Sahu v. State, I.L.R. 1969 Cut. 65; 35 Cut. L.T. 18; 1969 Cr. L.J. 626; A.I.R. 1969 Orissa 105 (108) (despite the trial Judge's opinion to the contrary, the High Court perused

the evidence and was satisfied that the child witnesses were competent.)

6. A. v. Lal Sahai, (1889) 11 All. 183; R. v. Shava, (1891) 16 Bom. 359 at p. 364.

7. R. v. Whitehead, (1866) L.R. 1 C.C.R. 33.

8. Wharton, Ev., 492; see Phipson, Ev., 11th Ed., 604; Taylor, Ev., Sections 1392, 1393; Wigmore, Ev., Section 486. The preliminary examination is known as the *voir dire*.

9. Narasingha Karwa v. State, (1974) 40 C.L.T. 491; (1974) 1 C.W.R. 428.

and rejected.¹⁰ The division of function between Judge and jury allots without question to the Judge the determination of all matters of fact on which the admissibility of evidence depends and therefore of the facts of a witness's capacity to testify.¹¹ It is for the Judge to decide whether a witness sufficiently understands the nature of the oath,¹² or a child is otherwise competent to give evidence.¹³ So, it was held that whether or not a child was competent to give evidence was a question for the Judge to decide and not for the jury; the amount of credit to be given to the statements being all that fell within the province of the latter.¹⁴ And it was held that before a child of tender years is questioned the Court should test his capacity to understand and to give rational answers, and to understand the difference between truth and falsehood. It was also held that the Judge must form his opinion as to the competency of a witness before the actual examination commences.¹⁵ When a person is called to give evidence and when there is reason to suspect that he may be incapable of giving rational answers to questions put to him, this is, as a rule, known either to the prosecution or the defence or to both. In such a case, the usual course is for the attention of the Court to be drawn to the matter and for the Court to question the person with a view to ascertaining whether he is a competent witness to give evidence or not.¹⁶ Failure to record the preliminary questions put to the child to judge his competency would be no ground for rejecting his testimony if the Judge found that the child understood the questions and has given rational answers.¹⁷ But need to maintain the formal record was emphasised by some High Courts so that the Appellate Court may receive the decision of the trial Court.¹⁸ It has been held in some cases that the preliminary enquiry as to the competency is imperative.¹⁹ But the proposition that the competency of the witness should be tested before his examination is commenced is not justified by the provisions of Sec. 118, Evidence Act.²⁰ It has been held in several cases that the holding of preliminary enquiry is merely a rule of prudence and not a matter of legal

10. Halsbury's Laws of England, 3rd (Simond's) Ed., Vol. 15, p. 419.

11. Wigmore, Ev., Sec. 487.

12. *R. v. Williams*, (1836) 7 C. & P. 320 (child); *R. v. Whitehead*, 1866 L.R. 1 C.C.R. 33 (deaf mute); *R. v. Hill*, (1851) 2 Den. 254 (person of unsound mind); see also *R. v. Reynolds*, 1950 K.B. 606 (C.C.A.) (1950) 1 All. E.R. 335 (but Judge should not examine the witness in private).

13. *R. v. Surgenor*, (1940) 2 All E.R. 249 (C.C.A.).

14. *R. v. Hossince*, (1867) 8 W.R. Cr. 60.

15. *Sheikh Fakir v. R.*, (1906) 11 C. W.N. 51; *Mst. Ram Sakhia v. Emperor*, 1934 Pat. 651; 153 I.C. 922; 15 P.L.T. 586; *Ah Phut v. The King*, 1939 Rang. 402; 185 I. C. 205; 41 Cr. L.J. 129; *Ghasi Ram v. State*, 1952 Bhopal 25.

16. *Ram Padarath Singh v. Emperor*, 1941 Pat. 513; I.L.R. 20 Pat. 339; 196 I.C. 478.

17. *Murli v. State*, 1971 A.W.R. 61;

Srinivas Murthy v. State of Karnataka, (1977) 2 Kar. L.J. 341; *Bir Singh Majhi v. State of Assam*, 1977 Cr. L.J. 1349.

18. *Sataji v. State of Gujarat*, (1976) 17 Guj. L.R. 254.

19. *Dhani Ram v. R.*, 1915 All. 437; I.L.R. 38 All. 49; 31 I.C. 1005; 16 Cr. L.J. 829; *Sahdeo Ram v. Emperor*, 1935 All. 579; 156 I.C. 849; 36 Cr. L.J. 1013; *Panchu Chowdhry v. Emperor*, 1923 Pat. 91; 66 I.C. 73; 23 Cr. L.J. 233; *Mst. Ram Sakhia v. Emperor*, 1934 Pat. 651; 153 I.C. 922; *Tulsi v. Emperor*, 1928 Lah. 903; 110 I.C. 799; 29 Cr. L.J. 767; *Jagannath v. State*, 1952 Raj. 153; I.L.R. 1951 Raj. 844; 53 Cr. L.J. 1200; 2 Raj. L.W. 128; *Dhanna v. State*, 1951 Raj. 37.

20. *Krishna Kahar v. Emperor*, 1940 Cal. 182; I.L.R. (1939) 2 Cal. 569; 187 I.C. 129; 41 Cr. L.J. 405; 43 C.W.N. 1117; see also *Nafar Sheikh v. Emperor*, 1914 Cal. 276; I.L.R. 41 Cal. 406; 20 I.C. 741.

obligation and the omission to hold the enquiry is mere irregularity which does not vitiate the trial.²¹ It has also been held that it is the duty of the Judge to record his finding as to the competency of the witness.²² But, although it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that,²³ the omission to question such a witness before he is examined or the failure to record the opinion of the Judge as to whether the witness understood the duty of speaking the truth may not by itself vitiate the judgment. The credibility of the witness has to be judged in the light of the circumstances in each case.²⁴ The statement of a child witness who gives rational answers to the questions put to it by the court is admissible evidence though there was no preliminary examination. In such a case the statement cannot be rejected on the ground that the witness was not a competent witness. The reason is that the recorded statement of a child witness ordinarily furnishes sufficient material to judge the competency of that witness.²⁵ When a Court in this country has once decided that a witness is competent, it ought not to intervene at a later stage *suo motu*.¹ But the view which the Judge forms at the preliminary enquiry would not, however, be final, because the competency of the witness would become apparent only after his examination and cross-examination.²

5. Child witness : Competency of. The tender age of a witness does not *ipso facto* render him, or her, incompetent to appear as a witness to give testimony.³ This section vests in the Court the discretion to decide whether an infant is or is not disqualified to be witness by reason of understanding or lack of understanding. It cannot be disputed that this discretion must be exercised in a judicial manner.⁴ No precise age is fixed by law within

21. Karu Singh v. Emperor, 1942 Pat. 159; I.L.R. 20 Pat. 893; 199 I.C. 200; Lakhan Singh v. Emperor, 1942 Pat. 183; I.L.R. 20 Pat. 898; 199 I.C. 638; Marianthony Mariasoosa v. The State, 1955 T.C. 81; Krishnan Vasu v. State of Kerala, I.L.R. 1960 Ker. 266.

22. Kanhaiya Lal Sewaram v. State, 1953 M.B. 262; 55 Cr. L.J. 6; 1953 M.B. L.J. 647.

23. Rameshwar v. The State of Rajasthan, 1952 S.C. 54; 1952 S.C.A. 40; 1952 S.C.J. 46; 1952 S.C.R. 377; 53 Cr. L.J. 547; (1952) 1 M. L.J. 440; Sataji Nathaji v. State, 1975 Mah. Cr. R. 278; 17 Guj. L.R. 254.

24. Marianthony Mariasoosa v. The State, 1955 T.C. 81; Arulan Israel v. The State, 1955 T.C. 6; Raju Shetty, In re. A.I.R. 1960 Mys. 48; Jai Singh v. State, 1973 Cri. L.J. 1466; 1974 All. Cr. R. 195; Sataji v. State of Gujarat, 1975 Mah. Cr. R. 278; 17 Guj. L.R. 254; State v. Lobsang Sharap, 1973 Cri. L.J. 85; (1972) 2 Sim. L.J. (H.P.) 216.

25. State of Rajasthan v. Vijairam, 1968 Raj. L.W. 1; 1968 Cr. L.J.

270; Nafar Sheikh v. Emperor, 1. L.R. 41 Cal. 460; A.I.R. 1914 Cal. 276; Krishna Kahar v. Emperor, 1. L.R. (1939) 2 Cal. 569; A.I.R. 1940 Cal. 182; Rakhan Singh v. Emperor, I.L.R. 20 Pat. 898; A.I.R. 1942 Pat. 183 (no legal obligation to ask preliminary questions); Ram Hazoor Pandey v. State, A.I.R. 1959 All. 409 (*voir dire* not necessary but desirable); Murli v. State, 1971 A.W.R. 61 (63).

1. Ram Padanath Singh v. Emperor, 1941 Pat. 513; I.L.R. 20 Pat. 399; 96 I.C. 478.

2. Govind Nath v. State, 1961 Guj. 11.

3. Queen-Empress v. Maru, I.L.R. (1888) 10 All 207; S. Rasul v. Emperor, 1930 Sind 129; 120 I.C. 514; 31 Cr. L.J. 114; Ranjha v. State, 1951 H.P. 75; Inder Singh v. State, 1953 Pepsu 193; 54 Cr. L.J. 1835.

4. Sheikh Fakir v. Emperor, (1907) 4 Cr. L.J. 412; 12 C.W.N. 51; Krishna Kahar v. Emperor, 1940 Cal. 182; I.L.R. (1939) 2 Cal. 569; 187 I.C. 129; 41 Cr. L.J. 405; 43 C.W.N. 1117.

which children are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding. Nor can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind, much must always depend upon the good sense and discretion of the Judge. In practice, it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding.⁵ In India, girls of even six to eight years have been held to be competent witnesses.⁶ In a case doubt was expressed that a witness would correctly depose about an occurrence when he was 10 years old.⁷ It is, however, submitted that this cannot be accepted as a general principle. If the evidence of a child witness appears to be probable and true, his competency cannot be questioned.⁸ The competency of a child to give evidence is not regulated by the age but by the degree of understanding he appears to possess.⁹ It has been held that a Court should examine a child of tender years as a witness only after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently of the deeds seen and to afterwards inform the Court thereof. If the Court is of opinion that, by reason of tender years, the child is unable to do this, it ought to refrain not only from administering the oath but from examining the child at all.¹⁰ "Where any child of tender years, who is tendered as a witness, does not, in the opinion of the Court, understand the nature of an oath, its evidence may be received, though not given upon oath, if in the opinion of the Court the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."¹¹

Where the Court is of opinion that the child is unable to give relevant information in the matter by reason of tender years and consequent immaturity of judgment, it should not examine the child at all.¹²

A child witness is a competent witness. But the prosecution is entitled to examine only such of the witnesses whom it considers to be material for the case.¹³ In a case where the daughter of the victim of murder stayed for

5. Taylor. Evidence Sec. 1377.

6. *Rameshwar v. The State of Rajasthan*, 1952 S.C. 54; *Jalwant Lodhin v. The State*, 1953 Pat. 246; I.L.R. 32 Pat. 217; 54 Cr. L.J. 1344; 1 B.L.J. 280; *Hanuman Sarma v. Emperor*, 1932 Cal. 723; 141 I.C. 622; 36 C.W.N. 1152; *Sadananda Bisoi v. State*, (1969) 35 Cut. L. T. 422 (430, 431) (girl of twelve years).

7. *State of Bihar v. Hanuman Kori*, 1971 Cr. L.J. 187.

8. I.L.R. (1970) Guj. 691.

9. *Inder Singh v. State*, 1953 Pepsu 193; see also notes under the heading "Competency".

10. *Dhanl Ram v. Emperor*, 1915 All. 437; I.L.R. 38 All. 49; 31 I.C. 1005; 10 Cr. L.J. 829; *Sahdeo Ram v. Emperor*, 1935 All. 579; 156 I.C. 849; 36 Cr. L.J. 1013; *Jagan-nath v. State*, 1952 Raj. 153; *Hussain Khan v. The Crown*, 1923 Lah.

332; 76 I.C. 1037; 25 Cr. L.J. 317; *Panchu v. Emperor*, 1923 Pat. 91; 66 I.C. 73; *Mst. Ram Sakha v. Emperor*, 1934 Pat. 651; 153 I.C. 922; (1972) 1 Cut. L.R. (Cri.) 227.

11. *Phillipson*, Evidence, 11th Ed., p. 605; *Narsingha Katwa v. State*, 40 Cut. L.T. 491; (1971) 1 Cut. W. R. 428; 1975 Cr. L.J. 1500.

12. *Ghulam Hussain v. Emperor*, 1930 Lah. 337; 127 I.C. 862; 32 Cr. L. J. 63.

13. *Doraiswami Udayan v. Emperor*, A.I.R. 1924 Mad. 239; *Jowaya v. Emperor*, A.I.R. 1930 Lah. 163; *Stephen Seneviratne v. The King*, A.I.R. 1936 P.C. 289; *Habeesh Mohammad v. State of Hyderabad*, A.I.R. 1954 S.C. 51; *Bakshish Singh v. State of Punjab*, A.I.R. 1957 S.C. 504; *Aheibam Ningol v. State of Manipur*, 1967 Cr. L.J. 1023; A.I.R. 1967 Manipur 11.

several months with the accused in a village and she was naturally attached to her mother, the prosecution properly did not examine the child.¹⁴

6. Child-witness: Credibility of. This section enacts that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years. . . . The section has been worded negatively. If the Court considers that a particular witness does not understand the questions put to him, and that the witness fails to give rational answers to questions put to him, it must not proceed to record the evidence of that witness. If, however, the Court proceeds to record the evidence, it must be taken that the Court considered the witness as competent to testify. The law does not provide that the Court must ask preliminary questions to test the capacity of a witness to testify, though it is a wholesome course to be adopted. The object of preliminary questioning is not to legalise the evidence but only to save the time of the Court, and not to further proceed with the examination of such witness, if it is satisfied that he is not a competent witness. If, in fact, the witness is examined, the best test of his capacity to testify is the evidence itself and the manner in which it is given. There is nothing illegal in the procedure, if the Court satisfies itself by recording the evidence straightaway without resorting to preliminary questions.¹⁵ In the case of a child-witness, it is desirable that the Court should always record its opinion that the child understands the duty of speaking the truth, and state why it thinks that, otherwise, the credibility of the witness may be seriously affected so much so that in some cases it may be necessary to reject the evidence altogether.¹⁶ Although even unsworn testimony of a child is admissible,¹⁷ it must be received with great caution.¹⁸ Children of tender age, generally speaking, are not to be regarded as trustworthy witnesses, since they can easily repeat glibly a story put into their mind, and do not possess the discretion to distinguish between what they have seen and what they have heard. As a matter of prudence, therefore, Courts are generally chary of putting absolute reliance on the evidence of a solitary child-witness and look for corroboration of the same from other circumstances in the case.¹⁹ Another point to be noted is, that the evidence of a child is notoriously unreliable,

14. *Aheibam Ningol v. State of Manipur*, 1967 Cr. L.J. 1023; A.I.R. 1967 Manipur 11 (22) (child 6 to 7 years old).

15. *State of Orissa v. Machindra*, A.I.R. 1964 Orissa 100 (102); *Datu Singh v. Emperor*, A.I.R. 1942 Pat. 159; *Lakhan Singh v. Emperor*, A.I.R. 1942 Pat. 183; *The State v. Bhima Patra*, (1971) 37 Cut. L.T. 765 (777) (Court not recording its opinion).

16. *Rameshwar v. State of Rajasthan*, A.I.R. 1952 S.C. 54; *State v. Lobsang Sharap*, 1972 Simla L.J. 216 (218).

17. *In re Dasi Viraya*, 1938 Mad. 490; 175 I.C. 422; 39 Cr. L.J. 585; *Sheo Prasad v. Emperor*, 1942 Oudh 193; I.L.R. 17 Luck. 376; 197

I.C. 701; *Ghasi Ram v. State*, 1952 Bhopal 25.

18. *Ah Phut v. The King*, 1939 Rang. 402; 185 I.C. 205; 41 Cr. L.J. 129; *Jalwanti Lodhin v. The State*, 1953 Pat. 246; I.L.R. 32 Pat. 217; 54 Cr. L.J. 1344; 1 B.L.J. 280.

19. *Ulla Mahapatra v. The King*, 1950 Orissa 261; I.L.R. 1950 Cut. 293; 16 Cut. L.T. 102; see also *Jalwanti Lodhin v. The State*, 1953 Pat. 246 and *Abbas Ali Shah v. Emperor*, 1933 Lah. 667; 143 I.C. 479; 34 Cr. L.J. 606 where Dr. Kenny's *Outlines of Criminal Law* and other authorities are cited; *Mahadevappa Sangappa v. State of Karnataka*, (1978) 1 Karn. L.J. 183.

unless available immediately; hence closer scrutiny is called for. This is the more necessary, when the conduct (of the child-witness) is also abnormal and there are major discrepancies in the story. In such cases, independent corroboration is necessary.²⁰

At the same time, it has been remarked that each case would depend upon its particular facts and circumstances. It cannot, therefore, be said that each and every child-witness must, without distinction, be discredited as untrustworthy.²¹ As pointed out by their Lordships of the Privy Council in *Bhojraj v. Sita Ram*²²: "Evidence substantially true not infrequently assumes too perfect a form and witnesses, such as children, not infrequently get a story by heart which is none the less a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case."²³ In *Mohamed Sugul Esa Mamasan Rer. Alalah v. The King*,²⁴ their Lordships of the Privy Council observed: "In England, where provision has been made for the reception of unsworn evidence from a child, it has always been proved that the evidence must be corroborated in some material particular implicating the accused. But, in the Indian Act, there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law." The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary, but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury, as the case may be, and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.²⁵ Normally, a Court should look for corroboration in such cases, but it is more, as already pointed out, by way of caution and prudence and not as a rule of law. Children are pliable and their evidence could easily be shaped and moulded. It is for this reason that a Court should see, if there are any signs or indications of tutoring. If, after carefully scrutinising the evidence, the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of such a child-witness.¹ It is, however, desirable that the questions put and the answers

20. *Dasarathi Mahanto v. State*, 27 Cut. L.T. 169.

21. *Ib.*; *Ranjha v. The State*, 1951 Him. Pra. 75 : 1953 Cr. L.J. 15.

22. 1936 P.C. 60 at 62 : 160 I.C. 45: 1936 A.L.J. 755.

23. *Chandan v. The Crown*, 1951 Punj. 599 : 52 Cr. L.J. 917 ; *Ranjha v. State*, 1951 H.P. 75 : *Sheo Prasad v. Emperor*, 1942 Oudh 193 : I.L.R. 17 Luck. 376 : 197 I.C. 701 : *Araniappa Goundan v. State of Kerala*, 1960 Ker. L.J. 377.

24. 1946 P.C. 3 at 5 and 6.

25. *Rameshwar v. State of Rajasthan*,

1952 S.C. 54 at 57 ; *Dharam Pal v. State*, 1971 Cr. L.J. 175 : A.I.R. 1971 H.P. 17 : (1972) 38 Cut. L.T. 428 ; (1972) 1 Cut. L.R. (Cr.) 269 ; (1975) 2 Cr. I.J. 317 (H.P.); *Ram Dayal v. State of Rajasthan*, 1975 W.L.N. 363.

1. *In re Sheikh Saheb*, 1957 Andh. Pra. 343 : 1957 Cr. L.J. 919 : (1957) 1 M.L.J. 43 : (1957) 1 Andh. W. R. 115 : 1957 Andh. L.T. 297 ; *In re Kamya*, A.I.R. 1960 Andh. Pra. 490 ; *Ram Hazoor Pandey v. State*, A.I.R. 1959 All. 409 : 1959 All. L.J. 289.

recorded from the child-witness are recorded so as to help the appellate Court to decide whether the decision of the trial Judge respecting the competency of the child-witness was justified.² The evidence of a child-witness should, however, be accepted with great caution³ and substantial corroboration is required.⁴ While a child-witness can often be expected to give a true version because of her innocence, there is always the danger in accepting the evidence of such a witness that, under influence, she might have been coached to give out a version by persons who may have influence on her.⁵ Corroboration is not a rule of practice but of prudence. The Court should be reluctant to rely upon uncorroborated evidence of child unless after adopting all precautions it is considered reliable.⁶ It is very unsafe to convict a person for murder on the uncorroborated testimony of a child who has improved his statement from that he gave to the police.⁷ When a child of 11 years answers the questions in a rational manner and understands the duty of speaking the truth, the question of credibility would arise and for that corroboration of his testimony is required.⁸ Thus, no corroboration is required if the testimony of the child inspires confidence and there is unlikelihood of tutoring and its demeanour was found to be straightforward by the trial Judge.⁹ If the child is intelligent and her testimony does not suffer from any infirmity there is no necessity for corroboration.¹⁰ A boy of 13 years though coming from rural area, but having mature understandings is credible.¹¹ But the Supreme Court has stressed the necessity of extreme care and caution in scrutinising the testimony of a child, when he is the only eye-witness.¹²

Where the Sessions Judge, who had opportunity to see and watch the demeanour of a child (8 or 9 years old), observed that the child gave evidence in a straightforward manner, the High Court will not discard the evidence on the ground that it might have been tutored.¹³ Where two courts accept-

2. *Varkey Joseph v. State of Kerala*, A.I.R. 1960 Ker. 301; *Ram Hazoor Pandey v. State*, A.I.R. 1959 All 409; 1959 A.L.J. 239 citing *Nafar Sheikh v. Emperor*, I.L.R. 41 Cal. 406; A.I.R. 1914 Cal. 276 which quoted the observations of Bremer, J. in *Wheeler v. United States*, (1895) 159 U.S. 523; *Shankar Lal v. Vijay Shankar*, A.I.R. 1968 All. 58 (61, 62).
3. *Raja Ram v. State*, 1959 All. L.J. 736.
4. *Dhansai Sahu v. State*, I.L.R. 1969 Cut. 66; 35 Cut. L.T. 18; 1969 Cr. L.J. 626; A.I.R. 1969 Orissa 105 (108); *State of Orissa v. Lokanath alias Natho Pradhan*, 1971 Cut. L.R. (Cr.) 354.
5. *State of Bihar v. Kapil Singh*, (1969) 1 S.C.J. 202; (1969) 1 S.C.W.R. 196; 1969 A.L.J. 1; 1969 B.L.J.R. 90; 1969 M.P.W.R. 61; 1969 M.L.J. (Cr.) 137; A.I.R. 1969 S.C. 53 (56).
6. *State v. Lobsang Sharap*, 1973 Cr. L.J. 85; (1972) 2 Sim. L.J. 216.
7. *Ram Singh v. State*, (1975) Raj. L. W. 415; I.L.R. 1975 Raj. 403; 1976 Cr. L.J. 667.
8. *Srinivas Murty v. State of Karnataka*, (1977) 2 Kap. L.J. 341.
9. *Dharam Pal v. State*, (1971) 1 Simla L.J. 211; 1971 Cr. L.J. 1750; A.I.R. 1971 Him. Pra. 17; *State v. Lobsang Sharap*, 1972 Simla L.J. 216 (Appellate Court can examine the correctness of the trial Judge's opinion).
10. *Sadhu Singh alias Surya Pratap Singh v. State of U. P.*, 1978 Cr. L.R. (S.C.) 485.
11. *Tahal Singh v. State of Punjab*, A.I.R. 1979 S.C. 1847.
12. *Shivaji Genu Mohite v. State of Maharashtra*, 1973 Cr. L.J. 169; 1973 S.C.C. (Cr.) 214; 1972 Cr. App. R. 432 (S.C.); 1973 U.J. (S.C.) 163; (1973) 3 S.C.C. 219; 1973 Mad. L.J. (Cr.) 462; (1973) 2 S.C.J. 303; 1973 Cr. L.R. (S.C.) 268; A.I.R. 1973 S.C. 55.
13. *Shahir Rashid v. State*, 1969 Cr. L.J. 1282 (1285) (Delhi); *Dharam Pal v. State*, 1971 Sim. L.J. (H.P.) 211; 1971 Cr. L.J. 1750; A.I.R. 1971 H.P. 17.

ed the evidence of a child-witness, which appeared to be truthful and untutored and it was corroborated by two witnesses, conviction on such evidence was upheld in revision.¹⁴

Minor discrepancies in the testimony of a child-witness are proof of their truth rather a badge of falsehood.¹⁵

In India, unlike in England, the unsworn testimony of one child-witness can be corroborated by the unsworn testimony of another; only the evidence of both the witnesses must be looked at with great care and acted upon with caution.¹⁶

To conclude :

(1) *Testimonial competency.* It is determined by the law relating to evidence of the different countries. In India, under this section a child is competent to testify, if it can understand the questions put to it, and give rational answers thereto. If he is under twelve years of age, he need not be sworn.

In England, a child must believe in punishment in a future state for lying.¹⁷ A child, unable to understand the nature of oath, however, may give evidence in certain proceedings, viz., offences against children under Criminal Law Amendment Act.¹⁸ or offences under Prevention of Cruelty to Children Act.¹⁹

In U. S. A., no precise age is provided before which a child may be incompetent to testify as a witness but statutes have been passed in some States where below a certain age the children are either presumptively or conclusively deemed to be incompetent to testify. But in most of the States competency is determined by his apparent intelligence and capacity or his ability to understand the distinction of truth and falsity and appreciation of his obligation to tell the truth.²⁰ By a statute in New York a child under twelve is presumed incompetent to testify and the presumption must be overcome by a preliminary examination.²¹ Tested by these standards, children of five, six or seven years of age have been held both competent to testify as

14. Ram Kishun v. State, 1971 All. Cr. R. 197.

15. Mohan Singh v. The State. (1965) 2 Cr. L.J. 127 : A.I.R. 1965 Punj. 291 ; Dharam Pal v. State, (1971) 1 Simla L.J. 211 : 1971 Cr. L.J. 1750 : A.I.R. 1971 Him. Pra. 17 (19).

16. State of Rajasthan v. Vijairam, 1968 Raj. L.W. 1 : 1968 Cr. L.J. 270 (274) ; see also Manni v. Emperor, A.I.R. 1930 Oudh. 406 ; Abbas Ali v. Emperor, A.I.R. 1933 Lah. 667 ; Darpan Potdarin v. Emperor, A.I.R. 1938 Pat. 153 (child ten years old) ; State v. Roop Singh, I.L.R. (1966) 16 Raj.

252 : 1966 Raj. L.W. 382 (385, 386).

17. Whitley Stokes, Vol. II, p. 831.

18. (1855) 48 & 49 Vict. c. 69.

19. (1904) 4 Edw. VII, c. 15, etc.

20. Wheeler v. U. S., (1895) 159 U.S. 522; 16 S. Ct. 93 ; People v. Peck, 314 Ill. 297 : 145 N.E. 353 ; Merchant v. Comm., 140 Ky. 12 : 190 S.W. 793 ; Comm. v. Tatisos, 238 Mass. 322 : 130 N.E. 495 ; Mackie v. State, 138 Miss. 740 : 103 So. 379 ; State v. Tella, 72 N.J.L. 515 : 62 Atl. 675 ; People v. Klein, 266 N.Y. 188 : 194 N.E. 402.

21. Peck v. Philadelphia and Reading R. Co., 242 Pa. 321 : 89 Atl. 124.

well as incompetent to testify under the disclosed circumstances.²² However, the discretion to be used should be sound.²³

(2) *Preliminary examination.* To be eligible to testify, the child must be able to understand the questions put to him and give rational answers to the questions so put.²⁴

Oath is to be administered after this satisfaction.²⁵ Since the discretion rests with the trial Judge and its exercise should be rational, a preliminary examination of the witness is directed towards it. Though it has been held that it is not obligatory to make a record of such satisfaction,¹ it would be appreciated by appellate Courts, if it is recorded. If the discretion has been exercised judicially, the absence of preliminary enquiry would be a mere irregularity.² It is very desirable that a Judge should preserve on record the questions put and the answers given to assure himself that the child understood the duty of speaking the truth. But failure in the face of other circumstances showing that the Judge had really done his duty would not vitiate the evidence.³

Proviso to Section 4 of the Oaths Act, 1969, says that where the witness is a child under twelve years of age, and the Court is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the provisions relating to oath shall not apply. But the duty of ascertaining the competency of the child witnesses by the Court by putting suitable questions in proper form is still there. Further, appropriate questions may also be necessary to find out whether the child "understands the duty of speaking the truth or not" and the Supreme Court has held that it is desirable that the Judges should record their opinion and reasons for so thinking, otherwise it may be necessary to reject the evidence.⁴

22. *Wheeler v. U.S.*, 159 U.S. 528 : 16 S. Ct. 93 ; *People v. Peck*, 314 Ill. 237 : 145 N.E. 353 ; *Peck v. Philadelphia and Reading R. Co.*, 242 Pa. 321 : 89 Atl. 124 ; *Whitacker v. Comm.*, 297 Ky. 279 : 179 S.W. (2d) 448 ; *Comm. v. Terogno*, 234 Mass. 56 : 124 N.E. 889 ; *State v. Juneau*, 88 Wis. 180 : 59 N.W. 580 ; *State ex. rel. Shields v. Postman*, 242 Wis. 5 : 6 N.W. (2d) 713.

23. *Petty v. State*, 224 Ala. 451 : 140 So. 585 ; *People v. Pearson*, 41 Cal. App. (2d) 614 : 107 Pac. (2d) 463 ; *State v. Orlando*, 115 Conn. 672 : 163 Atl. 256 ; *Bell v. State*, 169 Ga. 292 : 138 S.E. 238 ; *People v. Washer*, 196 N.Y. 104 : 89 N.E. 441. (New York and South Carolina permit the Court in its discretion to receive the testimony of a child without the administration of oath).

24. *Ah. Phut v. King*, 185 I.C. 205 : A.I.R. 1939 Rang. 402 ; *Jalwanti Lodhin v. State*, 1953 Pat. 246 ;

Ram Hazoor Pandey v. The State, A.I.R. 1959 All. 409 ; *Poornachandra v. The State*, A.I.R. 1959 Cal. 306 ; *In re Kanya*, A.I.R. 1960 A.P. 490.

25. *Nafar Sheikh v. Emperor*, 18 C.W.N. 147.

1. *Krishna Kahar v. Emperor*, 1910 Cal. 182 : I.L.R. (1939) 2 Cal. 569 : 187 I.C. 129 : 43 C.W.N. 1117 ; *Nafar Sheikh v. Emperor* supra.

2. *Katu Singh v. Emperor*, 20 Pat. 893 : 199 I.C. 200 : A.I.R. 1942 Pat. 159 ; *Lakhan Singh v. Emperor*, 20 Pat. 898 : 199 I.C. 638 : A.I.R. 1942 Pat. 183 ; *Mariasosa v. The State*, A.I.R. 1955 T.C. 81 : 1951 K.L.T. 758.

3. *Varkey v. State of Kerala*, A.I.R. 1960 Ker. 301 : 1960 Ker. L.T. 430 ; *In re Raju Shetty*, A.I.R. 1960 Mys. 48.

4. *Rameshwar v. The State of Rajasthan*, A.I.R. 1952 S.C. 54 : 1952 S.C.R. 377 : 1952 S.C.J. 46.

Mere tender age is not sufficient to exclude the testimony, if the witness is otherwise competent.⁵ If a person after having been sworn is shown to be incapable of understanding, the Judge should strike out all his evidence.⁶ The doctrine, that an objection to competency of a witness ought to be taken before the examination-in-chief, has been disputed, and it has been held, in conformity with some old decisions, that the objection may be raised at any time during the trial, and that, too, whether the objector knew of the disqualification or not.⁷ The trials of treason are exceptions to this.⁸ If the child does not possess testimonial intelligence, the Court should refrain from examining the child at all.⁹

(3) *Mode of recording evidence of a child.* Where the guilt or innocence of a person depends upon the evidence of a small boy, the testimony should be recorded in the form of questions and answers.¹⁰ For age-group, see the undernoted cases. Girls of 6–8 years allowed in *Rameshwar s/o Kalyan Singh v. The State of Rajasthan*.¹¹ *Jalwanti Lodhin v. State*,¹² and *Hanuman Sharma v. Emperor*.¹³

(4) *Oath to a child.* The only cases in which oath should not be administered are cases in which it clearly appears that the witness does not understand the moral obligation of an oath or affirmation or the consequences of giving false evidence.¹⁴ If the Judge deliberately refrains from administering affirmation on the ground that the child cannot understand its nature, the deposition will be admissible.¹⁵ Under the proviso to Sec. 4(1), Oaths Act, 1969, an oath may be dispensed with in the case of a child under 12 years of age. Section 7, Oaths Act, 1969, cures the omission to administer oath or affirmation. Judicial opinion was not unanimous in its interpretation as to whether omission includes deliberate omission or is confined to accidental one only. Later on, the Privy Council has held that the section is unqualified in its terms and there is nothing to suggest that it is to apply only where the omission occurs *in curiam*.¹⁶ The question of admissibility of evidence of a child witness, examined without oath, does not arise in view of the proviso to Sec. 4(1) of the Oaths Act, 1969.

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| 5. <i>R. v. Ram Sewak</i> , 23 A. 90. | 11. A.I.R. 1952 S.C. 54. |
| 6. <i>R. v. Whitehead</i> , 1866 L.R. 1 C. 33. | 12. 1959 Pat. 246 : I.L.R. 32 Pat. 217. |
| 7. <i>Needham v. Smith</i> , (1704) 2 Vern. 463 ; <i>Ld. Lovat's case</i> (1746) 18 How St. Tr. 596 ; <i>Taylor, Evidence</i> 1392 ; see <i>R. v. Har Prasad</i> , 45 All. 226 : 77 I.C. 961 : A.I.R. 1923 A. 91. | 13. 1982 Cal. 723 : 141 I.C. 622 : 36 C.W.N. 1152. |
| 8. <i>Taylor, Evidence</i> , 1392. | 14. <i>Fatu v. R.</i> , 6 Pat. L.J. 147 : 61 I.C. 705. |
| 9. <i>Dhaniram v. Emperor</i> , 1915 All. 437 : I.L.R. 38 All. 49 : 31 I.C. 1005 ; <i>Sahdeo Ram v. Emperor</i> , 1935 All. 579 : 156 I.C. 849 ; <i>Jagannath v. State</i> , I.L.R. 1951 Raj. 844 : 2 Raj. L.W. 128 : 1952 Raj. 153 ; <i>Hussain Khan v. The Crown</i> , 76 I.C. 1037 : 1923 Lah. 332 ; <i>Panchu v. Emperor</i> , 1923 Pat. 91 : 66 I.C. 73. | 15. <i>R. v. Kutha</i> , 5 Bom. L.R. 551 ; see <i>Hariramji v. R.</i> , 20 Bom. L.R. 365 : 45 I.C. 497 ; <i>S. Rasul v. R.</i> , 120 I.C. 514 : 1930 Sind 129 ; <i>Ah Phut v. King</i> , A.I.R. 1939 R. 402 ; <i>Fatu v. R.</i> , 6 Pat. L.J. 147 ; <i>In re China Venkadu</i> , 38 Mad. 550 ; <i>In re Dasi Viraya</i> , A.I.R. 1938 Mad. 490 : (1938) 1 M.L.J. 289 ; <i>Hussain Khan v. Crown</i> , 76 I.C. 1037 : A.I.R. 1923 L. 332. |
| 10. <i>Emperor v. Haria Dhobi</i> , A.I.R. 1937 Pat. 662 : 172 I.C. 780. | 16. <i>Md. Sugai v. R.</i> , 222 I.C. 304 : 50 C.W.N. 98 : A.I.R. 1946 P.C. 3 ; <i>Rameshwar Kalyan Singh v. State of Rajasthan</i> , A.I.R. 1952 S.C. 54. |

(5) *Testimonial responsibility.* The nature and extent of the mental capacity of children and the appreciation of testimonial responsibility by them are important subjects of cross-examination of children's testimony.

(6) *Child psychology.* A careful analysis of child's psychology from testimonial standpoint reveals that it differs from an average adult psychology in significant respects. A cross-examiner should keep in mind the following psychological data which have been supported by eminent jurists and Judges.

(i) *Children are artless.* The child is innocent and means to speak the truth.¹⁷ Though it must not be lost sight of, he is capable of committing perjury or being influenced, since it is an exception to his nature, he is usually unable to keep up a consistent false story through the various questionings of a tried examiner, which serves as a pretty safeguard against any great danger on that head. He is more likely to answer wrongly from not fully understanding questions put to him, than from deliberate falsehood.¹⁸ Dr. Hans Gross in his great work on investigation states that youths dislike lying which they regard mean.

The spirit of the youth not having as yet been led astray by the necessities of life, its storms and battles, its factions and quarrels, he can freely abandon himself to everything which appears out of the way; his life has not yet been disturbed by education, though he often observes more clearly and accurately than any adult. Besides, he has already got some principles; lying is distasteful to him because he thinks it mean. He is no stranger to the sentiment of self-respect and he never loses an opportunity of being right in what he affirms. Thus he is, as a rule, but little influenced by the suggestions of others, and he describes objects and occurrences as he has really seen them. We say again that an intelligent boy is, as a rule, the best witness in the world.¹⁹

(ii) *Children are susceptible to influences.* Suggestions, promises, threats, false representations,²⁰ external influences may be accidental or designed. Again, it must not be forgotten that a child is peculiarly exposed to external influence, whether designed or accidental. Anyone, knowing that a child is to appear as a witness in a Court of justice, if he is interested in his statement and has the chance of influencing it himself, will almost certainly exert that influence. The child, as yet devoid of principles, places great faith in the words of grown-up people; so if a grown-up person brings influence to bear on it, especially some time after the occurrence, the child will imagine, it has really seen what it has been led to believe. This result is obtained with certainty, if the man proceeds slowly and by degrees leading the child to the desired goal by repeated simple questions as "Is it not so?" "It was not so", "Was it not thus?"²¹

The result is the same, when the influence is undesigned. An important event happens; it is naturally much talked of, all sorts of hypotheses are started; there is gossip of what others have seen or might in certain circumstances

17. Ram on Facts, 154-155.

18. McGuire v. People, 44 Mich. 286, 287; per Campbell, J., in 6 N.W. Rep. 669 at 690; People v. Donohue, 114 N.Y. App. 830; 100 N.Y.S. (Supp.) 20.

19. Dr. Hans Gross: Criminal Investigation, p. 45, 1950 Ed.

20. Ram on Facts, pp. 154-155.

21. Dr. Hans Gross: Criminal Investigation, pp. 44-47, 1950 Ed.

have seen. If a child, which has itself seen something of the occurrence, hears these conversations, they become deeply engraved on its young mind, and ultimately it believes it has itself seen what the others have related.²²

One must therefore be always careful in questioning children but their statements, if judicially obtained, generally supply material of great value. Intelligent boys are, as a rule, but little influenced by the suggestion of others. They describe objects and occurrences as they have really seen; young girls are, however, dangerous witnesses in this respect. Thus, an insignificant theft is easily magnified into robbery with violence; the witness, out of a miserable swindler, manufactures a pale and interesting young man, a coarse word becomes a blow; and insignificant event develops into a romantic abduction; stupid chaff turns up as a great conspiracy. A young girl is also a very dangerous witness at, and often previous to, the period of her first menstruation or, as it is called in India, "attaining her age". Many women remain similarly influenced throughout their whole life, before and during each period of menstruation.²³

(iii) *Sensitiveness to immediately exciting sensorial stimuli characterises the attention of childhood and youth.* It is characterised by great active energy and has few organised interests by which they are worthy of notice or not, and the consequence is that extreme mobility of the attention with which we are all familiar in children.²⁴ But to be just we must recognise on the other hand that no one notices and knows certain things more cleverly than a young girl. If her agitation does not carry her away, she can furnish information more valuable than any grown-up person. The reason is the same as we have given for her exaggerations and inventions. Her school, her life, her daily tasks, do not afford sufficient nourishment for her imaginations and her dreams; the sexual instinct begins to awaken; she searches around her, almost unconsciously, for incidents touching, however remotely, this sphere. No one discovers more rapidly than a sprightly young girl approaching maturity, the little carryings-on and intrigues of her neighbours, the delicacy of her sensibility enables her to seize the least shade of sympathy which the pair, she is observing, have for each other and long before they have found it out themselves, she knows what their true feelings are for each other. She notes accurately the birth of the intimacy; she knows when they spoke for the first time and she anticipates long before what the result will be, reconciliation or rupture; in short, she knows everything earlier and better than any one else in her circle.²⁵ Young girls possess infinite delicacy of sensibility; children, however, lack adults' capacity for sustained attention.¹

(iv) *Memory.* Children perceive and forget a hundred things in an hour. Their brain is so soft that it receives immediately all impressions, like water or liquid, which are drawn there, immediately effaced or closed up again, as though you write with your finger on the surface of a river or on a vessel of oil.²

22. Dr. Hans Gross : Criminal Investigation, pp. 44-47, 1950 Ed.

23. Ibid.

24. James : Principles of Psychology. Vol. I, p. 417. On this see also Trains : "The Prisoner at Bar", Moore on Facts, Ram on Facts, Dr. Hans Gross : Criminal Investigation,

pp. 44-46.

25. Dr. Hans Gross : Criminal Investigation, p. 46.

1. F. X. Busch : Law and Tactics in Jury Trials, p. 476.

2. Dr. Watts : Improvement of the Mind (Emerson's) Edn. (Ch. XII, p. 171).

They are not expected to remember the dates of events.³ Their memory is often confused with dreams.⁴

(v) *Observation and perception.* Their perceptions though quick are imperfect.⁵ A child may be very quick to perceive aright some things which it sees or hears; but for want of knowledge or experience it may perceive imperfectly other things it sees or hears. In seeing, it may mistake one thing for another and in hearing may misunderstand words, and for those which it heard may substitute others of a different meaning. And there is danger lest a child should borrow somewhat from its imagination, or from what it has heard other people say, and so amplify facts beyond their just measure.

It is not accurate for want of being checked by sufficient experience. Intelligent boys are best known observers.

An intelligent boy, as already stated, is, as a rule, the best witness in the world. An intelligent boy is undoubtedly the best observer to be found. The world begins to take him by storm with its thousand matters of interest; what the school and his daily life furnish cannot satisfy his overflowing and generous heart. He lays hold of everything new, striking, strange, all his senses are on the stretch to assimilate it, as far as possible. No one notices change in the house, no one discovers the bird's nest; no one observes anything out of the way in the field; but nothing of that sort escapes the boy; everything which emerges above the monotonous level of daily life gives him a good opportunity of exercising his wits, for extending his knowledge, and for attracting the attention of his elders to whom he communicates his discoveries.⁶ Imperfection owes its sources in child's lack of appreciation of facts which may be pertinent from adults' testimonial point of view. He perceives things differently from grown-up people. The conceptions of magnitude, great or small; of pace, fast or slow; of beauty and ugliness; of distance, near or far, are quite different in the child's brain from those in ours—still more so when facts are in question. Facts to us perfectly indifferent delight or terrify the child and what for us is magnificent or touching does not affect it in the least. We are ignorant of the impression produced on the child's mind. There is yet another difficulty; the horizon of the child being much narrower than ours a large number of our perceptions are outside the frame within which alone the child can perceive. We know, within certain limits, the extent of this frame; we should not, for instance, question a child as to how a piece of complicated roguery was committed or how adulterous relations have developed; we know it is ignorant of such things. But, in many directions, we do not know the exact point where its faculty of observation commences or stops.⁷

With a young girl, it is a different affair because, by her circumstances, she is prevented from acquiring the necessary knowledge and breadth of view absolutely indispensable for accurate observation.

It is a different affair with a young girl of the same age as a boy. Her natural qualities and her education prevent her acquiring the necessary knowl-

3. Moore on Weight and Value of Evidence, Vol. II, 1908, S. 895.

4. Sully as quoted in Colgrove on Memory, p. 108.

5. Ram on Facts, 154-155.

6. Dr. Hans Gross : Criminal Investigation, p. 45.

7. Ibid., p. 44.

edge and the breadth of view which the boy soon achieves, and these are the conditions absolutely indispensable for accurate observation. The girl remains longer in the narrow family circle, at her mother's apron strings, while the boy is off with playmates, picking up in the fields and the woods all sorts of knowledge of the ordinary aspects of common things, which is the best training for discovering, distinguishing and observing anything extra or out of the way when it turns up. With his father and his playmates the boy learns to know the great sum of practical things of which life is composed and which one must know before being able to talk about them. The girl has no training of this sort; she goes out less, she has little to do with workmen, artisans and tradesmen, who are in many ways the school masters of the boy anxious to learn; she sees nothing of human life, and when anything extraordinary happens she is incapable, one might almost suggest, of seizing it, with her senses, that is to say, of observing accurately. If besides there be danger, noise, fear, all which attract the boy and serve to excite his curiosity, she gets out of the way in alarm, and either sees nothing or sees it indistinctly from a distance. Dr. Hans Gross in his celebrated work on "Criminal Investigation" continues: "But to be just we must recognise on the other hand that no one notices and knows certain things more cleverly than a young girl." It is, therefore, stated in judicial dicta that a child is more unreliable than an adult in his powers of observation or in his ability to report correctly and completely, what he has seen and heard.⁸ He is extremely imaginative and a large part of his reasoning is done by images rather than by words and imagined things become real to him and these fabrications are told from the witness-stand as truth.⁹ Because of his inexperience and impressionability outstanding features of the central event in an unusual occurrence may acquire greater importance and become more strongly attached in the juvenile than in the adult.¹⁰

A child's tendency is to stick to his story regardless of its disclosed weaknesses.¹¹

(vi) *Absence of oath sanctity.* The administration of oath and the knowledge of consequences of giving false testimony significantly contribute to the appreciation of testimonial responsibility. A child in many instances and to varying degrees makes a very inadequate judge of this responsibility. The cross-examiner should extract the limit and extent of this appreciation by the child.¹² Rev. F. Dennison Maurice has strongly deprecated the administration of oath to children which conveys them either no meaning or else every sort of meaning. "Chief Baron Pollock is reported to have made an admirable remark on one occasion," said the noted divine, "when a girl who was called as a witness showed manifestly that she did not understand anything about oaths or obligations, it was suggested that the case should be postponed till she could obtain the necessary instructions on the subject. The Chief Baron suggested that probably the little girl would lose more in memory during the interval than she would gain in ethical science. Who

8. Cornelius : The Cross-examination of Witnesses, p. 130, Bobbs Merrill & Co., Indianapolis.

9. Cornelius : The Cross-examination of Witnesses, p. 131, Bobbs Merrill & Co., Indianapolis.

10. F. X. Busch in Law and Tactics in Jury Trials, p. 477.

11. Ibid.

12. See Foster, 70 ; Ram on Facts, 154-155.

that knows anything of children will not recognise the sound sense, as well as the grave humour of that observation? I do not know what the case before the Court was. But suppose there had been an act of house-breaking, and the child had heard or seen a man come in by window. She had observed perhaps a punch on his eye-brow, or that he had one of his front teeth knocked out. Her impression on these points might be livelier than that of a grown-up person; her story simpler. But while you are talking to her about moral obligation, she becomes utterly confused. The black patch or the broken tooth loses all its distinctness. It might have been her own, or have belonged to that ugly thing called an obligation. That or any other spectre may have come through the window. So you have made a considerable sacrifice of the interests of justice in your zeal to test the child's theory about moral obligation. But if I ventured to speak my own professional language, I should say there was a heavier injury inflicted on the child herself. I should say that something more sacred than the child's memory would suffer from such treatment. Its conscience would become more stupefied if it had never been cultivated, less simple and clear, if it had, through these hard and premature experiments. A child is not taught by wise parents the meaning of kissing a book. It is taught not to tell lie, it is told that God is true and hates lies. If you substitute one kind of teaching for the other, when it comes into a Court you do not obtain fresh protection for its veracity, you lose the protection that you had. There is poem of Mr. Wordsworth with the title 'How Children May be Taught to Lie.' His experience showed him, that if you insist upon knowing the reason of a boy's or girl's likings or dislikings, the reason will be produced; it will be invented on the spot. I am afraid the Courts have found a still more effectual method of securing the same result. If, on the other hand, the child has already been taught to lie, if it comes primed with lies into the witness-box your terrors will not frighten it. The expectation of the flogging which awaits it at home if it stumbles into any wrong confessions will be far more effectual than the apprehension of any more distant punishment which may be in reserve for it if it does not speak all that it knows."¹³

(vii) *Judges and jury have instinctive love for children.* Man or woman will instinctively have love and sympathy for the child. In this respect the cross-examiner faces, the same problems as encountered in the cross-examination of women.¹⁴

(7) *Method of cross-examining.* The cross-examiner should be gentle and kind, not harsh and domineering. He must not impress the jury that he is misleading the child into erroneous statements, i.e., taking undue advantage of child's lack of understanding the aimed consequences.

(8) *Children of different ages.* The broad group of children does not admit of universal generalisations. They are of varying ages and really it is the age that goes far in determining the correct psychological limits of the testimony. Children may be broadly classified in three age groups:

- (1) those below 7;
- (2) those from 7 to 10;
- (3) those from 11 to 13, i.e., young boys and girls.

13. *McGuire v. People*, 44 *Mick.* 286, 287, per *Campbell, J.* in 6 *N.W. Rep.* 669 at p. 670.

14. *Cornelius* : Cross-examination of Witnesses. p. 131.

It is important to note the characteristics of these varying groups which would amplify the previously stated broad conclusions regarding their testimonial responsibility.

1. Boys and girls of 6 years. Campbell, J., commenting upon the testimony of a boy of six years observed: "There is, of course, some danger that a child of tender years may be influenced to tell what is not true. But the inability of such an inexperienced boy to keep consistent false story through the various questionings of a trial is a pretty safeguard against any great danger on that head. He is far more likely to answer wrongly from not fully understanding questions put to him than from deliberate falsehood. His method of telling his story here was simple and childlike, and so far as we can tell from a paper description of it, was candid and honest."¹⁵

2. Boys of age group 7 to 10. Dr. Hans Gross in his great work on "Criminal Investigation" observes that they are best witnesses (p. 44)—"The advantages are: love and hatred, ambition and hypocrisy, considerations of religion and rank, of social position and fortune, as yet unknown to them; it is impossible that preconceived opinions, nervous irritation or long experience should lead them to form erroneous impressions, the mind of the child is but a mirror that reflects accurately and clearly what is found before it".

The same learned author continues that these advantages are followed by corresponding drawbacks also, *viz.*, at the point of view of the child. "This obviously presents a great difficulty for the cross-examiner. Secondly, the child perceives things differently from the grown-up people. Thirdly, we do not know where their faculty of observation begins or stops. At times we cannot explain how it does not understand something or other, while at other times we are astonished to see it find its bearings easily among matters thought to be well beyond its intelligence. We are as a rule too distrustful of the capacity of a child. We have rarely found too much expected of it, while we have often discovered that it knew and noted much more than any one imagined. The same experience occurs to us in daily life. How many times do not people speak in its presence of things a child is not supposed to understand, only to discover later on that it has not only understood very well but has combined the information with other things heard before or after. Fourthly, it must not be forgotten that a child is peculiarly exposed to external influences whether designed or accidental".¹⁶

3. Intelligent boys. (i) They are undoubtedly the best observers.¹⁷

(ii) Their spirit is love of truth and hatred for falsity. They are best witnesses in the world.

4. Young girls. They make dangerous witnesses because—

(a) they are inaccurate observers,¹⁸ generally due to their lack of knowledge and lack of breadth of view;

(b) if per chance they are interested in the matter directly (being the centre of the matter) or indirectly, strong exaggerations and even pure inventions may be feared.¹⁹

15. *McGuire v. People*, 44 N.Y. 286.
287.

16. *Ibid.*

17. *Ibid.*

18. *Ibid.*

19. *Ibid.*

(c) to be just to them it must be recognised that certain things are observed by them so cleverly as none-else.²⁰

(d) finally they are tactful in spying on certain people.

An interesting beauty or a young man's acquaintance has no more vigilance watcher of all their goings on than their neighbour—a little girl of twelve to fourteen. No one knows better than she, who they are, what they do, what company they keep, when they go out, and how they dress. She even notes the moral traits of those coming under her supervision—their joy, their grief, their disappointments, their hopes, and all their experiences. If one desires information on such subjects, the best witnesses are school girls always supposing that they are willing to tell the truth.²¹

(9) *Appreciation of child testimony.* (i) The evidence of witnesses of tender age has to be accepted with great caution.²² However truth-loving, the testimony should be sifted with care, mindful that it is but natural that it may not comprehend as an adult the duty and limitations of a witness speaking of facts.²³ It was further observed in this very case, "I do not assume that the child intended to lie, she had doubtless heard her sister's story, and she may have believed it."

In *Bank v. Connecticut R., etc. Co.*,²⁴ also it was directed to jury, "of course you should recall his youth and the extreme liability of a child to repeat what he has heard."

(ii) Children have good memories and no conscience. They are easily taught stories and live in a world of make believe. So that they have often become convinced that they have really seen the imaginary incident which they have been taught to relate.²⁵ In a New Jersey case Vice-Chancellor Van Fleet said: "I cannot believe that his statements are corruptly false, but I think it is highly probable that his memory, under the artful and positive statements of his father has been so wrought upon to have unconsciously substituted the occurrences of a prior visit for those of the last."

(iii) In *Benard v. State*,¹ the Court held, "It should not be necessarily fatal to the entire credit of its testimony if, under such circumstances and trying situation and bewilderment of skilful cross-examination such a child should make contradictory and inconsistent statements. The principle of 'separate grain from chaff' should be observed in appreciating child's testimony."

(iv) In *State v. Blanc*,² it has been ruled that consistency of a witness's story as repeatedly related coupled with the improbability that various circumstances could have been correctly narrated by the witness unless they were true, may be convincing evidence of its not being fabricated. Where

20. *McGuire v. People*, p. 46 Mich.

21. *Ibid.*, 46-47.

22. 43 P.L.R. (J. & K.) 37.

23. Mr. Justice Jenks in *People v. Donoghue*, 114 N. Y. App. Div.

24. 64 Atl. Rep. 14.

25. *Manni v. Emperor*, 127 I.C. 878 : 1930 Oudh 406.

1. 88 Wis. 65.

2. 3 Brev. (S. Car.) 339.

the force of the testimony-in-chief is not detracted despite its subjection to a very thorough cross-examination, the testimony commanded confidence.³

(v) In a divorce case the evidence of a child against his father or mother has very slight value due to the peculiar circumstances usually attending such cases.⁴ Here testimony related to the adulterous conduct of the mother. The tendency to call children for testifying such facts was deprecated. Contrary opinion has been expressed in another case where testimony-in-chief stood a very thorough cross-examination.⁵

(vi) Little discount, if any, should be made from the face value of child's testimony, where the party against whom he testifies clearly exposes himself to any presumption arising from his non-denial or non-production of available evidence in contradiction of the witness.⁶

(vii) Innocence is an attribute of childhood but there are countless instances of children old beyond their years in crime, in wickedness and in cunningness.⁷

(viii) A child's approximation of time, distance, quality or quantity is ultimately unreliable.⁸

(10) *Credibility*. Although even unsworn testimony of a child is admissible,⁹ it must be received with great caution.¹⁰ Children of tender age, generally speaking, are not to be regarded as trustworthy witnesses, since they can easily repeat glibly a story put into their mind and do not possess the discretion to distinguish between what they have seen and what they have heard. As a matter of prudence, therefore, Courts are generally chary of putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from other circumstances in the case.¹¹

See also under Note 6, ante.

(11) *Tact of cross-examining a child*. The fundamental rule to be observed in dealing with the child testimony is to be fair, considerate and gentle in cross-examining him. Many advocates by their unfair style try to take

3. *Haverstick v. Pennsylvania R. Co.*, 171 Pa. St. 101, 106. See also *McGuire v. People*, 44 Mich. 286, 287.

4. *Judge Cooley in Kneale v. Kneale*, 28 Mich. 344, 345.

5. *Moore on Facts*, pp. 1961-1962; *Haverstick v. Pennsylvania R. Co.*, 171 Pa. St. 101, 106; 32 Atl. Rep. 669 at 670.

6. See *Chestnutt v. Chestnutt*, Spinks Ecc. & Adam. 196-204.

7. *People v. Donoghue*, 114 N.Y. App. Div. 830; 100 N.Y. (Supp.) 202, per Janks. J.; Foster, 70; Ram on Facts, 156.

8. *F. X. Busch in Law and Tactics of Jury Trials*, p. 477.

9. *In re Dasi Viraya*, 1958 Mad. 490;

175 I.C. 422; (1938) 1 M.L.J. 289; 47 L.W. 161; *Sheo Prasad v. Emperor*, 1942 Oudh 193; I.L.R. 17 Luck. 376; 197 I.C. 701; *Ghasi Ram v. State*, 1952 Bhopal 25.

10. *Ah Phut v. The King*, 1939 Rang. 402; 185 I.C. 205; *Jalwanti Lodhin v. State*, 1953 Pat. 246; I.L.R. 32 Pat. 217; 1 B.L.J. 280; 54 Cr. L.J. 1344.

11. *Ulla Mahapatra v. The King*, 1950 Orissa 261; I.L.R. 130 Cut. 293; 16 Cut. L.T. 102; see also *Jalwanti Lodhin v. State*, I.L.R. 32 Pat. 217; 1 B.L.J. 280; 54 Cr. L.J. 1344; 1953 Pat. 246 and *Abbas Ali Shah v. Emperor*, 1933 Lah. 667; 143 I.C. 479.

advantage of the inexperience of children by putting to them misleading or erroneous questions for extracting favourable answers. This seldom impresses Courts or juries who are at once with the children in protecting them. One should not be harsh or domineering.

Before proceeding to cross-examine the witness the lawyer should determine the extent of appreciation of testimonial responsibility by the witness as discussed in the psychological principles hereinbefore. In particular facts coming from imagination, or suggestion or other influence should be shifted from his direct testimony. If he happens to be a son or daughter of one of the parties, the well-known device of "To whom have you talked the matter" should be adopted.¹²

7. Disease of body. The section enacts that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or for giving rational answers to those questions, by disease, whether of body or mind. The requirement of the section is that the disease, whether of body and mind, must be such as would prevent the witness from understanding the questions put to him and from giving rational answers to those questions. If it is not so, the person in question shall be competent to testify. Thus, a leper, who is not prevented from understanding the questions put to him or from giving rational answers to those questions, cannot be said to be incompetent to testify.¹³ A witness may be in such extreme pain as to be unable to understand or to answer questions, or he may be unconscious, as if in a fainting fit, catalepsy, or the like. "The capacity of observation may be otherwise so lacking particularly through blindness, that the witness may be incompetent to testify on the specific subject to which the incapacity relates. The capacity of recollection or of communication may also be so affected by disease, or otherwise, as to lead to the same results."¹⁴

8. Disease of mind. This applies to idiocy and lunacy. An idiot is one who was born irrational; a lunatic is one who, born rational, has subsequently become irrational. The idiot can never become rational; but a lunatic may entirely recover, or have lucid intervals. At the time when unscientific ideas prevailed, the deaf and dumb were so far treated as idiots that they were presumed to be incapable of testifying until the contrary was shown. This presumption has now disappeared, and ordinarily the only question will be as to possibility of communicating with them by some certain system of signs.¹⁵

9. "Or any other cause of the same kind". E. g., drunkenness.¹⁶ It must be *ejusdem generis*. It follows from the modern theory of mental derangement that intoxication, even habitual, does not in itself incapacitate a person offered as a witness. The question is, in each instance, whether the witness was so bereft of his powers of observation, recollection or narration that he is thoroughly untrustworthy as a witness on the subject in hand.¹⁷

12. Aiyer : Art of Cross-examination ; Law Book Company, Allahabad.

13. Ram Krishna v. Arjuno, A.I.R. 1963 Orissa 29.

14. Wigmore, Ev., Sec. 500.

15. Wigmore, Ev., Sections 498, 811 (see Sec. 119, post).

16. ib., Sec. 449, see Walker's Trial, 23 How. St. Tr. 1153.

17. Wigmore, Ev., Sec. 499.

The disability is only co-extensive with the cause, and, therefore, when the cause is removed the disability also ceases. Thus, a lunatic during a lucid interval may be examined. The return of sobriety renders a drunkard competent.

10. Explanation. "This applies to the case of a monomaniac, or person affected with partial insanity, who may be a very good witness as to the other points than that on which he is insane."¹⁸ The leading case is *R. v. Hill*.¹⁹ There the witness believed that he had 20,000 spirits personally appertaining to him. On all other points he was perfectly sane. His testimony as to all other matters was received.

11. An accused person. Under sub-section (2) of Sec. 340²⁰ of the Code of Criminal Procedure, Act V of 1898, any person against whom proceedings are instituted in any Criminal Court under Sec. 107²¹ (for security for keeping the peace), or under Chapters relating to nuisances or urgent cases of nuisance or apprehended danger or disputes as to immovable property or to the maintenance of wives and children, or under Sec. 552²² (to compel restoration of abducted females) of the Code, may offer himself as a witness in such proceedings.²³ Such a person is, therefore, a competent witness.

Until the amendment of the Code of Criminal Procedure by Act XXVI of 1955, a person accused of any offence in any Criminal Court was not generally held to be a competent witness. But the new Sec. 342-A, Criminal Procedure Code, 1898, added by the Amendment Act, which has now been replaced by Sec. 315 of the Code of Criminal Procedure, 1973 allows the accused to be a witness on his own request.

It must, however, be noted that this new section makes an accused person a competent witness only for the defence. Even before the amendment it was held that the moment the pardon was tendered to the accused he must be presumed to have been discharged whereupon he ceased to be accused and could become a witness.²⁴ An accused cannot ever give evidence on behalf of the prosecution. The conditions laid down in the new section are that he cannot be called as a witness except on his own written request and that he may give evidence only after the charge against him has been made.²⁵

It has been said that testimonial compulsion is the very foundation of the law of evidence, for without such compulsion every refusal to give evidence will render administration of justice impossible. If Courts were to depend on volunteers who will choose for themselves whether to give evidence or not, then the entire machinery for discovery of facts on which the very foundation of justice depends will crumble to pieces. Testimonial compulsion, therefore, is not a legal fetish. It is a necessity. Testimonial compulsion is the general rule. The constitutional prohibition of self-incriminating evidence is an ex-

18. Norton, Ev., 306, 307; Wharton, Ev., Secs. 401, 418; Stewart Rapalje, op. cit., Secs. 1-10.

19. (1851) 2 Den. & P.C.C. 254.

20. Now Section 315 of the 1973 Code.

21. Now see Section 107 of the Code of 1973.

22. Now see Section 98 of the Code of 1973.

23. See Sec. 340 of Act V of 1898.

24. A.J. Peiris v. State of Madras, 1954 S.C. 616 : 55 Cr. L.J. 1638.

25. Subedar v. State, 1957 All. 396 : 1957 A.L.J. 263.

option designed to defend justice and insure the accused against self-created criminal traps. Legal protection against self-incrimination, therefore, is one of the pillars of liberty of criminal justice in a civilised society. But such liberty should be confined within the limits of its doctrine and not expanded into the sentimentality that testimonial compulsion is always a kind of unproclaimed tyranny to be shunned in law. Testimonial compulsion is a necessary obligation of a responsible citizen to aid the machinery of justice and thus help to discover truth.¹ The doctrine of immunity from self-incrimination is founded on the presumption of innocence which characterises the English system of criminal justice, and a fundamental principle of that system of justice (which differs from the inquisitorial procedure obtaining in France and some other continental countries) is that it is for the prosecution to prove the guilt of the accused and that the latter need not make any statement if he does not want to. In the words of Mayne in his *Criminal Law*: "It is the business of the Crown to prove him guilty, and he need not do anything but stand by and see what case has been made out against him.... He is entitled to rely on the defence that the evidence as it stands is inconclusive and that the Crown is bound to make it conclusive without any help from him."

The English Criminal Evidence Act of 1893,² provides that although the accused is competent to be a witness on his own behalf, he cannot be compelled to give evidence against himself, and that if he does give evidence in his defence, the prosecution may comment upon such evidence but must not comment upon his omission to do so. In England the protection extends to witnesses also. The Fifth Amendment to the Constitution of the United States of America has adopted the same principle by laying down that no person shall be compelled in any criminal case to be a witness against himself. Indeed, in the United States judicial interpretation has enlarged the scope of the privilege, though it must be stated that to some extent this has been done with the aid of the Fourth Amendment, which guarantees the right of privacy, the like of which is not provided for in England or India.

The doctrine of protection against self-crimination has also to a substantial extent been recognised in the Anglo-Indian administration of criminal justice by incorporation into various statutory provisions, but definite form it was given for the first time by Art. 20 (3) of our Constitution, which runs as follows :

"No person accused of any offence shall be compelled to be a witness against himself."³ The protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court-room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been

1. In re Central Calcutta Bank, Ltd. in Liquidation, 1957 Cal. 520 at p. 523 : 61 C.W.N. 709, per P.B. Mukherjee, J.
2. See now The Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), Section 1.

3. M. P. Sharma v. Satish Chandra, 1954 S.C. 300 : 56 Punj. L.R. 366 : (1954) 1 M.L.J. 680 : 1954 M.W.N. 566 : 1954 S.C.A. 419 : 1954 S.C.J. 428 : 1954 S.C.R. 1077 : Subedar v. State, 1957 All. 396.

levelled which in the normal course may result in prosecution. It would extend to any compulsory process for production of evidentiary document which are reasonably likely to support a prosecution against them.⁴ The offence contemplated in Art. 20(3) is a criminal offence although it does not use the word "criminal". Hence the Article has no application to the public examination of a Director under Sec. 45-G of the Banking Companies Act of 1949.⁵ The guarantee provided by Art. 20(3) is against the accused being compelled to give evidence and is not against his furnishing a matter which may be taken into consideration by the Court. The answers given by an accused when examined under Sec. 342,⁶ Criminal Procedure Code, are treated as evidence in that very enquiry or trial; they can only be taken into consideration. It is clear, therefore, that Sec. 342 does not convert the accused into a witness and certainly does not compel him to be a witness against himself in infringement of the constitutional guarantee. Again, Art. 20(3) confers merely a privilege and it is well settled that a privilege can always be waived; it may be waived by voluntarily answering questions, or by voluntarily taking stand in the witness box, or by failure to claim the privilege.⁷ As proof, Wigmore has remarked in his 'Evidence': "The privilege is merely an option of refusal, not a prohibition of enquiry." An accused person cannot, in a criminal case, be examined as a witness.⁸ The effect of Secs. 342, 343 (now Sections 313, 316 of 1973) (no oath to be administered to the accused) of the Criminal Procedure Code is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under Sec. 337 (now Sec. 306 of 1973 Cr. P. C.)¹⁰ The moment the pardon has been tendered to an accused, he must be presumed to have been discharged, whereupon he ceased to be an accused and could become a witness.¹¹ But an accused person to whom pardon has been tendered, and who has accepted such pardon, ought not to be put back into the dock without being examined as a witness when he shows an intention not to give the evidence which he has led the prosecution to expect. He should be examined as a witness, as directed by Sec. 337(2) of the Criminal Procedure Code, and then dealt with under Sec. 339.¹²⁻¹³ Such a person, if tried, should be tried separately, and after the trial of the other accused.¹⁴ If tried, he should be asked whether he relies on the pardon as a bar to his trial, and if he does so rely, the prosecution should first prove that the pardon has been forfeited by an incomplete or false disclosure. When this course is not

4. *M. P. Sharma v. Satish Chandra*, 1954 S.C. 306; 1954 S.C.R. 1077; 1954 S.O.A. 449; 1954 S.C.J. 428; (1954) 1 M.L.J. 680; 1954 M.W.N. 566; 56 Punj. L.R. 366.

5. *In re Central Calcutta Bank, Ltd. in Liquidation*, 1957 Cal. 520.

6. Now see Section 343 of the Code of 1973.

7. *Bhawan Lal v. State*, 1956 All. 341; 1956 Cr. L.J. 664.

8. 3rd Ed., Vol. 3 at p. 388.

9. *Subedar v. State*, 1957 All. 396.

10. *R. v. Hannam*, (1877) 1 B. 610 and see cases cited, post. In a large number of modern English statutes clauses have been incorporated enabling the party charged with a

crime to give evidence on his own behalf; see Best, Ev., Sec. 622. And under the Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), an accused may elect to give evidence on his own behalf; see Jelfs Law of Evidence in Criminal Cases.

11. *A. J. Peiris v. The State of Madras*, 1954 S.C. 616; 55 Cr. L.J. 1638. Now see Section 308 (1), proviso. 308 (2) and 308 (2) 2nd proviso of the Code of 1973.

14. *Arunachalam v. R.*, (1908) 31 M. 272; 3 M.L.T. 407 following *R. v. Ramasami*, 24 M. 321; *Khiali v. Emperor*, 1917 All. 316; 1 L.R. 39 All. 303; 38 I.C. 1004.

dopted, the conviction is illegal and will be set aside.¹⁵ The Calcutta High Court, however, has held that if an approver forfeits his pardon at the preliminary enquiry, the Magistrate may at that stage put him in the dock, commence the enquiry and commit him for trial with the other accused.¹⁶ Under Sec. 339 of the Criminal Procedure Code (now Section 508 of the Cr. P. C., 1973) the making of a full and true disclosure by the approver is not a condition precedent to the pardon; but making an incomplete or false disclosure is a condition subsequent by which such pardon is forfeited.¹⁷ With regard to several persons jointly accused, the rule, at one time in England and followed in India, was that, when there is no community of interest, any one of a number of prisoners jointly indicted may be called as a witness either for or against his co-defendants.¹⁸ By the word "accused" in the last sentence of Sec. 342 (now Section 313 of the Cr. P. C., 1973) of the Criminal Procedure Code is meant a person over whom the Magistrate or other Court is exercising jurisdiction.¹⁹ A person never arrested, and against whom no process had been issued, is a competent witness, even if a principal offender. So where a complaint was made to a Magistrate against A and B, and process issued against A only, B was held to be a competent witness on his behalf. When, during the course of a police investigation, one of several persons, who were arrested by the police, was illegally discharged by them, such person was held to be a competent witness. In *R. v. Liladhar*,²⁰ the reasoning in *R. v. Hanmanta*,²¹⁻²⁵ is extended to the case of an accused person against whom the Magistrate illegally allowed the charge to be withdrawn: his subsequent evidence as a witness was held inadmissible. "There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution." Where the public prosecutor, with the consent of the Court, withdrew from the prosecution of two out of several accused persons tried jointly for an offence, and the two accused were thereupon discharged under Sec. 494 of the Criminal Procedure Code (now Section 321 of the Cr. P. C., 1973) and then examined as witnesses for the prosecution, it was held that the persons so discharged were competent witnesses.¹ Section 263 of the Criminal Procedure Code only refers to the record of evidence and does not relieve a Magistrate from his duty to hear all witnesses and consider their evidence.²

15. *Kullan v. R.*, (1908) 32 M. 173 : 2 I.C. 343 ; *R. v. Bala*, (1901) 25 B. 675 : 3 Bom. L.R. 271 ; *R. v. Kothia*, (1906) 30 B. 611.

16. *Sashi Rajbanshi v. Emperor*, 1915 Cal. 667 : I.L.R. 42 Cal. 856 : 26 I.C. 657, distinguishing *R. v. Natu*, (1900) 27 C. 137 and dissenting from *R. v. Manik Chandra*, (1897) 24 C. 492 as now obsolete and *R. v. Abani Bhushan Chukerbutty*, (1910) 37 C. 845 : 8 I.C. 712 ; *semble* : when he deviates from the conditions of pardon in the Sessions Court, this cannot be done.

17. *Kullan v. R.*, (1908) 32 Mad. 173 : 2 I.C. 343 ; *R. v. Natu*, (1900) 27 C. 137 ; *R. v. Sudra*, (1892) 14 A. 336 ; see as to forfeiture, Woodroffe's "Criminal Procedure in India"

where the cases are cited.

18. *R. v. Ashruff Sheikh*, (1866) 6 W. R. Cr. 91.

19. *R. v. Mona Puna*, 16 B. 661 at pp. 665-668 citing Tinckler's case, 1 East P.C. 354 ; *Mohesh Chunder v. Mohesh Chunder*, (1882) 10 C.L.R. 553 ; *R. v. Behary Lall*, (1867) 7 W.R. Cr. 44.

20. Cr. Rule 18 of 1889.

21-25. (1877) 1 Bom. 610, 618.

1. *R. v. Hussain Haji*, (1900) 25 B. 422.

2. *Jabbar Shaik v. Tamiz Shaik*, I.L.R. 39 Cal. 931 : 17 I.C. 71 : 16 C.W.N. 984 ; see *R. v. Surath*, 1916 Cal. 106 : I.L.R. 42 Cal. 608 : 28 I.C. 699 : 19 C.W.N. 335 (all witnesses actually produced).

12. Accused as witness: Desirability. As regards the desirability of prisoner giving evidence, Lord Alverstone, C. J. ("Recollections of Ba and Bench") writes: "I had long been impressed with the absolute necessity of such a measure in the interests of justice for the protection of the innocent and it may be for the more certain conviction of the guilty; my main object was to enable an innocent man to give his own account of transaction in which he had engaged and which might appear to tell against him. I found when I was on the Bench how valuable the provision was. I think that the greatest protection an innocent man can have is to be able to give an account of the matter at the earliest possible moment."

We have the opinion of Sir Herbert Stephen ("Prisoners on Oath", p. 33) Summarising his reasons against the proposal that prisoners should be made competent witnesses, he says: "In the first place it (the proposal) makes it rather more difficult for a guilty man to escape. That is a matter of small importance because there is at present no complaint and no ground for complaint against our criminal Courts on the score of inefficiency in the conviction of prisoners. In the second place, it does not make it easier for innocent prisoners to secure acquittal. The idea that it does so is a fallacy natural enough if one had no experience, but exposed by the practical working of the law of competence. It does, however, on the contrary, make it more likely that innocent prisoners will be convicted and whereas the conviction of innocent persons who are not competent witnesses is as rare as it can possibly be a small but substantial proportion of prisoners who are convicted because they were competent witnesses and so lost the benefit of the doubt are unquestionably innocent. Further allowing prisoners to be called as witnesses practically amounts to an invitation to all those who are guilty to commit perjury and that invitation will be accepted by very many of them whereby to say the least the sacredness of the oath will not be made to seem more impressive to the public at large. Lastly, the whole tone and character of criminal proceedings is slightly but appreciably altered by making the accused person a competent witness. I do not suggest of course that it causes the adoption of the incomprehensible practices of bullying and torturing prisoners but it is undoubtedly a step though comparatively a short one in that direction." For some of these difficulties felt in practice, see Introduction by Filson Young in *Trial of Bywaters and Thompson*. In the trial of *Madelaine Smith*³ and the *Trial of Adelaide Bartlett*,⁴ the prisoners would not have escaped if the "privilege" of going into the witness-box had then been in existence, on the other hand, if Jean Pierre Vacquier had made a complete disclosure in the witness-box, he might not have been hanged.⁵ The great philosopher statesman Lord Morley has well said that so far as evidence given by prisoners is concerned, it really depends upon which maxim you adopt as paramount—(1) anything rather than the innocent man should suffer; (2) anything provided the guilty man shall be caught.⁶ Sir Edward Marshall Hall, K. C., regarded it as a mixed blessing.⁷ Lord Darling has said, "No one who is well acquainted with criminal adminis-

3. Notable British Trial Series by F. J. Jesse.

4. Notable British Trial Series by Sir John Hall Bart.

5. Trial of Jean Pierre Vacquier. Not-

able British Trial Series by R. H. Blundell, and R. E. Seaton.

6. Recollections, Vol. I, p. 385.

7. The Life of Sir Edward Marshall Hall by Edward Marjoribanks.

tration is ignorant of the fact that prisoners are practically bound to go into the box, and that in a great majority of cases they say what is not true."⁸ Lord Halsbury favoured this change.⁹ Recently Justice McCardie who remarked that in his view perjury can never have been more rife than it is at the present time and that the oath is rapidly losing its sanctity and often is looked upon as a mere formality drew pointed attention to the most glaring type of perjury which has arisen since the Criminal Evidence Act, 1898, enabled accused persons to give evidence.¹⁰

Experienced Indian Judges have advocated making accused a competent witness as in Section 107, Cr. P. C. cases and in the Anti-Corruption Special Act cases. In 1916, Sir E. J. Trevelyan, former Judge of the Calcutta High Court advocated it in an article in the journal of the Society of Comparative Legislation.¹¹ The Chief Justice of the Patna High Court in *Indra Chandra Narāṅ v. Emperor*¹² has held that Section 342¹³ is no adequate substitute. It is either futile when the pernicious practice of filing written statement stuffed with suggestions, concoctions and arguments like the old bills of Chancery called then pleader's matter is filed or degenerates into an inquisition by catching questions being put to entrap accused into making an incriminatory statement. The only objection that in some instances an unsophisticated or weakminded person may be pinned down to certain statements incriminating himself through snaring questions put by artful and overzealous advocates is not a valid one. As Professor Wigmore says: "All the rules in the world will not get substantial justice if Judges and counsel have not the correct living moral attitude towards substantial justice."¹⁴

13. Accomplice, competency of, as witness. The consensus of opinion in India is that the competency of an accomplice as a witness is not destroyed because he could have been jointly tried with the accused but was not, and was instead made to give evidence in the case.¹⁵

14. The practice of putting a defendant on oath. Prof. Glanville Williams, the leading English authority on Criminal Law, has some original and instructive things to say about the practice of putting a defendant on oath, cross-examination of the defendant and judicial comment upon the defendant's failure to testify. They deserve our closest attention as all Prof. Glanville Williams' comments do.

8. Lord Darling and His Trials.

9. Earl Birkenhead: Fourteen English Judges, p. 334.

10. Perjury by a person accused is now regarded as being the normal incident of a contested trial.

11. No. 36: New Series. Vol. XVI, Part II, p. 362.

12. 116 I.C. 756: A.I.R. 1929 Pat. 145 (F.B.).

13. Now see Section 313 of the Code of 1973.

14. See valuable Introduction to S. C. Sarkar on Evidence.

15. Laxmipat Choraria v. State of Maharashtra, (1968) 2 S.C.R. 624: (1968) 1 S.C.A. 682: 1968 S.C.D. 743: (1968) 2 S.C.J. 589: 70 Bom. L.R. 595: 16 Law Rep. 470: 1968 M.L.J. (Cr.) 614: 1968 Mah. L. J. 153: 1969 M.P.L.J. 109: 1968 Cr. L.J. 1124: A.I.R. 1968 S.C. 938 (944).

In England, the oath is treated with a levity that appears both remarkable and distasteful to the foreign observer. Routine papers in legal proceedings, like the affidavit of documents or the proof of a debt in liquidation, are invested with all the dignity of an oath, involving the use of the Bible and the invocation of the Deity; and all evidence except that of very young children is taken on oath, unless the witness declares that he has no religious belief or that his religious belief prevents him from taking an oath, in which case, he is allowed to affirm.

On the continent they are most discriminating. An accused person is not put on oath, because of the stark conflict between his self-interest and his sense of duty to speak the truth. Consequently, he is not subject to prosecution for perjury, or for any other offence, if he tells a lie. In Germany, the practice is to swear a witness (other than the accused) after he has made his spontaneous statement, the oath consisting of the simple affirmation that what he has said is true; and the Judge may refrain from causing the oath to be administered to a witness if he thinks that the circumstances create a strong probability that he has been tempted to lie. By not taking the oath the witness is saved from the risk of prosecution for perjury. Even in India, which has generally adopted the basic principles of English penal law, the accused gives evidence without an oath, and is not punishable for falsehood.¹⁶

The cross-examination of the defendant. On cross-examination counsel for the State is generally armed not only with other witnesses' statements or circumstantial evidence telling against the accused's version, but also, in many cases, with a statement made by the accused himself before or at the time of his arrest, which is inconsistent with the story that he now wishes upon reflection to put forward in the witness-box. The result is that the cross-examination of a guilty defendant quite frequently makes out the case for the State. In the words of Sir Patrick Hastings:

"Weaknesses in the defence are torn to shreds, improbabilities become glaring in their nakedness, and above all any lying statements that the defendant may have made become accentuated a thousandfold. The law which permits a prisoner to give evidence on his behalf is supposed to confer upon him an inestimable benefit, and indeed it is only just and proper that an innocent person should have the right to proclaim his innocence on oath, but to a guilty person, or indeed to one who has something vital to conceal, the privilege is of more than doubtful benefit, and indeed one which many accused persons would infinitely prefer to be without."¹⁷

The Criminal Evidence Act, 1898. The new law is universally pronounced to have worked well, Sir Harry Poland saying, after twelve years' experience, that all the predictions of its opponents had been falsified.¹⁸ That may have been true at the time, but, as will be shown, later events have largely fulfilled one of those predictions, namely, that the Act would force defendants into the box whether they liked it or not. The clerk to Mr. Justice

16. Code of Indian Criminal Procedure, Sec. 342; Glanville Williams, 'Proof of Guilt', p. 64.

17. Cases in Court (London, 1949)

273-74; Glanville Williams, 'Proof of Guilt', p. 62.

18. A Century of Law Reform (London, 1901), 54.

Avory, in his informative autobiography 'My Sixty Years in the Law', remarks that he has no hesitation in saying that for one prisoner it has helped to an acquittal, a score have been convicted by it.¹⁹

Judicial comment upon the defendant's failure to testify. As has already been mentioned, the passage of the Criminal Evidence Act was resisted in certain quarters in the interests of guilty defendants. It was argued that if the accused gave evidence, he could be made to convict himself, while his failure to testify would be a circumstance of suspicion against him. A similar debate took place in the United States, and when the federal statute of 1878 allowed an accused person to give evidence on his own behalf, it was provided that his failure to do so should not create a presumption against him. This has been taken to require the Judge to instruct the jury that they should not draw unfavourable inferences against the defendant because he does not enter the witness-box. Only in a very few States with special legislation is unfavourable comment possible, though the number is gradually being enlarged.²⁰ In Canada, too, the Judge is debarred from commenting on the accused's failure to testify.²¹

In England, those who wished to show this extreme solicitude for the acquittal of the guilty did not wholly get their way. The Act of 1898 was a compromise: it forbade counsel for the prosecution to make the damning comment upon the accused's failure to testify, but permitted the Judge to do so; under this compromise we live today. The Court of Criminal Appeal allows the Judge to exercise the discretion given him by the Act.²² The restrictive attitude of the Privy Council in *Waugh v. R.*²³ is open to question.²⁴⁻²⁵ In Scotland some Judges have gone so far as to express the opinion that the Judge should refrain from exercising his statutory privilege; for the different opinions, see *Brown v. Macpherson*,¹ *Scott v. H. M. Advocate*,² and the result is often to force the accused to give evidence in order to prevent the unfavourable comment from being made.³

15. Jurors and assessors. Generally, it is most undesirable that anyone appearing in one capacity at a trial should appear in any other.⁴ But in England apparently it is a well settled rule of law that a jurymen may be sworn and examined as a witness and is not disqualified, by reason of his having given evidence, from continuing to sit as a jurymen and taking part in delivering the verdict.⁵ The Indian Legislature must be presumed to be

19. F. W. Ashley, 'My Sixty Years in the Law' (London, 1936) 300; Glanville Williams, 'Proof of Guilt', p. 46.

20. J. C. Knox in (1925) 74 University of Pennsylvania Law Review 199; 50 Yale Law Journal 114 n. 45; Wigmore Evidence, 3rd Ed., Secs. 2272, 2272a. The American Law Institute's Model Code of Evidence (1942), Rule 201 (3) would allow the Judge to comment upon the accused's failure to testify.

21. Canada Evidence Act, 1952, Sec. 4 (5). But see May, (1915) 21 D.L.R. 728.

22. *R. v. Rhodes*. (1899) 1 Q.B. 77.

23. 1950 A.C. 203.

24-25. See (1950) 13 Modern Law Review 378; See also *R. v. Jackson*, (1953) 1 W.L.R. 591 at 594.

1. (1918) 1 S.C. (J) 3.

2. 1946 S.L.T. 140 (noted 10 J. Cr. L. 282).

3. Glanville Williams: 'Proof of Guilt', p. 56 & foll.

4. Roscoe's Criminal Evidence, 16th Ed., p. 131.

5. *Queen v. Mookta Singh*. (1870) 13 W.R. (Cr.) 60; 4 B.L.R. (Ap. Cr.) 15.

aware of this rule and yet it has not thought fit to make a departure from this rule. By Sec. 294 of the Criminal Procedure Code, it has been enacted that if a juror is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness. The section does not go on to say that after he is so examined he is disqualified for sitting as a juror. So following the well settled rule in England, it has been held that a juror who has been examined under the provisions of Sec. 294, Criminal Procedure Code, can continue to sit as a juror and participate in the decision.⁶ It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge; for it could not be known whether the verdict was according to or against the evidence, it is very possible that the private grounds of belief might not amount to legal evidence. And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath and the juror would not be subject to cross-examination. If, therefore, a juror knew any fact material to the issue, he ought to be sworn as a witness and be liable to be cross-examined.⁷

The same principles applied to assessors; but now the system of trial with the aid of assessors has been abolished by the Criminal Procedure Amendment Act, XXVI of 1955.

16. Arbitrators. An arbitrator, selected by the parties, comes within general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality, is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleuch v. Metropolitan Board of Works*,⁸ but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be an assistance in informing itself whether such charges were established.⁹ Where parties knowingly appointed two gentlemen as arbitrators who were witnesses in the case, it was held that it was not open to a party after the award was made to suggest that the arbitrator should not have acted as such, because he had knowledge of the facts of the case, or should not have placed his knowledge at the disposal of his fellow-arbitrators.¹⁰

17. Executors and others. No person, by reason of interest in, or of his being an executor of, a will is disqualified, as a witness, to prove the execution of the will or to prove the validity or invalidity thereof.¹¹ As to

6. *Emperor v. Pablu*, 1939 Lah. 475; I.L.R. 1939 Lah. 243; 184 I.C. 549; see also *R. v. Ram Churn*, (1874) 24 W.R. (Cr.) 28. *In re Hurro Chunder*, (1873) 20 W.R. (Cr.) 76; Taylor, Ev., Sec. 1379; Best, Ev., Sec. 187; see also Sec. 121, note.

7. Starkie on Law of Evidence, Vol. I. p. 543.

8. (1972) 5 H.L. 418; 27 L.T. 1; 41 L.J. Ex. 137.

9. *Mst. Amir Begum v. Syed Badrud-din Husain*, 1914 P.C. 105 at 108; I.L.R. 36 All. 336; 23 I.C. 625.

10. *Haridas Datta v. Baidyanath Ghose*, 1918 Cal. 644; 40 I.C. 646; 21 C. W.N. 895.

11. Act XXXIX of 1925, Sec. 68 (Indian Succession Act).

parties, and the wives and husbands of parties,¹² dumb persons,¹³ accomplices,¹⁴ and Judges,¹⁵ v. post.

18. **Counsel.** Though such a course is most strongly disapproved, a person may, in the same suit, be both advocate and witness.¹⁶

A counsel is not incompetent to give evidence, whether the facts to which he testifies occurred before or after his retainer. As a general practice, it is undesirable that, when a matter to which counsel deposes is other than formal, he should testify either for or against the party whose case he is conducting.¹⁷ The Court has no authority to exclude such evidence if tendered. It is not in all cases a breach of professional ethics for a counsel retained in the cases to give his evidence in it. In *D. Weston v. Peary Mohan Dass*,¹⁸ certain questions were put to the Bar Council, and the following is their reply with which Woodroffe, J., agreed: "(1) If counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept a retainer therein. (2) If he accepts a retainer not knowing or having reason to believe that he will be such a witness but at the opening or at any subsequent stage before evidence is concluded, it became apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardizing the interests of his client. (3) If counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer. (4) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought to adopt the same course of conduct as is mentioned in clause (2), ante. (5) In either of the cases mentioned in clauses (2) and (4) there is no rule of professional ethics which debars a counsel, if he continues to act as counsel in the case from going into the witness-box and being cross-examined".¹⁹

19. **Credibility of witnesses and weight of evidence.** The Evidence does not purport to lay down any rule as to the weight to be attached to

12. Section 120.

13. Section 119.

14. Section 133.

15. See note to Sec. 121.

16. *Ramfal Shaw v. Biswanath Mandal*, (1870) 5 B.L.R. App. 28; *Cobbet v. Hudson*, (1852) 1 E. & B. 11; see remarks in *R. v. Brice*, (1819) 2 B. & Ald. 606: "It is very unfit that a person should be permitted to state, not upon oath, facts which he is afterwards to state on oath". and *Best, Ev.* Secs. 184-187; *Steph. Dig.*, Note XLII. Cases, however, might occur in which it might be absolutely necessary for the advocate to give evidence; see *Best, Ev.*, Sec. 187, *Taylor, Ev.*, Sec. 1391; *D. Weston v. Peary Mohan Dass*, 1914 Cal. 396; I.L.R. 40 Cal. 898; 23 I.C. 25; 18 C.W.N. 185 (S.B.).

17. *Moolraj v. Manohar Lal*, 1938 Lah. 204; 178 I.C. 235; 40 P.L.R. 558; *D. Weston v. Peary Mohan Dass*, 1914 Cal. 396; I.L.R. 40 Cal. 898; 23 I.C. 25; 18 C.W.N. 185 (S.B.); *Sita Ram v. Ram Lal*, 1930 Lah. 361 (2); 117 I.C. 66. For instances in which counsel were allowed to be examined as witness, see *R. D. Sethna v. Mirza Mohammed Shirazi*, 9 Bom. L.R. 1044; *Corea v. Peiris*, 1909 A.C. 549; 100 L.T. 790; 25 T.L.R. 631; 79 L.J. P.C. 25; 5 I.C. 50; 14 C.W.N. 86; *Biradhinal v. Probhadati Kumar*, 1939 P.C. 152; I.L.R. 1938 Kar. 258; 181 I.C. 311.

18. 1914 Cal. 396 at 427 (S.B.).

19. See also *Chandreshwar Prasad v. Narain Singh*, 1927 Pat. 61; I.L.R. 5 Pat. 777; 101 I.C. 289; 8 P.L.T. 510.

the evidence when admitted. Nor is any such rule possible. The proper appreciation of evidence is a matter of experience, commonsense, and knowledge of human affairs. For weighing evidence and drawing inferences from it there can be no canon. Each case presents its own peculiarities, and commonsense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the functions of a jury in England has to weigh and decide.²⁰

According to Wigmore, the common law in repudiating the numerical system lays down four general principles. First, credibility does not depend on number of witnesses. Secondly, in general, the testimony of a single witness, no matter what the issue, or who the person, may legally suffice as evidence upon which the jury may find a verdict. Thirdly, conversely, the mere assertion of any witness does not of itself need to be believed even though he is unimpeached in any manner because to require such belief would be to give a quantitative and impersonal measure to testimony. And, fourthly, as a corollary of the first proposition, all rules requiring two witnesses, or a corroboration of one witness, are exceptions to the general principle.²¹ It follows, therefore, that in determining on the credit due to the witnesses regard must be had to the following considerations, namely, their integrity, their ability, their number and consistency with each other, the conformity of their testimony with experience, the conformity of their testimony with collateral circumstances.²² In every case witnesses do mix a certain amount of untruth in their evidence even when they give a substantially correct account. Part of this admixture of falsehood is the result of inadvertence and the very natural vagaries of observation and memory. Obviously, they should not affect the credibility of the witnesses. Very often there is something more, by way of exaggeration and wrong emphasis by a prejudiced observer. A part of this would be conscious and intentional and a part unconscious. But even an exaggeration that is intentional could be discounted without impairing the acceptability of the rest of the witnesses, provided that these super-additions do not go to the root of the matter and a separation is possible.

But sometimes a third type of witness comes who deliberately and intentionally falsifies a material part of his evidence. The most common thing is that he mentions wrong people. If, for example, a witness mentions A and B as the assailants and it is found that he speaks a deliberate falsehood in regard to B we should take extra precaution in the assessment of the statement against A also. A Court should ask itself, whether the witness being a brazen liar in regard to one there is any guarantee that he is not likely to be equally false in regard to him as well even though the latter has not been able to prove it. The test is twofold: The first generally about the veracity of the witnesses, viz., whether he has got such regard for truth, that generally speaking we can accept his statement, subject of course to correction for the vagaries of memory and observation and separable exaggerations and super-additions which do not go to the root of the matter. The second test is specifically whether in regard to each accused he had an

20. *Mahendrapal v. State*, 1955 All. 328 at 329 : 56 Cr. L.J. 892 : see also *Queen v. Madhub Chander*, 21 W.R. (Cr.) 19 at 19.

21. Wigmore, *Ev.*, Sec. 2034.

22. *Mahendrapal v. State*, 1955 All. 328 : 56 Cr. L.J. 892.

opportunity to make the correct observation and a motive to speak the truth. But when the witness does not come up to the mark in his general regard for truth, then even if he makes a plausible and consistent allegation in regard to an individual accused, we should look for extra guarantee that this is not vitiated by his general indifference to truth.²³

Where the only witnesses alleged to be eye-witnesses are found to be highly interested in the prosecution and have unsuccessfully denied their relationship with the deceased, these facts are not by themselves sufficient for holding that they have also lied while narrating the principal events, as the maxim "*falsus in uno falsus in omnibus*" has long been exploded.²⁴ It is sure that the Courts in India have been reluctant to act on the maxim "*falsus in uno falsus in omnibus*", yet the disregard of the maxim cannot be pushed too far. The whole statement should be scrutinised and if found unsatisfactory, it must be rejected. One may venture to suggest that where it is proved that a witness has deliberately lied in material particulars, his evidence will have to be looked upon with considerable suspicion.²⁵ Referring to an argument against the reliability of a part of the evidence when the other part has been disbelieved, their Lordships of the Supreme Court observed: "The argument, for all its repetition, length and eloquence, was the hackneyed one that when one part of a witness's evidence is disbelieved, it is unsafe to act on the rest of his testimony. The answer is equally hackneyed, namely, the Judges of fact have the right to do this."¹ This passage no doubt permits the Judge to act on the rest of the testimony. But it will be so only if the Judge regards the rest of the testimony as reliable. But where out of ten statements made by a witness, nine are decidedly false, what guarantee is there that the tenth statement is true? Where on the scrutiny of evidence, one finds that on the whole the evidence is more false than true, it would be dangerous to act upon it.² A witness is normally to be considered independent, unless he or she springs from sources which are likely to be tainted and that usually means, unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person, against whom a witness has a grudge, along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. But no sweeping generalisation can be made and there can be no general rule of prudence to require corroboration before the evidence is believed, and each case must be limited to and governed by its own facts. This is not to say that in a given case a Judge for reasons special to that case and to that witness cannot say that he is not prepared to believe the witness because of his gene-

23. *Shiv Raj Singh v. State of Vindhya Pradesh*, 1955 V.P. 36 at 39: 56 Cr. L.J. 1000.

24. *Dhanna v. State*, 1951 Raj. 37 : 52 Cr. L.J. 201 ; *Hadibandhu Jali v. State of Orissa*, I.L.R. (1972) Cut. 1181 : 1972 Cut. L.R. (Cri.) 526 : (1972) 38 Cut. L.T. 1044.

25. *State of Madhya Pradesh v. Bansi Lal Behari*, 1958 M.P. 13 : 1957 M.

P. L.J. 852.

1. *Sukha v. State of Rajasthan*, 1956 S.C. 519 at 519 : 1956 S.C.A. 791: 1956 S.C.J. 503 : 1956 S.C.C. 355: 1956 S.C.R. 288 : 1956 A.W.R. (Sup.) 83 : 1956 Andh. L.T. 583: 1956 Cr. L.J. 923.
2. *State of Madhya Pradesh v. Bansi Lal Behari*, 1958 Madh. Pra. 13 : 1957 M.L.J. 852.

ral unreliability, or for other reasons, unless he is corroborated. Of course, that can be done. But the basis for such a conclusion must rest on facts special to the particular instance and cannot be grounded on a supposedly general rule of prudence enjoined by law as in the case of accomplices.³ The testimony of the eye-witnesses who are natural witnesses of the occurrence, and whom one would expect to have seen the occurrence, cannot be doubted only because they happen to be related, by relationship or otherwise, to the party on whose behalf they give evidence.⁴ An eye-witness, who is a relative of the victim of murder is a competent witness but his evidence cannot be accepted without close and careful examination.⁵ Unless the evidence of witnesses is shaken in cross-examination, or their demeanour is such as to lead one to the inevitable conclusion that they have perjured themselves, no Court is entitled to discard evidence on grounds which are merely speculative.⁶ In a case relating to adoption the fact that the father of the boy who gave him in adoption happens to be the village munsiff is not sufficient to show that the *karnam*, a responsible village official, is incapable of giving disinterested evidence with regard to the *factum* of adoption.⁷ The mere fact that there has been some litigation between the witness and the accused by itself is no reason for disbelieving his testimony, if it is otherwise accepted.⁸ The mere fact that a witness is interested or partisan is not sufficient to discredit his testimony.⁹ If the witness is a rustic much emphasis should not be made on his failure to remember time and such slippery and small facts, and discrepancies in details and embellishments in very unessential parts of the story, provided the core of his testimony appears to be truthful and accords with probabilities.¹⁰ Evidence of chance witness named in first information report can be believed particularly when his presence at the spot is corroborated by other evidence.¹¹ A complainant who after all is one of the persons most likely to know the facts should not *ex hypothesi* be deemed to be unworthy of belief. It is true that his evidence ought, in all cases, to be carefully tested; but why it is not to be supposed to suffer an irrebuttable

3. Dalip Singh v. State of Punjab, 1953 S.C. 364 at 366; 1953 S.C.A. 709; 1953 S.C.J. 532; 1954 S.C.R. 145; 1953 M.W.N. 642; Mahendrapal v. State, 1955 All. 328; see also Tan San Mar v. U. Kya Zin, 1933 Rang. 162; 145 I.C. 330; Bagh Singh v. King-Emperor, 1925 Lah. 49; 81 I.C. 113; Bodhan v. Emperor, 1948 All. 223; 1947 A.L.J. 673; Gurdev Singh v. Emperor, 1948 Lah. 58; 49 P.L.R. 137.
4. Har Sahai v. Rex, 1949 All. 582; 50 Cr. L.J. 878; Payi v. State, 1959 Ker. I.T. 1074.
5. Darya Singh v. State of Punjab, (1964) 3 S.C.R. 397; (1964) 2 S.C.J. 319; 1964 S.C.D. 87; 1964 A.W.R. (H.C.) 532; 1965 (1) Cr. L.J. 350; 1964 M.L.J. (Cr.) 503; A.I.R. 1965 S.C. 328; A. Nagireddi v. State, (1968) 1 Andh. W.R. 178; 1968 M.L.J. (Cr.) 131 (139, 140).
6. Beas Singh v. Khedu Mian, 1930

- Pat. 58; 123 I.C. 637.
7. G. C. Ramasubbaya v. M. Chenchuramayya, 1947 P.C. 124; 74 I.A. 162; 1947 A.L.J. 510.
8. Arur Singh Fateh Singh v. State, 1957 Punj. 81.
9. S. H. Kankar v. State of Maharashtra, A.I.R. 1974 S.C. 1158; Hazari Parida v. State of Orissa, 1974 Cri. L.J. 1212.
10. Shivaji Shahebrao Bobade v. State of Maharashtra, (1973) 2 S.C.W.R. 426; (1973) 2 S.C.C. 793; 1973 Cri. App. R. 410 (S.C.); 1973 S.C.C. (Cri.) 1033; 1973 Cri. L.R. (S.C.) 602; (1974) 1 S.C.R. 489; 1975 Mad. L.J. (Cri.) 417; (1975) 2 S.C.J. 82; 1973 Cri. L.J. 1783; A.I.R. 1973 S.C. 2622.
11. L. Shivanath v. State of M. P., 1976 Cri. L.J. 176; 1970 M.P. L.J. 512; 1970 M.P. W.R. 437; 1970 Jab. L.J. 610.

presumption of unworthiness are at a loss to comprehend.¹² The fact that a witness is an old man "on the brink of the grave might excite sympathy for him but cannot enhance his credibility in a Court of law".¹³ It is well known that a Burman Buddhist is, as a rule, reluctant to give evidence against an accused person in a murder case. If he can help it he will always try and avoid it. The natural reluctance becomes more pronounced when an accused person happens to be a *pongyi*. Therefore, unless a more cogent reason than that of discovering a few discrepancies is given, his evidence should be accepted.¹⁴ There is no inflexible rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, 'because he is a party to the suit. Such a rule, if adopted, would nullify the provisions of Section 120 of the Indian Evidence Act, which provides that in all civil proceedings the parties to the suit shall be competent witnesses. When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness; and the Court is free to attach to the evidence that amount of credence which it appears to deserve, from his demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of a statement of a witness can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements.¹⁵ As regards credibility of "child-witness", see notes under the heading "Child witness", *supra*.

In order to judge the credibility of the witnesses, the court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses, but it is open to it to look into the surrounding circumstances as well as the probabilities so that it may form a correct idea of the trustworthiness of the witnesses.¹⁶ The testimony as to the execution of a document (will) cannot be considered independently of the surrounding circumstances.¹⁷ The truth or reliability of witnesses must be tested by the surrounding circumstances brought out in evidence.¹⁸ If there is any matter against a witness, no adverse inference can be drawn against him unless he was given an opportunity to explain it.¹⁹

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| <p>12. <i>Emperor v. Aftab Mohammad Khan</i>, 1940 All. 291 : 188 I.C. 649 : 41 Cr. L.J. 647 : 1940 A.L.J. 206 : 1940 A.W.R. 85.</p> <p>13. <i>Jnanada Govinda Chowdhary v. Virendra Nath Goswamy</i>, 1939 Cal. 595 : 185 I.C. 634 : 69 C.L.J. 347.</p> <p>14. <i>Y. Zawana v. Emperor</i>, 1936 Rang. 60 : 161 I.C. 113 : 37 Cr. L.J. 418.</p> <p>15. <i>Jogendra Krishna Roy v. Kurpal Harshi & Co.</i>, 1923 Cal. 63 : I.L.R. 49 Cal. 345 : 68 I.C. 993 : 35 C.L.J. 175.</p> <p>16. <i>Ramchandra v. Champabai</i>, (1964) 6 S.C.R. 814 : 1965 S.C.D. 362 : (1965) 2 S.C.J. 557 : (1964) 1 S.C.W.R. 629 : 66 Bom. L.R. 486 : 1965 M.P.L.J. 17 : 1965 Mah. L.J.</p> | <p>37 : A.I.R. 1965 S.C. 354 (357) ; <i>Chandraraj Kadamba v. Nemeraja Balipa</i>, (1967) 12 Law Rep. 92 (98, 99).</p> <p>17. <i>Ramchandra v. Champabai</i>, (1964) 6 S.C.R. 814 : 1965 S.C.D. 362 : (1965) 2 S.C.J. 557 : (1964) 1 S.C.W.R. 629 : 66 Bom. L.R. 486 : 1965 M.P.L.J. 17 : 1965 Mah. L.J. 37 : A.I.R. 1965 S.C. 354 ; <i>Chandraraj Kadamba v. Nemeraja Balipa</i>, (1967) 12 Law Rep. 92 (106).</p> <p>18. <i>Govinda v. Chinabai</i>, 13 Law Rep. 681 : A.I.R. 1968 Mys. 309 (312, 313) (case of adoption).</p> <p>19. <i>Sachindra Nath Chatterjee v. Nilima</i>, 74 C.W.N. 168 (207) : A.I.R. 1970 Cal. 38.</p> |
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There are four ways by which a trial Court can hold a witness unreliable; (a) the witness's statement is inherently improbable or contrary to the course of nature, e. g., he says that he identified the accused by face in pitch darkness, or that he recognized his voice from a mile away, or that he saw the accused killing the deceased with a lathi whereas medical evidence proves that he died of a bullet wound; (b) the witness's deposition contains mutually contradictory or inconsistent passages, e. g., at one place he says that A was the murderer, but at another that it was B; (c) the witness is found to be a bitter enemy of the opposite party and therefore possesses ample motive for wishing him harm; and (d) the witness's demeanour whilst under examination is found abnormal or unsatisfactory (a contingency provided for by Section 363, Criminal Procedure Code, 1898), (now Section 280 of Cr. P.C. 1973).

With regard to items (a), (b) and (c) above, the Court of Appeal in evaluating the testimony of a witness is not at all in an inferior position compared to the trial Court. Indeed the appellate Court stands in a position of greater advantage over the trial Court, for it can view the evidence of the witness concerned more objectively and consequently is in an even better position to decide the question of its credibility. It is only in respect of item (d) that the trial Court can be deemed to be in a more favourable position, for it alone has the advantage of watching the demeanour of the witness whilst in the witness-box and can, if it so chooses, make a note about the demeanour.²⁰ See also cases under Section 3. Note 9, "Appreciation of Evidence by trial Court".

119. *Dumb witnesses.* A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Section 3 ("Evidence.")

Section 3 (Meaning of "Oral evidence.")

Section 118 (Competency).

Taylor, Ev., s. 1376; Steph., Dig., Art. 107; Roscoe, N.P. Ev., 18th Ed., 162 and authorities cited in the last section. Wharton, Ev., ss. 406, 407; Stewart Rapalje's Law of Witnesses, s. 6; Wigmore, Ev., s. 811.

SYNOPSIS

1. Principle.

2. Dumb witness.

1. Principle. See Introduction, ante.

2. Dumb witness. A person can "be a witness", not merely by giving oral evidence but also by producing documents or making intelligible gestures, as in the case of a dumb witness or the like. So, where a person is assaulted, and after the assault, he becomes unconscious and subsequently regains consciousness, but he loses speech, his evidence can be given by signs under this section. If evidence is recorded under this section, there must be

20. State v. Murli. 1957 All. 53 : 1957 Cr. L. J. 32.

a record of signs and not the interpretation of signs.²¹ "To be a witness" is nothing more than "to furnish evidence," and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.²² A deaf-mute is taught to give ideas by signs, which must be translated by an interpreter skilled and sworn.²³ It is not the practice of the Courts to force any man to act contrary to his religious convictions, so long as his acts are legal. Therefore, a witness, who has taken a religious vow of silence, should be deemed unable to speak within the meaning of this section, and his evidence can be taken by having it written in open Court in answer to the questions put to him.²⁴ If the witness is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method.²⁵

120. *Parties to civil suit and their wives or husbands. Husband or wife of person under criminal trial.* In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Section 118 (Competency).

Section 122 (Communications during marriage).

Cr. P.C. 1973 ss. 125, 126; Act IV of 1869, ss. 51, 52 (Indian Divorce); Best, Ev., ss. 167—169; Taylor, Ev., ss. 1348—1372; Steph., Dig., Arts 106, 108, 108-A. Note XLI; Stewart Rapalje's Law of Witnesses, ss. 25—45; see also Index; Wharton, Ev., ss. 421—433, 457—490.

SYNOPSIS

1. Principle.
2. Interested evidence.
3. Parties to civil suits.
4. Proceedings under Secs. 125, 126, Cr. P. C. 1973.
5. Matrimonial proceedings.

1. **Principle.** See Introduction, ante.

2. **Interested evidence.** In the vast majority of cases, there can be none more interested in the success of their cause than the parties to the suit and the husband or wife of such party, yet they are competent witnesses, as this section specifically prescribes. If parties to a suit are to be disbelieved as

21. Kumbhar Musa v. State of Gujarat, A.I.R. 1966 Guj. 101 : 1965 Guj. L.R. 890.

22. M. P. Sharma v. Satish Chandra, 1954 S.C. 300 at 304 : 1954 S.C. A. 449 : 1954 S.C.J. 428 : 1954 S.C.R. 366 : 55 Cr. L.J. 865 : 1954 Andh. L.J. (S.C.) 54 : (1954) 1 M.L.J. 680 : 1954 M.W.N. 566 : 56 P.L.R. 366.

23. Cowley v. People, 83 N.Y. 478 (Amer.).

24. Lakhani Singh v. Emperor, 1942 Pat. 183 : I.L.R. 20 Pat. 898 : 199 I.

C. 838 : 43 Cr. L.J. 570 : 8 B.R. 589 : 23 P.L.T. 332.

25. Morrison v. Lennard, (1827) 8 C. & P. 127, but this is denied in certain American cases, where it is said that the witness should be permitted the most fluent and natural mode. Wigmore, Ev. Sec. 811, p. 915n, 3. see also Wharton, Ev., Secs. 406, 407. Stewart Rapalje, op. cit., Sec. 6 : as to evidence by an interpreter, see Ruston's case, 1 Leach. C.C. 408.

1. Section 488, Cr. P. C., 1898.

interested witnesses, only because they are parties, that will nullify this section. So, the testimony of the parties or their spouses, must be scrutinised in the same way as that of any other witness.²

3. Parties to civil suits. The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party, who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected, in all its particulars, to cross-examination. It is the bounden duty of a party, personally knowing all the circumstances of the case, to give evidence in the suit and be subjected to cross-examination, and his non-appearance, as a witness, would be the strongest possible circumstance going to discredit the truth of his case.³ The position of parties to a civil suit is (except when otherwise regulated by Statute not different from that of other witnesses.⁴ Normally defendant is not summoned as a witness for plaintiff, but when there are admissions of defendant in previous proceedings and the defendant does not come to explain them, the court is justified in calling him.⁵

4. Proceedings under Secs. 125, 126, Cr. P. C. 1973. Proceedings under Secs. 125, 126 (old Section 488) of the Code of Criminal Procedure, which provides for the passing of orders for the maintenance of wives and children, are in the nature of civil proceedings within the meaning of this section, and the person sought to be charged is a competent witness on his own behalf.⁶ Sub-section (3) of the Section 126⁷, Cr. P. C., provided that "the accused may tender himself as a witness and in such case shall be examined as such". That sub-section has been omitted by Section 131 of Act XVIII of 1923, as provision is made in Section 315^{7-a} of the Code for the examination of the person proceeded against as a witness.

5. Matrimonial proceedings. The rule in matrimonial proceedings is that upon a petition by a wife for dissolution of marriage on account of adultery coupled with cruelty or desertion, the parties are competent and compellable to give evidence of, or relating to, such cruelty or desertion, but they cannot in the case be examined or cross-examined as to facts relating to acts of adultery, and cannot, in other cases, be examined at all, unless they

2. Binani Properties (Private) Ltd., v. G. A. Hossain & Co., A.I.R. 1967 C. 390.

3. Gur Baksh Singh v. Gurdial Singh, 1927 P.C. 230 : 105 I.C. 220 : 29 Bom. L.R. 1392 : 46 C.L.J. 272 ; Shah Muhammad Khan v. Ahmad Ali Khan, 1935 Oudh 170 : 153 L. C. 987 : 11 O.W.N. 880 ; Gokul Dass v. Devinder Dass, 1949 H.P. 11.

4. See as to weight to be given to testimony of a party, Jogendra Krishna Roy v. Kurpal Harshi, 1923 Cal. 63 : I.L.R. 49 Cal. 345 : 68 I.C. 993 : 35 C.L.J. 175.

5. Vashram Daya v. B. Deva, (1971) 12 Guj. L.R. 40.

6. *In re Tokee Bibee v. Abdool Khan,*

(1879) 5 C. 536 ; Nur Mahomed v. Bismulla Jan, (1889) 16 C. 781 followed in Rozario v. Ingles, post : (1894) 18 B. 468 and Sec. 112 ; Hira Lal v. Saheb Jan, (1895) 18 A. 107 ; see also Bachau Kalwar v. Jamuna Kalwarin, 1925 Cal. 339 : 81 I.C. 915 : 25 Cr. L.J. 1091. As to examination of wife as to non-access of husband, see Rozario v. Ingles, ante ; as to the corroboration of the mother's evidence, required by English law, see Gloe v. Manning, L.R. 2 Q.B.D. 611 ; Lawrence v. Ingmire, 20 L.T.N.S. 391 and note to Sec. 134, post.

7. Section 488 (7) Cr.P.C. 1898.

7-a. Section 340 (2) Cr.P.C. 1898.

offer themselves as witnesses or verify their cases by affidavit.⁸ The co-respondent, in a suit by husband for the dissolution of his marriage with his wife on the ground of adultery, was summoned by the petitioner in such suit as a witness. The Court did not explain to him before he was sworn, that it was not compulsory upon, but optional with him, to give evidence or not. He did not object to be sworn, and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had had sexual intercourse with respondent. He then asked the Court whether he was bound to answer such question; on the court answering in the affirmative, he answered the question in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. It was held under the circumstances, that the co-respondent had not "offered" to give evidence, within the meaning of Section 51 of the Divorce Act, and therefore his evidence was not admissible.⁹ It has been held that in India under this section, both parties to a divorce are competent to prove non-access and the consequent illegitimacy of a child.¹⁰ The English rule is that the evidence of a husband or wife that there has been no access by the husband to the wife is inadmissible, because it is evidence which tends to bastardize the issue.¹¹ It has been held, in some cases, that the same rule applies in India.¹² But, in numerous other decisions, it has been held, that whatever may be the position in regard to suits for divorce, the law in India which is contained in Sections 112 and 120 of this Act, does not preclude a husband from giving evidence of non-access to his wife, even though its effect is to bastardize a child born during wedlock.¹³ It may be mentioned that even in England consequent on the enactment of the Matrimonial Causes Act, 1949, evidence of the parents has been rendered admissible in any proceedings to prove that after marriage intercourse did or did not take place between them during that period. As to evidence of communications during marriage, see Section 122, post. In criminal proceedings the party accused, or any person jointly indicted and tried with the accused, is now a competent witness for defence.¹⁴ So much of the section, as declares

8. Act IV of 1869, Secs. 51-52 (Indian Divorce) and see *Kelly v. Kelly*, (1869) 3 B.L.R. App. 6; *DeBretton v. DeBretton*, (1881) 4 A. 49; as to English rule see *Steph. Dig. Art. 109*.
9. *DeBretton v. DeBretton*, (1881) 4 A. 49.
10. *John Howe v. Charlotte Howe*, (1916) 38 M. 466; 1916 Mad. 338; 21 I.C. 645 (F. B.), followed in *Doutre v. Doutre*, 1939 All 522; 1 I.L.R. 1939 All. 573; 184 I. C. 110.
11. See *Russell v. Russell*, 1924 A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 40 T.L.R. 713; 68 Sol. Jo. 682.
12. *Sweeney v. Sweeney*, I.L.R. 62 Cal. 1080; 193 I.C. 749; *Prem Chand Hira v. Baigalal*, 1927 Bom. 594; 1 I.L.R. 51 Bom. 1026; 105

- I.C. 871; 29 Bom. L.R. 1336.
13. *Hanumantha Rao v. Ramachandrayya*, 1944 Mad. 376; I.L.R. 1945 Mad. 53; (1944) 1 M.L.J. 285; *Doutre v. Doutre*, 1939 All. 522; I.L.R. 1939 All. 573; 184 I.C. 110; 1939 A.L.J. 478; 1939 A.W.R. 420; *King v. King*, 1945 All. 190; I.L.R. 1945 All. 620; 1945 A.L.J. 162; 1945 A.W.R. (H.C.) 590; *Mst. Saroo Mali v. Yeshwant*, 1934 Nag. 124; 150 I.C. 306; *Mst. Shanta Bai v. Dal Chand Sheo Prashad*, 1953 Nag. 374; I.L.R. 1954 Nag. 204; *Shyam Singh v. Saibalini Ghose*, 1947 Cal. 183; 226 I.C. 271; 47 Cr. L.J. 870; *Mayandi Asari v. Sami Asari*, 1932 Mad. 44; I.L.R. 55 Mad. 292; 135 I.C. 580.
14. Section 315, Cr.P.C., 1973.

husbands and wives competent witnesses against each other in criminal proceedings, differs from the English rule, according to which such persons are, in general, incompetent.¹⁵ Though under the Criminal Evidence Act, 1898,¹⁶ every person charged with an offence and the husband or wife of such person are now competent witnesses for the defence at every stage of the proceedings,¹⁷ the section is in accordance with the Full Bench decision in the case of *R. v. Khyroolah*.¹⁸ In England, in addition to the husbands or wives of persons charged with criminal offences, who are in general only admissible upon the application of the person charged, though in some few cases they are competent for the prosecution, the only classes of persons now incompetent to testify are persons who in cases of High Treason or Misprison of Treason (other than such as consist in injuring or attempting to injure the person of the Sovereign) are not included or properly described in the list of witnesses delivered to the defendant, and secondly persons devoid of sufficient understanding to know what they are about.¹⁹

In a petition for dissolution of marriage on grounds of adultery and desertion, the husband alone gave evidence which the court found was true, worthy of credit and free from any possible suspicion of collusion. His evidence was, therefore, accepted and the relief afforded.²⁰ Similarly, if the evidence of the wife alone in a petition for nullity of marriage on the ground of the husband's incapacity, is reliable and can be safely acted upon, the court can act upon it, though the evidence is of an interested party, and no corroboration is required.²¹ In a matrimonial proceeding involving proof of non-access "though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence unless its absence is accounted for to the satisfaction of the court".²²

121. *Judges and Magistrates.* No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

15. Taylor. Ev., Secs. 1371, 1372; Steph. Dig. Arts., 108, 108-A; Whitley Stokes. 831.
16. 61 & 62 Vict., c. 36.
17. Taylor. Ev., Secs. 1342-3; Stephens Dig. (14th Ed), Vol. II at p. 307.
18. (1866) 6 W.R. (Cr) 21 B.L.R. Sup. Vol. App. 11 and see for a case under the earlier law, *R. v. Gouer Chand*. (1864) 1 W.R. (Cr.) 17.
19. Taylor, Ev., Sec. 1372 (g).

20. *Antoniswamy v. Anna Manickam*. (1969) 2 M.L.J. 457 : 82 M.L.W. 459 : A.I.R. 1970 Mad. 91 (92).
21. *Suvarnababen v. Rashmikan*, 10 Guj. L.R. 661 : A.I.R. 1970 Guj. 43 (46).
22. *Vira Reddi v. Kistamma*. (1969) 1 M.L.J. 366 : 81 M.L.W. 490 : A.I.R. 1969 Mad. 235 (246, 247) quoting from *Venkateswarulu v. Kistamma*, (1954) 1 M.L.J. 152: A.I.R. 1954 S.C. 176 (184).

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(c) A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Section 3 ("Court.")

Section 118 (Competency.)

Sections 35—166 (Examination.)

Section 165, Prov. 2 (Judge's power to put questions.)

Steph., Dig., Art. 111; Taylor, Ev., Sec. 938; Phipson, Ev., 11th Ed. 244, 198; Best, Ev., Secs. 184, 188, Stewart Rapalje's Law of Witnesses, Secs. 45, 68n, 275; Wharton, Ev., Sec. 600.

SYNOPSIS

1. Principle.

2. Judges and Magistrates.

1. Principle. The rule is based on the general grounds of convenience (e.g., the inconvenience of withdrawing a Judge from his own Court) and public policy.²³ This section clears up a doubtful point of English law. It is hardly necessary to add that, with regard to things not coming to his knowledge in Court as Judge, a Judge is as competent and compellable a witness as any other person.²⁴

2. Judges and Magistrates. The privilege is that of the witness, i.e., of the Judge or Magistrate of whom the question is asked. If he waives such privilege, or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege.²⁵ No definition is given of "Judge" or "Magistrate" in the Act.¹ Arbitrators who are (but to a narrower extent) within the rule in England, appear from the terms of the section itself, not to be within it.² Where a Court is asked to amend a decree

23. See *R. v. Gazard*, (1838) 3 C. & P. 595; *Buckleuch v. Metropolitan Board of Works*, 1872 L.R. 5 H.L. 418; Best, Ev., Sec. 188, p. 176, note; Taylor, Ev., Sec. 938. As to illust. (c), see *R. v. Lord Thanet*, 27 St. Tr. 836; and for law before the Act, *Ramasami v. Ramu*, (1867) 3 Mad. H.C.R. 372 (evidence of subordinate Magistrate holding preliminary enquiry into a criminal charge).

24. Steph., Dig., Art. 111 and Note XLII; Taylor, Ev., Sec. 1379; Best, Ev. supra; Stewart Rapalje, op. cit., ss. 45, 68. Section 275; Wharton, Ev., Sec. 600.

25. *R. v. Chidda Khan*, (1881) 3 All. 573. As to the meaning of the word 'compelled' in the section, see *R. v. Gopal Dass*, (1881) 3 Mad. 271 and in Sec. 132; see *Emperu v. Banarasi*, A.I.R. 1924 All. 381; 1 L.R. 46 All. 254; 77 I.C. 829; 25 Cr. L.J. 477; 22 A.L.J. 144.

1. Cf. definition given in Penal Code,

Sec. 19, and Act 1 of 1868, Sec. 4, sub-section (13); see now Act X of 1897.

2. *Buckleuch v. Metropolitan Board of Works*, (1872) L.R. 5 H.L. 418; *Amir Begam v. Badr-ud-din Hussain*, 1914 P.C. 105; 1 L.R. 36 All. 836; 23 I.C. 625; *In re Whiteley*, (1891) 1 Ch. 558; 64 L.T. 81; *O'Rourke v. Commissioner for Railways*, (1890) 15 A. Cas. 371; *Ellis v. Saltau*, (1808) 4 C. & P. 327 na; *Whiteley Stokes*, 831. In England it has been also held that a barrister cannot be compelled to testify as to what he said in Court in his character of a barrister. *Curry v. Walter*, 1 Es. 456; Steph., Dig., Art. 111. And a further rule exists against the competency of jurors to give evidence as to what passed between the jurymen in the discharge of their duties, Steph., Dig., Art. 114; Best, Ev., Secs. 579, 580; Taylor, Ev., Secs. 942, 945.

passed on an award on the ground of a clerical or accidental slip or omission, it is open to it to examine the arbitrators and to form an opinion for itself whether the slip or omission has occurred.³ If a party makes out a *prima facie* case, of *mala fides* of the arbitrator, the Court can summon the arbitrator, but not for finding out how he arrived at his conclusions.⁴ This Act contains no provisions against the competency of jurors to give evidence as to what passed between them in the discharge of their duties; but, in the case cited, the English rule on this point has been adopted and it has been held that statements or evidence of admissions by jurors as to their mode of reaching their verdict are inadmissible.⁵ In this case it was alleged that jurors had reached their verdict by casting lots and evidence of another witness was admitted in support of this statement.

The object of Sec. 303, Criminal Procedure Code, is merely to enable the Court to ascertain whether the jury intended to bring in a verdict of guilty or not guilty, and for no other purpose is a Judge entitled to interrogate the jury under Sec. 303 after they have given their verdict. A Judge is not entitled to examine the jurors as to the grounds upon which they have based their verdict.⁶ There is no corresponding provision in new Cr. P. C. 1973 as jury system of trial has been abolished.

A Judge cannot, without giving evidence as a witness in the usual way, import into a case his own knowledge of particular facts.⁷ A judgment based on materials which are not in evidence, or on the personal knowledge of the Judge, is not in accordance with the law.⁸ But, in a case in the Madras High Court, it has been said that a Judge is entitled to use his general knowledge and experience.⁹ When a Judge gives evidence, he should be sworn like other witnesses.¹⁰ In a case tried by a Sessions Judge with the aid of

3. C. K. Narayanan Nair v. C. K. Devaki Amma, A.I.R. 1945 Mad. 290: (1945) 1 M.L.J. 354.
4. Union of India v. M/s. Orient Engineering & Commercial Co. Ltd. (1977) 3 A.L.R. 702: A.I.R. 1977 S.C. 2445.
5. Emperor v. Harkumar Barman Roy, I.L.R. 40 C. 693: 30 I.C. 216: 17 C.W.N. 787, but the competency of jurors in a case which are trying is a different question for which see Sec. 118, ante.
6. Emperor v. Derajtulla, A.I.R. 1930 Cal. 448: 127 I.C. 79: 31 Cr. L.J. 1150: 34 C.W.N. 283.
7. Hurlpurshad v. Sheo Dayal. (1876) 9 I.A. 259, 286; Rousseau v. Pinto, (1867) 7 W.R. 190; Mee-thun Bibee v. Busheer Khan, (1867) 11 Moo. I.A. 213, 221; Kallonnass v. Gunga Gobind, (1876) 25 W.R. 121; Sooraj Kant v. Khodee Narain, (1874) 22 W.R. 9; R. v. Donnelly, Cal. 405, 416; Girish Chunder v. R., (1893) 20 Cal. 857, 865; R. v. Fatik Biswas, (1868) 1 B.L.R.A. (Cr.) 13. As to the duty of the Judge to state to the accused

- the facts he himself observed, and the right of the accused to cross-examine thereon, see *In re Hurro Chunder*, (1873) 20 W.R. Cr. 76; *Girish Chunder v. R.*, supra, 866. It is extremely improper for a Magistrate in disposing of a case, to rely in any way on statements made to him out of Court, *R. v. Sahadev*, I.L.R. (1890) 14 Bom. 572. In *Sri Balusu v. Sri Balusu*, I.L.R. (1898) 22 Mad. 427, the Court says: "District Judge of Godavery says 'the people have settled down under the law enunciated in 1862'. He can hardly recollect the state of thing prior to 1862, but his statement of the present state of things is founded on personal knowledge."
8. Durga Prasad Singh v. Ram Dayal Chaudhari, I.L.R. 38 Cal. 153: 10 I.C. 955.
 9. Lakshmayya v. Sri Rajah Varadarajah Apparow, I.L.R. 29 Mad. 168: 17 I.C. 353; see ante Commentary on Sec. 3.
 10. Kishore Singh v. Ganesh Mookerjee, (1868) 9 W.R. 252.

assessors, it was held that a Judge is a competent witness, and can give evidence in a case being tried before himself, even though he laid the complaint, acting as a public officer: provided that he has no personal or pecuniary interest¹¹ in the subject of the charge; and he is not precluded thereby from dealing judicially with the evidence, of which his own forms a part.¹² Although a Magistrate is not disqualified from dealing with a case judicially, merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case, when there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.¹³ Further, a Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. A Judge, who is a sole judge of law and fact, cannot give his own evidence and then proceed to a decision of the case in which that evidence is given.¹⁴ Where, in such a case, he has given his evidence and convicted the accused, his having so acted makes the conviction bad.¹⁵ The conviction, however, is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed, to support the conviction.¹⁶ *Quære*—Whether the presence of assessors takes the case outside the operation of the last mentioned rule.¹⁷

Where a Magistrate, in whose Courts a complaint of rioting and mischief had been filed, made a personal inspection of the *locus in quo*, which inspec-

11. See *R. v. Bholanath Sen*, (1876) 2 Cal. 23; *R. v. Hira Lall*, (1871), 8 B.L.R. 422, 430; *In re Hurro Chunder*, (1873) 20 W.R. Cr. 76; *Girish Chunder v. R.*, (1893) 20 C. 557; *R. v. Donnelly*, ante; *Wood v. Corporation of Calcutta*, (1881) 7 C. 522; *Loburi Domini v. Assam Railway Company*, (1884) 10 Cal. 915; *Swamirao v. Collector of Dharwar*, (1892) I.L.R. 17 Bom. 299; *Kashinath Khargiavala v. Collector of Poona*, (1884) 8 B. 553 and *R. v. Meyer*, 1 Q.B.D. 173; *R. v. Pherozsha Pestonji*, (1893) 18 B. 442; *Aloo Nathu v. Gayubha Dipsangji*, (1894) 19 B. 608. The same person should not be both Judge and prosecutor; *R. v. Nadi Chand*, (1875) 24 W.R. Cr. 1; *R. v. Gangadhar Bhunjo*, (1878) 3 C. 622; *R. v. Deoki Nandan*, (1880) 2 A. 806; *In re Het Lal*, (1874) 22 W.R. Cr. 75, appeal; *Girish Chunder v. R.*, (1893) 20 C. 857, 865; *R. v. Sahadev*, (1890) 14 B. 572. And a public prosecutor should be without personal interest, *R. v. Kashinath Dinakar*, (1871) 8 Bom. H.C.R. Cr. Ca. 126.
12. *R. v. Mookta Singh*, (1870) 4 B. L.R. Cr. 15; 15 W.R. Cr. 60.
13. *R. v. Bholanath Sen*, (1867) 2 C. 23, 29; and see remarks of Phear, J., in *In re Hurro Chunder*, (1873) 20 W.R. Cr. 76; and of Markby, J., in *R. v. Donnelly*, (1877) 2 C. 401, 414; *Taylor, Ev.*, Sec. 1379.
14. *R. v. Donnelly*, supra, *per curiam*; *Taylor, Ev.*, Sec. 1379; *Girish Chunder v. R.*, (1893) 20 C. 857, 865; *Hari Kishore v. Abdul Baki*, (1894) 21 C. 920; *Swamirao v. Collector of Dharwar*, (1892) 17 B. 299; see also *R. v. Fattah Chand*, (1897) 24 C. 499. The cases of *Girish Chunder v. R.*, (1893) 20 C. 857 and *Sudhana Upadhya v. R.*, (1895) 23 C. 328 were distinguished in the matter of *Anando Chunder v. Basu Mudh*, (1896) 24 C. 167.
15. *R. v. Donnelly*, supra, *per Markby, J.*
16. *ib.*, *per Prinsep, J.*
17. See *R. v. Mookta Singh*, (1870) 4 B.L.R. Cr. 15; 15 W.R. Cr. 60 and *R. v. Donnelly*, supra, 414 in which latter case the correctness of the former decision, in so far as it proceeded upon the ground that the presence of assessors brought the case within the general rule laid down by it is doubted.

tion was not made only for the purpose of better understanding the evidence which had already been given, it was held that, by so doing, he had made himself a witness in the case and had thereby rendered himself incompetent to try it; it was held, further that where a Judge is the sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused.¹⁸ When a Magistrate was present at a search made by the police during investigation and in all probability he came to know of some facts in connection with the case, it was held to be expedient that the case should be tried by some other Magistrate.¹⁹ This section also empowers an appellate Court to question the trial Court on matters relating to the proceedings before him, and the answers on such question can be taken into account when deciding the appeal.²⁰

122. *Communications during marriage.* No person who is or has been married shall be compelled to disclose a communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

S. 120 (Competency of husband and wife.) S. 165 Prov. 2 (Judge's power to question.)

Taylor, Ev., Secs. 909-910-A; Best, Ev., Sec. 586; Roscoe, N. P. Ev., 18th Ed., 164, 169; Steph., Dig., Art. 110; Wharton, Ev., Secs. 427-437; Rapalje's Law of Witnesses, Sec. 274; Hageman's Privileged Communications, Secs. 165-188; Wigmore, Ev., Secs. 22, 27, et seq.

SYNOPSIS

1. Principle.
2. Scope and applicability.
3. Consent.
4. "For crime committed against the other".

1. **Principle.** The protection given by this section has been said to rest upon the ground that the admission of such testimony would have a powerful tendency to disturb the peace of families and to weaken, if not to destroy, the mutual confidence upon which the happiness of the married state depends.²¹ The exception is made *ex necessitate rei*. The prohibition rests on no technicality that can be waived at will, but is founded on a principle of high import which no Court is entitled to relax.²² It has, however, been

18. *R. v. Manikam*, (1896) 19 M. 263 but a Magistrate who views a place merely to better understand the evidence does not make himself a witness. In *re Lalji*, (1897) 19 A. 302.

19. *Gya Singh v. Mohammed Soliman*, (1901) 5 C.W.N. 864.

20. *Banke Behari Lal v. Mahadeo Prasad*, 1953 All. 97; 1952 A.L.J. 580;

1952 A.W.R. 527.

21. Taylor, Ev., Sec. 909; Best, Ev., Sec. 586; see also *Ramchandra v. Emperor*, 1933 Bom. 153; 35 Bom. L.R. 174.

22. *Nawab Howladar v. Emperor*, I. L. R. 40 Cal. 891; 23 I.C. 511; *Ram Chandra v. Emperor*, 1933 Bom. 153; 35 Bom. L.R. 174.

pointed out²³ that no argument advanced for the privilege has even risen to a higher level than an appeal to considerations of sentiment; and the conclusion of the Commissioners of Common Law Procedure in their second report was that husband and wife should be competent and compellable to give evidence both for and against one and another on matters of fact, as to which either could be examined as a party in the cause.

The English rule that husband and wife are one in law has not been adopted in its full force under the Indian system of law and certainly not in the Indian Criminal Jurisprudence.²⁴

2. Scope and applicability. The Section inhibits disclosure of marital confidence. It cannot be contravened by spouse through medium of a third person. The section is of general application and anything done contrary thereto should not be heard or accepted in evidence: Note the absence of the words "to the Court," unlike in Section 129, *post*. Anything done contrary to Section 122 should not be heard or accepted in evidence in a court of law. So, if the wife of the accused hands over to her father letters sent to her by accused which are complained to be defamatory, the letters cannot be proved either by the wife herself directly or through her father in whose hands she had voluntarily placed them.²⁵ The section does not bar evidence under other sections of the Act.¹ The section applies to "communications" and not to acts and conduct of a married person.² The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife.³ An incriminating statement made by wife to husband is inadmissible.⁴ It extends also to cases in which the interests of strangers or solely involved as well as those in which the husband or wife is a party on the record. It is, however, limited

23. Wigmore, Ev., p. 3041, Bentham says: 'Hard', 'hardship', 'policy', 'peace of families', 'absolute necessity'—"some such words as these are the vehicles by which the faint spark of reason that exhibits itself is conveyed. These are the leading terms, and these are all you are furnished with; and out of these you are to make applicable as distinct and intelligible a proposition as you can," Rationale, Book IX, Part IV. c. V.
24. M. C. Verghese v. T. J. Ponnun, (1969) 2 S.C.R. 692; (1969) 1 S.C.C. 37; (1970) 2 S.C.J. 353; 1970 S.C. Cr. 199; (1969) 2 Un. N.P. 691; 1968 K.L.T. 904; 1970 M.L.J. (Cr.) 636; 1970 Cr. L.J. 1651; A.I.R. 1970 S.C. 1876 (1878).
25. T. G. Ponnun v. M. C. Verghese, I.L.R. (1967) 1 Ker. 145; 1967 K.L.J. 56; 1966 K.L.T. 1010; 1967 M.L.J. (Cr.) 184; 1961 Cr. L.J. 1511; A.I.R. 1967 Ker. 228.
1. M. C. Verghese v. T. J. Ponnun,

- A.I.R. 1970 S.C. 1876 (1878); Appu v. The State, 1971 Cr. L.J. 615; 1970 L.W. (Cr.) 239; (1971) 2 M.L.J. 53; A.I.R. 1971 Mad. 194. In also R. v. Donaghue, *infra*, see further Rumping v. D. P. P., (1962) 3 All. E. R. 256 at p. 265, per Lord Redcliffe.
2. Ram Bharosey v. State of Uttar Pradesh, 1954 S.C. 704; 55 Cr. L. J. 1755.
3. Ram Bharosey v. State of U. P., A.I.R. 1954 S.C. 704; O'Connor v. Marjoribanks, (1842) 4 M. & Cr. 435; Ram Chandra v. Emperor, 1933 Bom. 153; 35 Bom. L.R. 174; Jowala Sahai v. Emperor, 1914 Lah. 569; 27 I.C. 664; 226 P.L.R. 1915.
4. Ihsanan v. Emperor, 1923 Lah. 40; 81 I.C. 271; 25 Cr. L.J. 783 (confession); Mat. Fatima v. Emperor, 1914 Lah. 380; 25 I.C. 525; 261 P.L.R. 1914.

to such matters as have been communicated *during* the marriage and, consequently, if a man were to make the most confidential statement to a woman *before* he married, and it was afterwards to become of importance in a civil suit to know what that statement was, the wife, on being called as a witness and interrogated with respect to the communication, would, as it seems, be bound to disclose what she knew of the matter.⁵ The privilege extends only to persons who *legally and technically are husband and wife*, and therefore there is none where the marriage is void.⁶ With reference to Sec. 102 of the Evidence Ordinance, 3 of 1901 of the Revised Laws of the Turks and Caicos Islands, 1909, which corresponds to this section, their Lordships of the Privy Council observed: "A statement made outside the witness-box is obviously inadmissible against any one except the person making it, but the section cannot be intended to prevent the police or indeed any third person outside a Court of law listening to the statement of a wife suspected of a crime or the wife from excusing herself or explaining the circumstances, even though the explanation or excuse may implicate her husband. The section is dealing with evidence given in the witness-box, and means that marital disclosures cannot there be given in evidence and against an accused." A statement of the wife which was neither given in evidence nor disclosed as evidence against the husband was therefore held to be admissible for and against the wife.⁷ A document, even though it contains a communication from a husband to a wife or *vice versa*, in the hands of third person, is admissible in evidence: for in producing it, there is no compulsion on, or permission to, the wife or husband to disclose any communication. The section protects the individuals and not the communication, if it can be proved without putting into the box for that purpose, the husband or the wife to whom the communication was made. So where, on a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of his house made there by the police; it was held that the letter was admissible in evidence against the accused.⁸ The law does not protect marital communications as such but only excludes the spouse from being a witness to prove it. Thus, marital communications could be proved by the evidence of the overhearers, even though the wife herself could not have been called to prove them.⁹ If a communication is inadmissible, it makes no difference that no objection was raised at the trial to the reception of the evidence.¹⁰

5. Taylor, *Ev.* s. 909; see Wharton, *Ev.*, Secs. 427—432; Rapalje, *op. cit.*, Sec. 274.

6. See Wigmore, *Ev.* p. 3042; "Their domestic peace may be shattered at any litigant's discretion..... Again, its (the rules) benefits are not lost by the ingenious wrong-doer who brings himself within its formal terms by marrying the witness after service of subpoena and thus creating *ad hoc* domestic peace which is to be jealously safeguarded".

7. *Daniel Youth v. The King*, 1945 P.C. 140 at 143; 1945 A.L.J. 269; (1945) 2 M.L.J. 578; 58 L.W. 401.

8. *R. v. Donaghue*, (1898) 22 M. 1; *Appu v. State*, 1971 Cr. L.J. 615; 1970 L.W. (Cr.) 239; (1971) 2 M.L.J. 53; A.I.R. 1971 Mad. 194 (196) evidence of over-hearers in proof of husband's examinations to wife in confidence.

9. *R. v. Smithies*, (1832) 5 C. & P. 332; *R. v. Simons*, (1834) 6 C. & P. 540; *R. v. Bartlett*, (1837) 7 C. & P. 832; *Hamp v. Robinson*, (1865) 16 L.T. 29, cited by Phipson, 11th Ed., p. 260, para 609.

10. *Bishen Das v. Emperor*, 19 I. C. 1004; 14 Cr. L.J. 316; 27 P. R. 1913.

The privilege continues even after the marriage has been dissolved by death or divorce.¹¹ So, where a woman, who had been divorced and had married another person, was offered as a witness against her former husband to prove a contract which he had made during the coverture, Lord Alvanley rejected the evidence, adding: "It can never be endured, that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever by the misconduct of one party the relations has been dissolved."¹² The words "has been married" in the above section give effect to this *dictum*. The rule being "that nothing shall be extracted from the bosom of the wife which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce, or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation."¹³

There is nothing in Sections 122, 124, 126 of the Act to prevent a person from being asked, whether he had shown a particular asset or income in his income-tax return for a particular year or otherwise. Nor does Section 137 of the Income Tax Act, 1961, prevent a party from being asked a question *simpliciter* whether he had included a particular asset or income in his income-tax-return or inhibit a party from replying to such a question.¹⁴

3. Consent. The communications can be permitted to be disclosed only if the requirements of this section are fulfilled.¹⁵ Under the section, the wife is not permitted to disclose any communication made by the husband during marriage unless the husband who made it consents.¹⁶ The consent to the evidence being given cannot be implied. It is incumbent upon the Court to ask the party against whom the evidence is to be given whether he or she would consent to the evidence being given and not to admit it unless such consent is given.¹⁷

4. "For crime committed against the other." This portion of the section obviously refers to such crimes as assault or bodily injuries, wrongful confinement, etc., by the spouses against the other. There may be also other forms of crime but the gist of this exception is : may be the crime committed by one married person against the other. Possession of an unlicensed pistol by the husband or wife cannot be said to involve any crime committed by the one against the other. The protection given by the section obviously cannot exist in suits between married persons when one of the spouses is litigating against the other or when one of the spouses commits any crime against the other, for to prevent disclosure in that event will be to defeat justice.¹⁸ An offence "against" a person is an offence calculated to injure his person or property or reputation, as in cases of defamation, and does not include an offence against a son, though such offence may cause to the father

11. Taylor, Ev., Sec. 910; Roscoe, N. P. Ev., 18th Ed., 169; Monroe v. Twistleton, Pea. Add, Cas. 221; Averson v. Lord Kinnaird, 6 East, 192, 193; O'Connor v. Marjoribanks, (1842) 4 M. & G. 435; but see Wigmore, Ev., pp. 3054, 3055.
12. Monroe v. Twistleton, supra.
13. Greenleaf, Ev., Sec. 254, 7th Ed., cited in Best, Ev., Sec. 586.
14. A. S. N. M. Idris Ambalam v. M.

Abdul Hakim, 1960 L.W. 63 (64).
15. Kaikobad v. F. Khambatta, 1930 Lah. 280 (2); 120 I.C. 494.
16. Ramchandra v. Emperor, 1933 Bom. 153; 35 Bom. L.R. 174.
17. Nga Tin v. Emperor, 1937 Rang. 347; 171 I.C. 529.
18. Norendra Nath v. State, 1951 Cal. 140; I.L.R. (1952) 1 Cal. 239; 87 C.L.J. 58.

grief of mind.¹⁹ In a case, it was held that, where there was no representative-in-interest who could consent to the disclosure of a communication made by a deceased husband to his wife during their marriage, the widow could not be regarded as being his representative-in-interest for the purpose of giving such consent and could not be permitted to disclose such communication.²⁰

123. *Evidence as to affairs of State.* No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Principle. 2. Scope. 3. Section 91 of Cr. P. C., 1973 and this Section. 4. Distinction between Sections 123 and 124. 5. "Unpublished official records relating to any affairs of State". 5-a. Claim of privilege and duty of court. 6. Officer at the head of the department concerned. 7. Permission of the head of the department, conclusive nature of. | <ol style="list-style-type: none"> 8. Secondary evidence. 9. Section 123 and Order XI, Rule 19, C.P.C. 10. Sections 123 and 162. Nature and extent of enquiry which Court can hold. 11. Mode of claiming privilege. 12. Power and duty of Court and of officer claiming privilege. 13. Procedure to be followed by Court on objection under this section. 14. Claim of privilege under the Act and in writ proceedings—Powers of High Court. |
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1. **Principle.** The principle and the foundation of the rule laid down in this section is concern for the public interest.²¹ The section gives effect to the principle that public interest must be paramount and private interest must give way, when there is any conflict between public and private interests.²²

This section constitutes a serious departure from the ordinary rules of evidence, since a document which is material and relevant is allowed to be withheld from the Court. The general rule is, that all the material documents have to be proved; else the presumptions in Sec. 114 will come into play. But this section prevents any such inference to be drawn where the concerned party is the State. The reason is, that the production of the document would cause injury to public interests; and that when a conflict arises between public interests and private interests, the latter must yield to the former. Therefore, injury to public interests is the sole foundation for the claim under this section. Section 162 authorises the Court, and indeed it

19. *Mst. Fatima v. Emperor*, 1941 Lah. 380 : 25 I.C. 525 : 261 P.L.R. 1914.

20. *Nawab Howladar v. Emperor*, 40 C. 891.

21. *Henry Greer Robinson v. State of South Australia*, 1931 P.C. 254 : 135 I.C. 625 : 35 C.W.N. 1121 : 61 M.L.J. 943 : 34 L.W. 575 ; *I. M. Iall v. Secretary of State*, 1944 Lah. 209 : 216 I.C. 89.

22. *Dinbai v. Dominion of India*, 1951 Bom. 72 : 53 Bom. L.R. 229 : "We are of opinion that if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice", per Pollock, C. B. in *Beatson v. Skene*, (1860) 5 H. & N. 838 at 853 : 29 L.J. Ex. 430 : 8 W.R. 544.

is obligatory on it to decide the validity of the objection to production or admissibility.

This Chapter provides for all the claims of privileges; Sec. 123 deals with only one of such privileges. Under Sec. 124, the Court would have first to determine whether the communication in question has been made in official confidence; if it is not so, the document has to be produced; if it is so, it will be for the officer concerned to decide whether the document should be disclosed or not. The second clause refers to objections both as to production and admissibility of the document. The "matters of State" are identical with "affairs of State". Therefore, Sec. 162 of this Act empowers the Court to inspect the document while dealing with the objection; but this power cannot be exercised when the objection relates to documents having reference to "matters of State" and it is raised under this Section. In such a case, the Court is empowered to take other evidence to enable it to determine the validity of the objection. In holding an enquiry into the validity of the objection under this section, the Court cannot permit any evidence about the contents of the document. If the document cannot be inspected, its contents cannot be proved indirectly. This is not, however, to say that other collateral evidence cannot be produced which may assist the Court to determine the validity of the objection. Anxiety to suppress a document may be natural in an individual litigant, and so it is checked and kept under control by the provisions of Sec. 114. While this Section confers the powers on the head of the department to claim privilege on the ground that disclosure may cause injury to public interest, care should be taken to avoid making the claim for privilege on the ground that the disclosure of the document may defeat the defence of the State. The effect of the document, or its impact on the Minister, is not relevant to make a claim for privilege under this Section, nor the apprehension of public censure. The sole and only test which should determine the decision of the head of the department is *injury to the public interest and nothing else*. Reading Sec. 123 and Sec. 162 together, it is plain that the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide. But the Court is competent, and indeed is bound, to hold a preliminary enquiry to determine the validity of the objection to its production; and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Sec. 123 or not. In this enquiry, the Court has to determine the character or class of the document. If it concludes that the document does not relate to affairs of State, then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to affairs of State, it should leave it to the head of the department to decide whether it should permit its production or not.²³

Sections 123 and 162 should be harmoniously construed. Regard should be had to the fact that the position in India is not identical with that in England and in America. In the latter country, it is within the power of a Court to overrule the claim of privilege on the ground that the disclosure would be essential for the determination of the defence of the accused; if

23. State of Punjab v. Sodhi Sukhdev Singh, (1961) 1 S.C.A. 434: (1961) 2 S.C.J. 691: A.I.R. 1961 S.C. 493, per Majority; State of Orissa

v. Jagan Nath Jeha, (1973) 1 C.W.R. 661: 39 Cut. L.T. 827: I.L.R. (1973) Cut. 427.

the Government insists on the privilege, the Court can acquit the accused. But Sections 123, 124 and 162 of the Evidence Act do not even suggest that an accused is entitled to be acquitted when privilege has been claimed with regard to unpublished official records, relating to any "affairs of State."²⁴ The Court possesses, under Sec. 162, power to disallow a claim of privilege, but in its discretion, it will exercise its power only in exceptional circumstances, when public interest served by the disclosure clearly outweighs that served by the non-disclosure.²⁵ But Kapur, J., held that the correct way is to interpret in the manner, which is in accord with English law, namely, the Court has no power to override ministerial certificate against disclosure. Ministerial discretion should be accepted and it should be neither reviewed, nor overruled.

His Lordship concluded: "The words of Section 123 are very wide; and the discretion to produce or not to produce a document is given to the head of the department and the Court is prohibited from permitting any evidence to be given which is derived from any unpublished documents relating to affairs of State. Section 162 does not give the power to the Court to call for other evidence which will indicate the nature of the document or which will have any reference to the reasons impelling the head of the department to withhold the document or documents. In the very nature of things when the original cannot be looked at and no secondary evidence is allowable the Court will only be groping in the dark in regard to the nature of the document or the evidence. The correct way of looking at the Indian statute, therefore, is to interpret in the manner which is in accord with the English law, *i.e.*, the Court has not the power to override ministerial certificate against production.

"It is permissible for the Court to determine the collateral facts whether the official claiming the privilege is the person mentioned in Section 123, or to require him to file proper affidavit or even to cross-examine him on such matters which do not fall within the enquiry as to the nature of the document or nature of the injury but he may be cross-examined as to the existence of the practice of the department to keep documents of the class secret but beyond that ministerial discretion should be accepted and it should neither be reviewed nor overruled."

Subba Rao, J. observed: "(1) Under Section 162 of the Evidence Act, the Court has the overriding power to disallow a claim of privilege raised by the State in respect of an unpublished document pertaining to matters of State; but, in its discretion, the Court will exercise its power only in exceptional circumstances when public interest demands, that is, when the public interest served by the disclosure clearly outweighs that served by the non-disclosure. One of such instances is where the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. (2) The said claim shall be made by an affidavit filed by the Minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its

24. *State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493 overruling *W. S. Irwin v. D. J. Reid*, I.L.R. 48 Cal. 304: 63 I.C. 467: A.I.R. 1921 C. 282 and *Nazir Ahmad v. Emperor*, I.L.R. 26

Lah. 219 and approving *Ijjatal Talukdar v. Emperor*, I.L.R. (1944) 1 Cal. 410: 209 I.C. 124 A.I.R. 1943 C. 539.

25. *Ibid.*

non-disclosure purports to serve. (3) Ordinarily, the Court shall accept the affidavit of a Minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the Minister and take other evidence to decide the question of privilege. (4) Under no circumstances can a Court inspect such a document or permit giving of secondary evidence of its contents. (5) Subject to the overriding power of the Court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for Courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State: (a) 'records relating to affairs of State' mean documents of State whose production would endanger the public interest; (b) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; (c) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character; (d) in cases of documents mentioned in (c), it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer." Even though there is no legal bar to claim privilege in respect of documents relating to commercial activities of the State where State Government is a party to litigation, the privilege should not be claimed lightly or capriciously.¹

The principle behind Sections 123 and 162 is the same as in English law. Portions of blue book containing rules and instructions for the protection of Prime Minister while on tour can be disclosed provided by doing so wrong impression is not given.²

Since broad principle of public policy underlies Sections 123 and 124, it cannot be disregarded by an arbitrator.³

2. Scope. The privilege conferred by this section is a narrow one and most sparingly to be exercised. "The principle of the rule," Taylor points out in his work on Evidence, Sec. 939, "is concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires." As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. *Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production.* Documents relating to the trading, commercial or contractual activities of a State can be claimed to be protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be "some plain overruling principle of public interest concerned which cannot be disregarded".

1. State of Bihar v. Kasturbhai Lal-bhai, A.I.R. 1978 Pat. 76.

2. State of U.P. v. Raj Narain, 1975 S.L.W.R. 174: (1975) 1 Scr. L. R. 541: (1975) 4 S.C.C. 428:

(1975) 3 S.C.R. 333: A.I.R. 1975 S.C. 665, reversing the decision in Raj Narain v. Indira Nehru Gandhi, A.I.R. 1974 All. 324.

3. I.L.R. (1971) 1 Punj. 391.

But the cases in which this is so must, in view of the sole object of the privilege and especially in time of peace, be rare indeed.⁴ But see the dictum of Subba Rao, J., in *State of Punjab v. Sodhi Sukhdev Singh*.⁵ As regards the grounds for claiming the privilege: "It is not a sufficient ground that the documents are State 'documents' or 'official', or are marked 'confidential'. It would not be a good ground that, if they were produced, the consequences might involve the department or the Government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. It is not enough that the Minister or the department does not want to have the documents produced. The Minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production, except in cases where the public interest would otherwise be damnified, e.g., where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."⁶ It is important to note that the dicta of Lord Simon, L. C., last quoted, that a Judge must accept as final a Minister's decision to exclude evidence, were overruled in *Conway v. Rimmer*,⁷ it being laid down that courts have power to order production and to overrule the Minister's decision to withhold, if necessary, on the principles that follow. In deciding whether a claim of Crown privilege should apply to a document, there are two kinds of public interest to be considered by the court. There is (1) the public interest that harm shall not be done to the nation or the public service, and (2) the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are cases where the nature of the injury which might be done to the public service is so great that no other interest can be allowed to prevail. But there are other cases where the possible injury is much less and the court balances the interests involved in deciding whether to withhold the document or not. When a Minister's certificate suggests that a document belongs to a class which

4. *Henry Greer Robinson v. State of South Australia*, 1931 P.C. 254; see also *Asiatic Petroleum Company, Ltd. v. Anglo-Persian Oil Company*, (1916) 1 K. B. 822 at 829, 830; 85 L.J.K.B. 1075; 114 L.T. 645; 66 S.J. 417; 32 T.L.R. 367; *Smith v. East India Company*, (1841) 1 P. L. 50; 11 L.J. Ch. 71; *Governor General in Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228; 52 P.L.R. 153 (F.B.); *Muhammad Yusuf v. State of Madras*, (1972) 84 L.W. 455 (457) (privilege upheld only in respect of inter-State correspondence); *Raj Narain v. Indira Nehru Gandhi*, A.I.R. 1974 All. 324.

5. A.I.R. 1961 S.C. 493; *Jagannath Dwarkanath Raje v. The State of Maharashtra*, 74 Bom. L.R. 320 (332) (no plea of privilege taken

in the affidavit of the Under Secretary) but in this case it is said that *Duncan v. Cammell Laird & Co., Ltd.*, (1942) 1 All. E.R. 587 was approved in *Conway v. Rimmer*, (1968) 1 All E.R. (H.L.) 874.

6. *Duncan v. Cammell Laird & Co., Ltd.*, 1942 A.C. 625; (1942) 1 All E.R. 587; see *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228 (F.B.); *Jagannath Dwarkanath Raje v. State of Maharashtra*, 74 Bom. L.R. 320 (332); 1972 Mah. L.J. 618 (633, 634); see also *Union of India v. Raj Kumar Gujral*, 1966 D.L.T. 577 (579).

7. 1968 A.C. 910; (1968) 1 All E.R. (H.L.) 874 (privilege in respect of routine reports on a probationer constable).

ought to be withheld, then, unless his reasons are of a kind that judicial experience is not competent to weigh the test is whether the withholding of a document because it belongs to a particular class is really necessary for the functioning of the public service. If a Judge decides that on balance the documents probably ought to be produced, it would generally be best that he should see them before ordering production.⁸ In India, the decision of the Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh*,⁹ in which the dicta of Lord Simon, L. C., in *Duncan v. Cammell Laird and Co. Ltd.*,¹⁰ were approved, still holds the field and has been followed in several decisions of the High Courts. The fact that production of the documents might, in the particular litigation, prejudice the Government's own case or assist that of the other side is no such "plain overriding principle of public interest" as to justify any claim of privilege. The zealous champion of Government's rights may frequently be tempted to take the opposite view, particularly, in cases where the claim against the Government seems to him to be harsh or unfair. But such an opposite view is without justification. In truth, the fact, that the documents, if produced, might have any such effect upon the fortunes of the litigation, is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security.¹¹ The privilege should not be claimed unnecessarily.¹² It cannot be claimed where the records are not required to be produced as evidence.¹³ It is unnecessary to state that a privilege of this nature should be rarely claimed and should only be claimed after the responsible Minister, or the head of the department, has fully satisfied himself that the document whose disclosure is being resisted is really a document relating to the affairs of State and whose disclosure will result in injury to public interests. The scales are always weighed against the subject who fights against Government, and Government should be loath to throw against him more weight in the scales by refusing disclosure of documents which are relevant to the issues in the suit. Government should always bear in mind that it is incumbent upon it to see that there is a fair trial between itself and the subject who is fighting the Government. It should also realise that refusal to disclose material documents makes it difficult or impossible for the subject to make good his allegations against the Government. Government should also bear in mind that the loyalty of its officers to the cause of Government should not prevail to the extent of injustice being done to the subject. Even if disclosure of a document may result in the subject succeeding in getting heavy damages or compensation against the Government, that is no reason why a material document should not be disclosed. The only loyalty, which the section contemplates and which must undoubtedly prevail over private interests, is the loyalty to the State, in the sense that public interests must prevail over private interests, and the disclosure of a particular document should be withheld only if it will damnify public interests. Even though, injustice may be done to a

8. Phipson, 11th Ed., para 565 (p. 242) and para 562 (p. 240) citing *Conway v. Rimmer*, (1968) 1 All E.R. (H.L.) 874 at p. 888 and referring to the article, 'Last word on the last word' by D.H. Clark, 32 M.L.R. 142.

9. A.I.R. 1961 S.C. 493.

10. (1942) 1 All E.R. 587.

11. *Henry Greer Robinson v. State of*

South Australia, 1931 P.C. 254; *Ibrahim Shariff Yazdani v. Secretary of State*, 1936 Nag. 25 : 461 I.C. 668.

12. *Mehtab Singh v. Secretary of State* 1933 Lah. 157 : 143 I.C. 685.

13. *P. Joseph John v. State*, 1953 T.C. 363 : I.L.R. 1952 T.C. 857 : 1952 K.L.T. 417.

private interest, it is much better that such injustice should be done rather than public interest should be injured by the disclosure of a document which is a document relating to the affairs of State.¹⁴ Objection may be taken by the public officer, or by the party interested in excluding the evidence, or by the Judge himself. "No sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown or by the party or when no objection is taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the document of information."¹⁵

The provisions of this section and Section 124, *post*, apply to, and govern trial of election petitions.¹⁶

3. Section 91 of Cr. P. C., 1973 and this section. Sub-section (1) of Section 91 (old Sec. 94) of the Code of Criminal Procedure provides that whenever any Court considers that the production of any document is necessary or desirable for the purposes of any enquiry, trial or other proceeding, such Court may issue a summons to the person in whose possession or power such document is believed to be, requiring him to attend and produce it, or produce it at the time and place stated in the summons. The discretion conferred on the Court by that sub-section is an absolute discretion, the only condition for its exercise being that in the opinion of the Court, the production of the document is necessary or desirable for the purpose of the enquiry, trial or other proceeding before the Court. Certain limitations have, however, been placed on the exercise of the discretion of the Court by sub-section (3) of Section 91 which provides that nothing in that section shall be deemed to affect Sections 123 and 124 of this Act. It follows that the Court cannot, by making an order under sub-section (1) of Sec. 91, set at naught the provisions of Sections 123 and 124 of this Act.¹⁷

4. Distinction between Secs. 123 and 124. See Notes under Sec. 124, *post*.

5. "Unpublished official records relating to any affairs of State". Under this head have been held to come the deliberations of Parliament, the proceedings of the Privy Council, confidential State secrets and papers, communications between public officials in the discharge of their public duties, political communications and the like.¹⁸ It has been doubted, whether a Government Resolution relating to the conduct of a Deputy Collector can properly be described as relating to an affair of State; but it was held that, if it could be so regarded, the Government had, in relying on it in their list of documents, practically conceded permission.¹⁹

14. *Dinbai v. Dominion of India*, 1951 Bom. 72 : 53 Bom. L.R. 229.

15. *Per Wills, J.*, in *Hennessy v. Wright*, (1888) 21 K.B.D. 509, in which all the authorities are reviewed; and it was held that an affidavit of objection by the Secretary of State to production sufficed to justify a refusal to give discovery; see *Jehangir v. Secretary of State*, (1903) 6 Bom. L.R. 131, 160.

16. *C. Subba Rao v. K. Brahmananda*

Reddy, (1966) 2 Andh. W.R. 401 : 1967 Cr. L.J. 691 : A.I.R. 1967 A.P. 155 (171).

17. *Chandubhai v. State*, A.I.R. 1962 Guj. 290 : 1962 Guj. L.R. 833.

18. See text-books cited *post* under Sec. 124, *et al. casae*. The section was wrongly applied in *R. v. Ramadhan*, (1900) 2 Bom. L.R. 329.

19. *Jehangir v. Secretary of State*, I.L.R. 27 Bom. 189 : (1903) 6 Bom. L.R. 131, 160.

Unpublished official records relating to affairs of State may include (1) documents that passed between two States; (2) documents between the State and its own subject; (3) documents between the State and a subject of another State; (4) documents between subjects of more than one State; and (5) documents that passed between Heads of Departments or between Ministers of a State, etc.²⁰ The privilege under this section can be claimed only in respect of *unpublished* official records relating to affairs of State. *It cannot be asserted in relation to documents the contents of which have already been published.*²¹ Unpublished official record means a record which has not been disclosed to any member of the public other than departmental officials. If a document is produced in Court by virtue of the order of Court, it amounts to publication even though production was not a voluntary act.²² Documents which were filed in another case cannot be regarded as unpublished documents.²³ Notings on file, instructions and correspondence part of file is unpublished official record, but not that part which contains orders.²⁴ Departmental confidential notings in official files cannot be called upon if an affidavit filed on behalf of Government shows that public interest would be impaired by the disclosure.²⁵ Letters addressed by the head of a department would not be unpublished documents within the meaning of this section when they reach the addressee.¹ Letters issued by an Under Secretary to the Government but limited for communication to the officers of the Railway were held to be unpublished records.² Where a document in respect of which privilege is claimed is not an official document or is not an unpublished document, the question, whether it relates to affairs of State or not, does not even arise.³ The Evidence Act does not say what documents are to be regarded as unpublished official records relating to affairs of State, or communications made to an officer in his official capacity. The word "unpublished" in the Section relates primarily to the person against whom privilege is claimed under this section. If that person has been permitted lawfully to see those papers, it would be futile for the authorities to claim privilege under this Section.⁴

It is not every official record or register or every official communication which can be regarded as privileged.⁵ In *Duncan v. Cammell Laird and Co., Ltd.*,⁶ Viscount Simon pointed out : "The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced, if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production." So the expression "*affairs of State*", as used in this sec-

20. Iqbal Ahmad v. State of Bhopal, 1954 Bhopal 9 : 55 Cr. L.J. 602.

21. Henry Greer Robinson v. State of South Australia, 1931 P.C. 254 ; Union of India v. Sudhir Kumar, I.L.R. 1963 Cut. 213 : A.I.R. 1963 Orissa 111.

22. I.L.R. (1974) 2 Delhi 51.

23. Khairati Lal v. Delhi Dev. Authority, 1974 Rajdhani L.R. 403.

24. I.L.R. (1973) Hinn. Pra. 459.

25. State of Orissa v. Jagannath Jena, (1977) 2 S.C.C. 165 : A.I.R. 1977 S.C. 2201.

1. Mehtab Singh v. Secretary of State, 1933 Lah. 157 : 143 I.C. 685.

2. Mutsadi Lal v. Union of India, 1955 Hyd. 61 : I.L.R. 1955 Hyd. 256.

3. Emperor v. Ch. Raghunath Singh, 1946 Lah. 459 : 223 I.C. 412.

4. Union of India v. Sudhir Kumar, I.L.R. 1963 Cut. 213 : A.I.R. 1963 Orissa 111.

5. In re Mantubhai Mehta, 1945 Bom. 122, 124 : 219 I.C. 290 : 46 Cr. L.J. 562 : 46 Bom. L.R. 802.

6. 1942 A.C. 624 at 636.

tion, has a restricted meaning. It may be defined as matters of a public nature in which the State is concerned and the disclosure of which will be prejudicial to the public interest or injurious to national defence, or detrimental to good diplomatic relations.⁷ The diary of a foot constable who was shadowing the movements of a suspect,⁸ papers relating to a departmental enquiry,⁹ the material on the basis of which order of compulsory retirement was passed,¹⁰ records evidencing unauthorised intervention by Government in a pending judicial or quasi-judicial matter,¹¹ statements made to and recorded by a Forest Range Officer in the course of investigation,¹² statements made to a police officer during investigation and not reduced to writing when used at trial of an offence not under investigation when the statements were made,¹³ record kept at the police station about the activities of a particular person and the reports about him made by the Sub-Inspector to the Inspector, or by the Inspector to the Superintendent of Police,¹⁴ an accident register,¹⁵ copies of Account Books, made during an investigation by police¹⁶ and an entry in a register of postings showing that certain Customs Preventing Officers were ordered to be at their station,¹⁷ were held to be not relating to affairs of State and therefore not privileged. But a Jail Diary Book¹⁸, a report submitted to the Inspector-General of Police under the Jail Manual,¹⁹ and character rolls and confidential reports of Government employees²⁰ were held to be unpublished official records relating to affairs of State and therefore privileged under this section. Statements recorded in the police diary are ordinarily privileged and cannot be given to outsiders except under Sec. 162, Criminal Procedure Code, and that is limited to the case of an accused who is being tried for an offence under investigation at the time when the statement was made.²¹ Reports made by one public officer to another in the discharge of his official duties, would come both under Secs. 123 and 124. These documents relate to "public affairs," and would also become privileged documents, if the public officer dealing with them considers that their disclosure would not be in public interests, of which however the concerned

7. Governor-General-in-Council v. Pect Mohd. Khuda Bux, 1950 E.P. 228 (F.B.); see also R. M. D. Chamarbaghwalla v. Y. R. Parpia, 1950 Bom. 230; 52 Bom. L.R. 291; Dinbai v. Dominion of India, 1951 Bom. 72.
8. Mohan Singh v. Emperor, 1940 Lah. 217; 188 I.C. 717; 41 Cr. L.J. 667.
9. Ibrahim Sheriff Yazdani v. Secretary of State, 1936 Nag. 23; 161 I.C. 668; Harbans Sahai v. Emperor, (1912) 15 I.C. 77; 13 Cr. L.J. 445; 16 C.W.N. 431; D. Weston v. Pearey Mohun Dass, 1914 Cal. 396; I.L.R. 40 Cal. 898; 23 I.C. 25; 18 C.W.N. 185.
10. A. Cement Co. v. Labour Court, 1973 Lab. I.C. 952 (Bom.).
11. Emperor v. Rais Rasulbakhsh, 1944 Sind 145; I.L.R. 1944 Kar. 175; 214 I.C. 173; 45 Cr. L.J. 740.
12. Kallappa Udayan v. Emperor, 1937 Mad. 492; 168 I.C. 867; 38 Cr. L.J. 619; (1937) 1 M.L.J. 613.
13. Baijnath Bhatnagar v. Mohammad Din, 1936 Lah. 359; I.L.R. 17 Lah. 472; 166 I.C. 501.
14. Teja Singh v. Emperor, 1945 Lah. 293; 232 I.C. 234.
15. In re A. Venkanna, 1940 Mad. 240; 189 I.C. 816; 41 Cr. L.J. 817.
16. Bhaiya Saheb Dajibabhan v. Ram Nath Ram Pratap, 1938 Nag. 358.
17. Rokun Ali v. Emperor, 1918 Cal. 138; 45 I.C. 284; 19 Cr. L.J. 524; 22 C.W.N. 451.
18. Emperor v. Chowdhry Raghunath Singh, 1946 Lah. 459; 223 I.C. 412; 48 P.L.R. 41.
19. King-Emperor v. Nanda Singh, 1925 Oudh. 450; 89 I.C. 387; 26 Cr. L.J. 1347.
20. State v. Surjit Singh, (1975) 1 Serv. L.R. 433; 1975 Serv. L.J. 489; I.L.R. (1976) 1 Punj. 541; A.I.R. 1975 Punj. 11.
21. Jagannath Rao v. Emperor, 1935 Nag. 23; see also Emperor v. Dharan Vir, 1933 Lah. 498; 142 I.C. 854; 34 Cr. L.J. 464.

public officer would be the sole judge.²² The report of an enquiry departmentally held over the loss of goods in transit owing to fire, could be held to be a privileged document in the context of impending legislation between the Railway and the consignee.²³

For the privilege in respect of the Income-tax Papers, see Sec. 54 of the Income-tax Act, 1922 (see now Sec. 137, Income-tax Act, 1961). On police papers see *In re Barjorji*,²⁴ and *Teja Singh v. Emperor*,²⁵ on departmental Papers see *Harbans v. Emperor*¹ and *Weston v. Peary Mohun Dass*.²

Inspection report by Reserve Bank, of a scheduled bank, and the correspondence between the various branches of the Reserve Bank regarding their affairs and documents relating to affairs of State and the claim for privilege in respect of these documents is justified. The fact that, in the first instance, the Government had sent some documents for the inspection of the court to satisfy itself on its claim to privilege does not preclude the Government from subsequently claiming privilege against court's inspection regarding the same documents if they still remained unopened along with the other documents of the same nature.³

Administrative instructions and guidance notes secretly given to various governmental authorities at different levels relate to affairs of State.⁴ As observed by the House of Lords in *Duncan v. Cammell Laird and Co., Ltd.*,⁵ 'Practice of keeping a class of documents secret is necessary for the proper functioning of the public service'.

A document which embodies minutes of discussion between a private party and a State Minister and indicates the advice given by that Minister is protected under the section and if such a document is produced and protection under the section is claimed, the court cannot compel the State to produce it.⁶ Orissa High Court held that the opinion of various officers regarding the appointment of a candidate to a public post contained in file and examination papers of such candidate are not privileged documents.⁷ But the Supreme Court seems to disapprove of this view and has observed that this view of Orissa High Court should not be followed as precedent as it seems to have been so decided only due to insufficient affidavit.⁸

No privilege can be claimed in respect of Register No. 8 of the Registration Department as it cannot be said to be a record relating to affairs of State or public policy.⁹

22. *State of Andhra Pradesh v. Appanna*, (1962) 1 Andh. W.R. 256.

23. *N. E. Railway v. Ram Lal Golcha*, A.I.R. 1960 Pat. 489.

24. A.I.R. 1932 Bom. 196; 33 Cr. L. J. 797; 139 I.C. 628.

25. 222 I.C. 234; A.I.R. 1945 Lah. 293.

1. 13 Cr. L.J. 445.

2. 18 C.W.N. 185; 23 I.C. 25; A.I.R. 1914 C. 396; I.L.R. 40 C. 898.

3. *Reserve Bank of India v. Central Government Industrial Tribunal*, Delhi, (1959) 1 L.L.J. 539.

4. *Sujit Kantha Neogi v. Union of India*, 1970 Lab. I.C. 1573; A.I.R.

1970 Assam 131 (136).

5. 1942 A.C. 624; (1942) 1 All E.R. 587.

6. *Kotah Match Factory v. State of Rajasthan*, I.L.R. (1969) 19 Raj. 461; A.I.R. 1970 Raj. 118 (124) (F.B.).

7. *State of Orissa v. Jagannath Jena*, (1975) 41 Cut. L.T. 363.

8. *State of Orissa v. Jagannath Jena*, (1977) 2 S.C.C. 163; A.I.R. 1977 S.C. 2201.

9. *Lagan Singh v. Khada Singh*, 1969 All. Cr.R. 322 (324); 1969 A.W. R. (H.C.) 494.

When a court in the exercise of its jurisdiction under Article 226 of the Constitution of India calls for the records for scrutiny and perusal by it, it cannot be said that the court is permitting anybody to give evidence from 'unpublished records relating to any affairs of State'.¹⁰

A conciliator's report to Government in an industrial dispute is neither a privileged nor a confidential document. A party cannot, therefore, be denied access to a copy of the report.¹¹

A decision of Cabinet relates to affairs of State and privilege can be claimed in its respect.¹²

There is no question of privilege involved granting to accused copies of statements made during investigation of a different case (suicide).¹³ But State can claim privilege in respect of unpublished records relating to affairs of State, even though the interest of the accused may be adversely affected, because public interest overrides private interest.¹⁴

Departmental inquiry papers are not unpublished documents relating to affairs of State.¹⁵ When the probity of the conduct of a public servant is in issue, the State cannot screen his conduct on the ground that it is an "affair of State" and is therefore sacrosanct.¹⁶ When proceedings of the Departmental Promotion Committee and confidential reports, and file and minutes are called for, only confidential reports are privileged and not the other documents.¹⁷

The Public Service Commission is an independent entity under the State Constitution and cannot be said to be the Government or a department of the Government so as to claim privilege under Sections 123 and 124.¹⁸

Where in respect of proceedings under Sec. 46 of the U. P. Zamindari Abolition and Land Reforms Act, 1950 (U. P. Act 1 of 1951), the State Government (Petitioner) claimed to have the proceedings reopened on the ground that it had no knowledge of the Raja's (Respondent's) objections and the application was resisted by the respondent alleging that the petitioner had knowledge of the proceedings and had actually participated in them

10. Sri Rambhotla Ramanna v. State of A. P., (1970) 2 Andh. W.R. 323: A.I.R. 1971 A.P. 196 (207).
11. Haralal Sadashcorao Bande v. State Industrial Court, Nagpur, 68 Bom. L.R. 731: 1966 Mah. L.J. 1060: (1967) 1 Lab. L.J. 168: A.I.R. 1967 Bom. 174 (181).
12. Orient Paper Mills v. Union of India, 83 Cal. W.N. 328: A.I.R. 1979 Cal. 114.
13. Suryamani Tarai v. State of Orissa, I.L.R. 1967 Cut. 538: 33 Cut. L.T. 576: 1967 Cr. L.J. 1552: A.I.R. 1967 Orissa 189 (190).
14. State v. V. D. Kumar, 1974 B.B. C.J. 993: 1975 Pat. L.J.R. 40: 1974 B.L.J.R. 796: 1975 Cr. L.J. 1411.
15. Harbans Sahai v. State, (1912) 16 C.W.N. 431; D. Weston v. Peary Mohan Dass, (1913) I.L.R. 40 Cal. 898 (918); Ibrahim Shariff Yazdani v. State, A.I.R. 1936 Nag. 25; Niranjana Dass Sehgal v. State of Punjab, 70 Punj. L.R. 65: 1968 Lab. I.C. 804: I.L.R. (1968) 2 Punj. 171: A.I.R. 1968 Punj. 255 (261).
16. Niranjana Dass Sehgal v. State of Punjab, *supra*.
17. Ram Gopal v. Union of India, 1972 Serv. L.R. 258: I.L.R. (1972) 1 Delhi 446.
18. M. A. Jauhari v. The State of Jammu and Kashmir, 1971 Kash. L.J. 350 (354).

before the Compensation Officer and calling for discovery and production of documents in the possession of the State Government and its officers for proving the State Government's knowledge of the objections filed by the respondent, the Supreme Court decided that the Compensation Officer should decide in the light of its decisions in *State of Punjab v. Sodhi Sukhdeo Singh*,¹⁹ and *Amar Chand v. Union of India*,²⁰ whether the claim of privilege raised by the State Government should be sustained or not, after appropriate affidavits by the heads of the departments are filed and the claim of privilege is properly examined.²¹

The document, in respect of which the State claims privilege, must belong to a class, the non-disclosure of which was necessary for the proper functioning of public service and the disclosure of which would affect the freedom and candour of expression of public servants and would thus cause injury to public interest.²² Documentary evidence showing the steps taken for selection to the post of Chief Secretary cannot be said to pertain to affairs of State.²³

A matter in respect of which ('affairs of State' in the instant case) privilege is claimed and sustained cannot be brought in as evidence in the case.²⁴ When the contents of the documents have been disclosed and set out in affidavit there is no purpose in the plea of privilege.²⁵

The mere fact that the record by a police officer, under departmental instructions, of a public speech is confidentially forwarded to his superior, does not render the document privileged under this section read with Section 162 post.¹

In an election petition where the evidence sought to be given is derived from unpublished official records relating to 'affairs of State', it is within the province of the court to determine whether a certain document sought to be let in evidence relates to 'affairs of State'.² Mental notes and reports of C.I.D. Officers deputed to cover election meetings given from the point of view of maintenance of peace and security, are privileged.³

The trial court is bound to consider objectively whether the material placed before it justified the inference that the documents in question related to the 'affairs of State' and to arrive at its own decision.⁴

19. (1961) 2 S.C.R. 371 : A.I.R. 1961 S.C. 493.

20. 67 P.L.R. 90 : A.I.R. 1964 S.C. 1658.

21. Sub-Divisional Officer, Mirzapur v. Raja Sri Niwas Prasad Singh, (1966) 2 S.C.R. 970 : (1966) 1 S.C.A. 556 : I.L.R. (1966) 1 All 851 : A.I.R. 1966 All 1164.

22. H. L. Rodhey v. Delhi Administration, 1969 Lab. I.C. 974 : A.I.R. 1969 Delhi 246 (257).

23. N. P. Mathur v. State of Bihar, 1971 Pat. L.J.R. 471 : 1971 B.L.J.R. 918 : (1971) 1 Serv. L.R. 335 : I.L.R. (1971) 50 Pat 689 : A.I.

R. 1972 Pat. 93.

24. A. Sanjeevi Naidu v. The Madras State Transport, I.L.R. (1969) 2 Mad. 289 : (1970) 1 M.L.J. 300 (317).

25. Ibid.

1. R. Ramasrinivasan v. P. Shanmugam, 1968 M.L.W. (Cr.) 211 : A.I.R. 1969 Mad. 378 (379).

2. C. Subba Rao v. K. Brahmananda Reddy, (1966) 2 Andh. W.R. 401 : 1967 Cr. L.J. 691 : A.I.R. 1967 A.P. 155 (172).

3. I.L.R. (1972) 2 Delhi 291.

4. Joti Prasad Sharma v. Additional Civil Judge, 1967 A.L.J. 469 (470).

5-A. Claim of privilege and duty of court. When privilege is claimed, the court has to determine the character or class of the document in respect of which the privilege is claimed. If it comes to the conclusion that the document does not relate to 'affairs of State', then it should reject the claim for privilege and direct its production. If, on the other hand, it comes to the conclusion that the document relates to 'affairs of State', it should leave it to the head of the department concerned to decide whether he should permit its production or not. In the instant case, the privilege claimed fell in the latter category. Therefore, it was for the head of the department and not the court to assess whether disclosure will injure the public interest.⁵ Where the court permits inspection of documents after hearing arguments on the claim for privilege, the claim will be deemed to have been rejected.⁶

6. Officer at the head of the department concerned. The State Government, where it is a party, has to decide whether it should claim privilege in respect of documents of which inspection or production is sought. It can authorise any of its officers to swear an affidavit on its behalf. It is only where the State Government is not a party that the contention may be raised that the privilege should be claimed by the head of the department concerned.⁷ Ordinarily, the head of the department will mean the officer who is in control of the department and in whose custody records of that department remain. It will usually be the Secretary to the State Government in State Departments or the Secretary to the Government of India in the departments of the Government of India. In England, it is the political head or the Minister who has been held to be the head of the department, but under the Evidence Act it is either the Minister or the permanent head of department who has the right to grant or withhold permission to the production of a document relating to affairs of State.⁸ The use of the word 'concerned' in relation to the head of the department shows that the affidavit must contain a sworn statement by the head of the department in whose custody the documents happen to be at the time when discovery and production is claimed.⁹ The question as to who is the head of the department depends on the particular facts of each case.¹⁰ Affidavits filed by permanent heads of departments, like Secretaries to the Government, claiming privilege on the ground that documents related to affairs of State are sufficient

5. *Hira Singh v. Union of India*, 72 P.L.R. (D) 250 (256) : 1970 Lab. I.C. 593 : 1970 Serv. L.R. 223 ; 1970 D.L.T. 402.

6. *B. S. Sindhu v. Union of India*, (1971) 1 Ser. L.R. 600 (H.P.) ; relying on *State of Punjab v. S. S. Singh*, A.I.R. 1961 S.C. 493.

7. *Miss Rajul Rao Ji Bhai Shah v. Provincial Government of C. P. and Berar*, 1951 Nag. 212 : I.L.R. 1950 Nag. 690.

8. *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228 : 52 P.L.R. 153 (F.B.) ; see also *State of Madras v. Sayed Abdurahiman Baffaki Thangal*, 1954 Mad. 926 : (1954) 2 M.L.J. 236 ;

Public Prosecutor v. D. Venkata Narasayya, 1957 Andh. Pra. 486 : I.L.R. 1957 Andh. Pra. 174 : 1957 Cr. L.J. 943 : (1957) 1 Andh. W. R. 106 : (1957) 1 M.L.J. (Cr.) 19 ; *State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493 ; *Union of India v. Sudhir Kumar*, I.L.R. 1963 Cut. 213 : A.I.R. 1963 Orissa 111.

9. *I. M. Lall v. Secretary of State*, 1944 Lah. 209 : 216 I.C. 89.

10. *Public Prosecutor v. D. Venkata Narasayya*, 1957 Andh. Pra. 486 : I.L.R. 1957 Andh. Pra. 174 : 1957 Cr. L.J. 943 : (1957) 1 Andh. W. R. 106 : (1957) 1 M.L.J. (Cr.) 19.

compliance with the terms of this section. It is not correct to say that the Secretary to the Government in charge of the department was not an officer at the head of the department within the meaning of this section. Accordingly an affidavit from the Minister-in-charge cannot be insisted on by the Court.¹¹ Similarly, the Registrar of Co-operative Societies is the head of the department of Co-operation.¹² But, the Secretary of the Board of Education, West Bengal, was held to have no power to claim privilege in respect of a document called the Reviewer's Report which was submitted to the Board and was with its President.¹³ In *Union of India v. Indradeo*,¹⁴ it has been held that the Railway Minister or Secretary to Railway Ministry is head of the department. But the head of the personnel department of a railway is not the head of the department of the Government. This decision has been affirmed by the Supreme Court in *Union of India v. Indradeo*.¹⁵ The words 'officer at the head of the department' are wide enough to include an officer who officially functions as the head of the department though not formally designated as such.¹⁶

7. Permission of the head of the department, conclusive nature of.

This section puts a ban on the evidence derived from unpublished official records relating to any affairs of State. The witness is prevented from stating, and the Court from hearing, any evidence of that character from unpublished official records except with the permission of the head of the department concerned. The words 'who shall give or withhold such permission as he thinks fit' at the end of this section clearly indicate that the head of the department, who is in possession of the document, has an absolute discretion in the matter of giving the permission. The Court cannot inspect the documents in order to determine whether they are unpublished official records relating to any affairs of State, but the jurisdiction of the Court to determine whether a particular document is an unpublished official record relating to any affairs of State is not taken away by the provision enacted in Sec. 162 of the Act. It is for the Court, and Court only, to decide whether a document falls within that category. In order to determine whether the document falls within the category, the Court can have regard to all the circumstances, barring, of course, the inspection of the document itself. But that apart, there is no fetter on the jurisdiction of the Court looking at whatever materials are available for the purpose of ascertaining whether the document is an unpublished official record relating to any affairs of State. The occasion for claiming privilege under this section only arises where it is sought to give any evidence derived from unpublished official records relating to any affairs of State. That is

11. *I. M. Lall v. Secretary of State*, A.I.R. 1944 Lah. 209 : 216 I.C. 89; and *Lady Dinbai Dinshaw Petit v. Dominion of India*, A.I.R. 1951 Bom. 72 : 53 Bom. L.R. 229, relied on. *The State of Madras v. Saved Abdurahiman Baffaki Thangal*, (1954) 2 M.L.J. 236.
12. *Public Prosecutor v. D. Venkata Narasayya*, 1957 Andh. Pra. 486.
13. *Devaljyoti Burman v. D. Nalinakshya*

Sanyal, 1954 Cal. 216 : 55 Cr. L.J. 624.

14. A.I.R. 1963 Pat. 129 : 1963 B.L.J.R. 156.

15. A.I.R. 1964 S.C. 1118 : (1964) 1 S.C.W.R. 399; 1965 S.C.D. 1 : (1965) 1 S.C.J. 520 : 1965 M.L.J. (Cr.) 762.

16. *Reserve Bank of India v. Sudeshan Kumar Khanna*, 1970 D.L.T. 121 (127).

a condition precedent.¹⁷ But the section is silent as to who is to decide whether the condition precedent has been fulfilled. There is divergence of opinion as to who is to judge whether a particular document is an unpublished record relating to the affairs of State and protected from production. The Lahore High Court has taken the view that the head of the department is the exclusive judge of the fact whether the unpublished records are protected from production on the ground of their being related to affairs of State and that if the ban has been imposed by the head of the department on the ground that the documents related to affairs of State, no person belonging to that department would have the right to give evidence in regard to any matter to which the documents relate and no Court would be competent to order the person who has appeared on behalf of the department to act to the contrary. In other words, the discretion to remove the ban vests in the head of the department and in none else. But when the document itself is asked to be produced and it is not merely a question of giving any evidence derived from unpublished official records, one must go to Sec. 162, Evidence Act.¹⁸ Paragraph 1 of that section directs a witness summoned to produce a document in his possession or power to bring to Court although he may have any objection in regard to (a) its production, or (b) its admissibility. The validity of either of these objections has, according to the concluding words of paragraph 1, to be determined by the Court. Paragraph 2 permits the Court to inspect the document for the purpose of adjudicating upon its validity, if the objection is in regard to its production with this important exception that it is precluded from inspecting it, if the document refers (and as there is no other means of verifying it by the Court at that stage whether the document is or is not of that category, it must mean 'or is alleged to refer') to affairs of State. Since the Court is debarred under the statute from inspecting it and secondary evidence of the document cannot be admitted for the purpose of deciding the objection as to its production,¹⁹ the Court cannot possibly adjudicate on the question whether the document refers to matters of State. The Court must stay its hands as soon as a claim is made that the document refers to matters of State. The decision that the document cannot be produced will certainly be a decision of the Court; but the Court can, if it is satisfied that the claim has been made by or under instructions of the person who can put forward such a claim, pronounce no other order but allow the privilege.²⁰

17. *Ijjatali Talukdar v. Emperor*, 1943 Cal. 539; 209 I.C. 124; 45 Cr. L.J. 82; 47 C.W.N. 928; *State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493.

18. *Nazir Ahmad v. Emperor*, 1944 Lah. 434; I.L.R. 1945 Lah. 219; 46 P.L.R. 273; see also I. M. Lall v. Secretary of State, 1944 Lah. 209; 216 I.C. 89; *Emperor v. Raghunath Singh*, 1946 Lah. 459; 223 I.C. 412; 48 P.L.R. 41. But see *State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493, overruling *Nazir Ahmad v. Emperor*, I.L.R. 1945 Lah. 219; A.I.R. 1944 Lah. 434.

19. *Abdur Razak v. Gouri Nath*, 5 I.

C. 714; *Jehangir M. Cursetji v. Secretary of State*, I.L.R. 27 Bom. 189; 5 Bom. L.R. 30.

20. *Nazir Ahmad v. Emperor*, 1944 Lah. 434; I.L.R. 1945 Lah. 219; 46 P.L.R. 273; see also I. M. Lall v. Secretary of State, 1944 Lah. 209; 216 I.C. 89; *Emperor v. Raghunath Singh*, 1946 Lah. 459; 223 I.C. 412; 48 P.L.R. 41. But see *contra*: *R. M. D. Chamarbaghwalla v. Y. R. Parpia*, 1950 Bom. 230; 52 Bom. L.R. 231; *In re Manthubhai Mehta*, 1945 Bom. 122; 219 I.C. 2903; 46 Bom. L.R. 802; *Lady Dinbai Dinsbaw Petit v. Dominion of India*, 1951 Bom. 72; 53 Bom. L.R. 229.

In a Full Bench case of the East Punjab High Court also, it has been held that, in the case of a document relating to affairs of State, the course of inspecting the document is not open to the Court, but this does not mean that the Court's right to adjudicate upon the validity of the objection is completely taken away thereby. The Court has still the right to take other evidence and determine whether the objection taken by the witness who was ordered to produce the document or the head of the department is indeed a valid objection. In other words, the Court has a right to satisfy itself that the document does in fact relate to affairs of State.²¹ Similarly in *Ijjatali Talukdar v. Emperor*,²² Das, J., of the Calcutta High Court observed: "It is only in case of documents relating to affairs of State that the Court cannot inspect the document. It only means that in cases of such documents one of the methods or means by which the Court is to decide the question is not available to it. The duty of deciding the question is still on the Court under the first paragraph of the section. In case of documents relating to affairs of State it may be difficult for the Court to decide the question, yet, it need not be necessarily impossible for the Court to do it. Ordinarily, no difficulty will arise because heads of departments or public officers are not expected to act capriciously, and ordinarily the Court will accept their statement". Reading the case-law on the subject in conjunction with the provisions of the Evidence Act, Vivian Bose, J., of the Nagpur High Court, laid down the following rules as being applicable in India when the State is not a party to the case:

"(1) That all documents called for must actually be produced in Court, provided of course they are in the possession and power of the person who is summoned to produce them.

(2) That in the case of State documents the privilege should ordinarily be claimed by the witness who is summoned to produce them, though the Court may and should raise the objection of its own motion if it is satisfied either from the nature of the document called for or otherwise, as for example, from a letter written by a responsible public officer in response to the summons to produce, that it is an unpublished official record relating to an affair of State or communication made to a public officer in official confidence.

(3) That when objection is taken, the Court is precluded from inspecting the document but is entitled, if it thinks fit (that is to say, it is not bound), to examine other evidence to determine its nature and character though not its contents.

(4) Ordinarily, it will be enough if the head of the department concerned certifies, not necessarily in a sworn statement, but in a letter or other document produced and proved by the witness concerned or in some other way (e.g. under Sec. 57, Evidence Act, where the signatures of certain public officers need not be proved) that the document is an unpublished official record relating to an affair of State or a communication made to a public officer in official confidence.

21. *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228 at 234: 52 P L R 153 (F.B.).

22. 1945 Cal 339: 209 I.C. 124: 47 C.W.N. 928. Approved in *State of Punjab v. Sodhi Sukhdev Singh*, A. I.R. 1961 S.C. 493.

(5) But the Court is not bound to accept that as final and may require further evidence to satisfy itself that the document in question is really of that nature bearing in mind, however, the observation of the Judicial Committee in *Robinson v. State of South Australia*,²⁸ that :

'The Judge in giving his decision, will be careful to safeguard the interests of the State, and will not in any case of doubt resolve the doubt against the State without further inquiry from the Minister,'

or hear the head of the department.

(6) If, after all this, the Court decides that the document is not privileged, it must be tendered in evidence, although in view of the possible disastrous public consequences which may flow from disclosure, it would be right and proper to allow the State a reasonable time for taking such steps as it thinks fit to have the matter set right.

(7) On the other hand, if the Court considers that the document is a State document of the nature described above, then it cannot be admitted in evidence unless the party who seeks its production produces the permission of the head of the department or the public officer concerned. The burden is on the party calling for the document, and the decision of the head of the department or the public officer concerned to give or to withhold consent is in that event final."²⁴

In short, it is for the Court to decide, if the documents relate to the affairs of the State while it is for the head of the department concerned to decide if the disclosure would be against public interest.²⁵ The Supreme Court has examined the question in all its bearings in *State of Punjab v. Sodhi Sukhdev Singh*,¹ and the view of the majority of their Lordships was that in holding an enquiry into the validity of the objections under Sec. 123, the Court cannot permit any evidence about the contents of the document. Subba Rao, J., however was, of the opinion that, under Sec. 162, the Court has the overriding power to disallow a claim of privilege raised by the State in respect of unpublished documents pertaining to matters of State; but in its discretion the Court will exercise its power only in exceptional circumstances when public interest served by the disclosure would clearly outweigh that served by the non-disclosure. Kapur, J., expressed the view that the court is prohibited from permitting any evidence to be given which is derived from any unpublished documents relating to the affairs of State. The Court has no power to override a ministerial certificate against production. Ministerial discretion should be accepted and it should neither be reviewed nor overruled.² The finding of a Court regarding the validity or otherwise of claim of privilege can be revised by High Court in revision.³

23. 1931 A.C. 701 at p. 725 : A.I.R. 1931 P.C. 254.

24. *Bhaiya Saheb Dajibabhai v. Ram Nath Ram Pratap*, 1938 Nag. 358.

25. *Iqbal Ahmad v. State of Bhopal*, 1954 Bhopal 9 ; 1974 Rajdhani L. R. 342 : I.L.R. (1970) 1 Delhi 879 ; *Durga Prasad v. Parveen*, 1975 M.P.L.J. 801 : 1975 Jab. L.J. 440 : A.I.R. 1975 M.P. 196 ; *State v. V.D. Kumar*, 1974 B.B.C. J. 993 : 1975 Pat. L.J.R. 40 :

1974 B.L.J.R. 796 : 1975 Cr. L. J. 1411.

1. A.I.R. 1961 S.C. 493.

2. *State of Punjab v. Sodhi Sukhdev Singh*, (1961) 2 S.C.R. 371 : (1961) 1 S.C.A. 434 : (1961) 2 S.C.J. 691 : 1961 M.L.J. (Cr.) 731 : (1961) 2 Andh. W.R. (S.C.) 203 : (1961) 2 M.L.J. (S.C.) 203 : A. I.R. 1961 S.C. 493.

3. I.L.R. (1974) 2 Delhi 51.

8. **Secondary evidence.** If the original of the document is privileged, surely that privilege cannot be got over by litigants getting hold of copies surreptitiously of the document from the Secretariat and asking the Court to look at the secondary evidence of the document.³⁻¹ The exclusion when allowed is absolute, so that in the case of privileged documents no secondary evidence is admissible.⁴

9. **Section 123 and Order XI, Rule 19, C. P. C.** Section 123 is a special provision of law, and hence prevails over the provisions of Order XI, Rule 19, C. P. C., which, though enacted later, cannot be held to repeal the former. Consequently, the court is not entitled to inspect a document which is privileged nor even to put questions to the head of department or any other witness directly or indirectly to reveal its contents.⁵ The point was raised in *State of Punjab v. Sodhi Sukhdev Singh*⁶; it was contended that the provisions of Sec. 162 of this Act can be invoked only where a witness has been summoned to produce a document and a privilege is claimed by him in respect of it and that the said provisions cannot be invoked where the Court is called upon to decide the validity of the claim of privilege at the stage of inspection of the document. In other words, where the State is a party to the suit and an application for inspection of document is made against it by its opponent, and a claim for privilege is put forward by the State, the Court is entitled under Order XI, Rule 19(2) to inspect the documents for the purpose of deciding as to the validity of the claim of privilege. This position was seriously disputed. It was observed by the majority of the Judges that it is true that Order XI, Rule 19(2) provides that in dealing with a claim of privilege it shall be lawful for the Court to inspect the document for the purpose of deciding the validity of the claim of privilege. It was observed: "The provisions of the Act are intended to apply to all judicial proceedings in or before any Court; that in terms is the result of Sec. 1 of the Act and the proceedings before the Court under Order XI, Rule 19 are judicial proceedings to which *prima facie* Sec. 162 would apply. Similarly, Sec. 4(1) of the Code of Civil Procedure provides, *inter alia*, that in the absence of any specific provisions to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law in force, that is to say, in the absence of any provisions to the contrary, the Evidence Act would apply to all the proceedings governed by the Court. Besides, it would be very strange that a claim for privilege to which Order XI, Rule 19(2) refers is allowed to be raised under Sec. 123 of the Act, whereas the procedure prescribed by the Act in dealing with such a claim by Sec. 162 is inapplicable and Section 123 of the Act applies and the claim for privilege can be raised under it; *prima facie* there is no reason why Sec. 162 should not likewise apply. But apart from these general considerations, the relevant scheme of the Code of Civil Procedure itself indicates that there is no substance in the argument raised.... Order XXVII prescribes the procedure which has to be adopted where suits are filed by or against the Government.... The Minister who is the political head of the department or the

3-1. *Lady Dinbai Dinshaw Petit v. The Dominion of India*, 1951 Bom. 72 : 55 Bom. L.R. 229 ; see also *Jaffarul Hossain v. Emperor*, 1932 Cal. 468 : I.L.R. 59 Cal. 1046 : 138 I.C. 351.
4. *Heine v. Bentinck*, 2 B. & R. 150; *Dawkins v. Rokeby*, L.R. 8 Q.B.

255 ; *Hennessey v. Wright*, (1891) 21 B.B.D. 509.

5. *Lakhuram Hariram v. Union of India*, A.I.R. 1960 Pat. 192 : 1959 Pat. L.R. 277.
6. A.I.R. 1961 S.C. 493 : (1961) 2 S.C.R. 371.

Secretary who is its administrative head is not the Government.....there can be little doubt that where a privilege is claimed at the stage of the inspection and the Court is required to adjudicate upon its validity, the relevant provisions of the Act under which the privilege is claimed as well as the provisions of Sec. 162 which deal with the manner in which the same privilege has to be considered are equally applicable; and if the Court is precluded from inspecting the privileged document under the second paragraph of Sec. 162, the said provisions would apply as much to a privilege claimed by the State through its witness at the trial as a privilege similarly claimed by it at the stage of inspection". Their Lordships held that the provisions of Order XI, Rule 19(2) must, therefore, be read subject to Sec. 162 of the Act.

10. Sections 123 and 162. Nature and extent of enquiry which Court can hold. The Supreme Court has held in *State of Punjab v. Sodhi Sukhdev Singh*,⁷ that though under Sections 123 and 162 of this Act, the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question, that matter being left for the authority concerned to decide, the Court is competent to hold a preliminary enquiry and determine the validity of the objection to its production and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State under this section. In view of the fact that this section confers wide powers on the head of the department, the heads of the departments should act with scrupulous care in exercising their right under this section and should never claim privilege either only or even mainly on the ground that the disclosure of the document in question may defeat the defence raised by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of State may be prejudiced by disclosure must always be distinguished from considerations of expediency which may persuade the head of the department to raise a plea of privilege on the ground that if the document is produced, the document will defeat the defence made by the State.⁸ The Court must decide in the light of decisions in the said two Supreme Court decisions whether the claim of privilege raised by the State should be sustained or not. That must be done after appropriate affidavits by heads of departments concerned are filed and claim of privilege is properly examined.⁹ The claim of privilege must strictly fall within the four corners of the provisions of law. A court cannot, without deciding the claim of privilege have its contents proved indirectly.¹⁰

When privilege is claimed with regard to a certain document, it is for the court to determine in the first instance whether the document relates to affairs of State. This decision rests entirely with the court. The court under Section 162, post, will not inspect the document although it is brought to court in order to determine whether it relates to affairs of State. It will, however, have power to determine the point by entertaining collateral

7. A.I.R. 1961 S.C. 493: (1961) 2 S.C.R. 371.

8. *Amar Chand v. Union of India*, A.I.R. 1964 S.C. 1658.

9. *Sub-Divisional Officer v. Raja Sri Niwas Prasad Singh*, (1966) 2 S.C.

R. 970: (1966) 1 S.C.A. 556: A.I.R. 1966 S.C. 1164.

10. *Union of India v. Raj Kumar*, A.I.R. 1967 Punj. 387: 1966 D.L.T. 577 (578) (claim for privilege disallowed).

evidence or evidence *aliunde*.¹¹ Patna High Court, however, held that court should examine document for itself and then decide about the validity or otherwise of the claim.¹² It is submitted that this view of Patna High Court is opposed to the principle laid down by Supreme Court in *State of Punjab v. Sodhi Sukhdev Singh* (*supra*).

11. Mode of claiming privilege. The privilege should be claimed generally by the Minister-in-charge who is the political head of the department concerned; if not, the Secretary of the department who is the departmental head should make the claim; and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary, the court may, in a proper case, require the affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are a series of documents included in a file it should appear from the affidavit that each one of the documents whose disclosure is objected to have been duly considered by the authority concerned.¹³ Privilege should be claimed when document is asked for, but failure to do so will not make the claim *mala fide* when made after the final order to produce document is passed.¹⁴

12. Power and duty of court and of officer claiming privilege. The persons summoned to produce the document must bring it into Court. The Court will decide on the validity of the objection and if the objection is overruled the document will have to be admitted in evidence under this section or Section 124. The Court must not exercise its powers so as to occasion the mischief which the law guards against. If the privilege is claimed under Sec. 124, the Court may inspect the document in its discretion. The final decision of both the departmental head and of the Judge is to be governed only by the consideration whether the disclosure would injure the public interest.¹⁵

11. *State of Punjab v. Sodhi Sukhdev Singh*, (1961) 2 S.C.R. 371 : A.I.R. 1961 S.C. 493, according with the decision of the Privy Council in *H.G. Robinson v. State of South Australia*, 1931 A.C. 704 at p. 725 : A.I.R. 1931 P.C. 254; *Sujit Kantha v. Union of India*, A.I.R. 1970 Assam 131 (135).
12. *Union of India v. Lalli*, A.I.R. 1971 Patna 264.
13. *State of Punjab v. Sodhi Sukhdev Singh*, (1961) 2 S.C.R. 371 : (1961) 1 S.C.A. 434 : (1961) 2 S.C.J. 691 : 1961 M.I.J. (Cr.) 731 : (1961) 2 Andh. W.R. (S.C.) 203 : (1961) 2 M.L.J. (S.C.) 203 : A.I.R. 1961 S.C. 493 (reiterated in *Amar Chand v. Union of India*, 67 Punj. L.R. 90 : A.I.R. 1964 S.C. 1658); *Joti Prasad Sharma v. Addl. Civil Judge, Dehra Dun*, 1967 A.L.J. 463 : A.I.R. 1968 All. 42 (43)

- (claim made casually without considering the several documents on the file individually claim disallowed); *Dattaram Sadashiv v. The State*, 74 Bom. L.R. 550 (559) (the affidavit of the Secretary did not satisfy the requirement); *State of Orissa v. Jagannath Jena*, (1973) 1 Cut. W.R. 661 : 39 Cut. L.T. 827 : I.L.R. (1973) Cut. 427; *State of Bihar v. V. D. Kumar*, 1974 B.B.C.J. 993 : 1974 B.L.J.R. 796 : 1975 Pat. L.J. 440 : 1975 Cri. L.J. 1411; *Ram Nath v. State of Haryana*, 1972 S.L.R. 352 (Punj.); *Raj Narayan v. Smt. Indira Nehru Gandhi*, A.I.R. 1974 All 324.
14. *Union of India v. Lalli*, A.I.R. 1971 Pat. 264.
 15. *Kalliat v. State of Kerala*, I.L.R. (1963) 1 Ker. 346 : A.I.R. 1964 Ker. 274.

13. Procedure to be followed by Court on objection under this section. It has been settled (in *State of Punjab v. Sukhdev Singh*,¹⁶ that where an objection is raised regarding the document being a privileged one under this section, the Court has no jurisdiction to inspect the document first and then to determine the question as to whether the document is a privileged one or not. The proper course is to first hold an enquiry and then determine the character, class or the nature of the document concerned and if the Court finds that the document belongs to the "noxious" class, it may stay its hands and refer the document to the head of the department and leave it to his discretion to produce the document. If, however, the Court finds that the document is not privileged and does not relate to the affairs of the State, it can direct the document to be tendered in evidence and overrule the objection on that score. Where, the objection relates to a matter under this section, the Court cannot inspect the document before determining the question as to whether the document is privileged or not. The jurisdiction given to the Court to decide the validity of the objection covers not only the objections raised under Section 123 but all other objections as well. The jurisdiction conferred on the Court to deal with the validity of an objection as to the production of a document is not illusory or nominal; it has to be exercised in cases of objections raised under this section also by calling for evidence permissible in that behalf though in holding the enquiry into the validity of the objections under this section, the Court cannot permit any evidence about the contents of the document. If the document cannot be inspected its contents cannot indirectly be proved; but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of the objection. The Court is competent and is bound to hold a preliminary enquiry and determine the validity of the objections raised, but only when the document is summoned and brought before the Court. All that the Court has to see is what is the nature and the character of the document and whether it relates to the affairs of the State, without inspecting the document, but only on the affidavits and the other materials. If necessary, the Court may call further affidavit and may also summon the head of the department for cross-examination on this point. The privilege which is claimed by the State or by the head of the department is not utilised to override the considerations other than those of public interest.¹⁷ If the Court comes to conclusion on enquiry that a document does not relate to the affairs of State, the claim of privilege ought to be rejected irrespective of the fact that by doing so the defence of the State in a suit may be defeated.¹⁸

14. Claim of privilege under the Act and in writ proceedings—Powers of High Court. Whereas under the Evidence Act, the court's power is limited to determining whether a particular document relates to affairs of State, and the power or discretion of deciding the disclosure of the contents of such a document will injure public interest is entrusted to the officer at the head of the department. Article 226 of the Constitution of India must be interpreted as entrusting both those powers to the High Courts which will take into account, and have due regard for, the case of the head of the

16. (1961) 2 S.C.R. 371 : A.I.R. 1961 S.C. 493.

17. *State v. M. A. Beg.*, A.I.R. 1963 J. & K. 20 relying on *State of Punjab v. Sodhi Sukhdev Singh*, (1961)

2 S.C.R. 371 : A.I.R. 1961 S.C. 493.

18. *Orient Paper Mills v. Union of India*, 83 Cal. W.N. 328 : A.I.R. 1979 Cal. 114.

partment that, in his opinion, a disclosure of any of the contents thereof may injure public interest. Unlike in the case of ordinary civil litigation where the very production of a document as evidence in a case entitles all parties to inspect the same, the calling of documents by a High Court under article 226 of the Constitution of India, being primarily for the satisfaction of judicial review, the mere fact that the court has looked into a document, does not *per se*, entitle the parties to look into it. Whether and if so, to what extent, the contents or any part of the contents of a document may be disclosed in the interest of justice to any of the parties is a matter exclusively within the jurisdiction of the High Court.¹⁹ In appeal to Supreme Court new plea of privilege during arguments was not allowed.²⁰

124. *Official communications.* No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Section 3 ("Evidence").

Section 162 (Production of document referring to matters of State).

Section 165, Pro. 2 (Judge's power to put questions or order production).

Act V of 1889 (Disclosure of Official Secrets); 21 Geo. III, c. 70, Sec. 5 (Prosecutions against Governor-General or Member of Council, Production of Order in Council).

Taylor, Ev., Secs. 946-948-A; Roscoe, N. P. Ev., 172, 173; Best Ev., Sec. 578; Steph., Dig., Art. 112; Bray on Discovery, 547, 549; Powell, Ev., 9th Ed., 242, 243, 273, 274; Phipson, Ev., 11th Ed., 240, 241; Wharton, Ev., Secs. 604-A-605; Rapalje's op. cit., Sec. 276; Hageman's Privileged Communications, Secs. 301-317.

SYNOPSIS

1. Principle.
2. Scope.
3. Applicability.
4. Distinction between Secs. 123 and 124.
5. Public officer.
6. Communication made to him in official confidence.
7. Claim to privilege—Procedure—Power and duty of Court and of officer claiming privilege.

1. **Principle.** This section is really supplementary to the previous section and gives effect to the same principle of public policy; prejudice to the public interest by disclosure.²¹ If it were not so, it would be impossible to communicate freely.²² The objection is sometimes based upon the view

19. Medhi Ali v. Union of India, (1972) 1 Mys. L.J. 339 (346, 347).

20. Western India Match Co. v. Workmen, (1973) 2 Lab. I.C. 1602.

21. Lady Dinbai Dinshaw Petit v. Dominion of India, 1951 Bom. 72; 53 Bom. L.R. 229; Governor-General-in-Council v. Peer Mohammad Khuda Bux, 1950 E.P. 228; 52 P. J.R. 153 (F.B.); Wadeer v. East

India Company, 9 D.C.M. & G. 191 (production does not depend on the question of the person called on to produce, being a party to the suit or not); Moodalay v. Morton, (1785) 1 B.C.C. 469.

22. Smith v. East India Company, (1841) 1 Ph. 55; The Bellerophon, (1874) 44 L.J. Adm. 5; Hennessy v. Wright, (1888) 21 Q.B.D. 509.

that the public interest requires a particular class of communication, with, or within, a public department to be protected from production on the ground that the candour and completeness of such communication might be prejudiced, if they were even liable to be disclosed in subsequent litigation rather than upon the contents of the particular document itself.²³ If the giving of such evidence would be injurious to the public interest, the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice. The public officer concerned, and not the Judge, is to decide whether the evidence referred to in these sections shall be given or withheld, because the Judge would be unable to determine this question without ascertaining what the document or communication was and why the publication or disclosure of it would be injurious to the public interest—an enquiry which cannot take place in private and which, taking place, may do all the mischief which it is proposed to guard against.²⁴ It has, however, been held²⁵ that it is for the Court to decide whether or not a particular document, for which privilege is claimed under this section, is a communication made to a *public officer in official confidence*. If the Court decides that it was so made, then it cannot compel its disclosure and the public officer himself is the sole judge whether its disclosure would or would not be in the public interest. But, it has also been held¹ that an officer's refusal to disclose a document on grounds of public policy is final and that it is not competent for the Court to call for and examine the secret archives of the State in order to satisfy itself of their confidential nature.

2. Scope. The section relates only to public officers. It enacts that no public officer shall be compelled to disclose communications made to him, if—

- (1) those communications were made to him in official confidence, and
- (2) the public officer considers that the public interests would suffer by the disclosure.

It follows that public officers can be compelled to disclose communications made to them, if—

- (1) they were not made in official confidence, or
- (2) the public officer does not consider that the public interests would suffer by the disclosure.

This section applies to communications made in *official confidence* to a *public officer*, and he need not be head of the department who cannot be compelled

23. *Duncan v. Cammell Laird & Co.*, 1942 A.C. 624; 111 L.J.K.B. 406; (1942) 1 All E.R. 587; 166 L.T. 366; 58 T.L.R. 242; 86 L.J. 287.

24. *Per Pollock, C. B.* in *Beatson v. Skene*, (1860) 5 H. & N. 838, 853; as to the meaning of the word "compelled" in this section, see *R. v. Gopal Doss*, I.L.R. (1881) 3 Mad. 271 at 277; *Nagaraja Pillai v. Secretary of State*, 1915 Mad. 1113; I.L.R. 39 Mad. 304; 26 I.C. 723.

25. *Collector of Jaunpur v. Jamna Prasad*, 1922 All. 37; I.L.R. 44 All. 360; 66 I.C. 171; 20 A.L.J. 140; *Governor-General-in-Council v. Peer*

Mohammad Khuda Bux, 1950 E.P. 228; 52 P.L.R. 153 (F.B.); see also notes post. In *Phipson*, 9th Ed., p. 197, the English rule is stated to be that when the head of the department by person or proxy objects, the Judge will not compel the production nor decide upon the validity of the objection, unless it is a palpably futile one. See *Lal Tribhawan v. Deputy Commissioner, Fyzabad*, 1918 Oudh 225; 47 I.C. 225.

1. *Lal Tribhawan v. Deputy Commissioner, Fyzabad*, 1918 Oudh 225

to give evidence but is at liberty to waive the objection. The basis of prohibition is that it would restrain the freedom of communications made to public officers or by one public officer to another and would thereby injure public interest. If such communications were compelled, there will be a danger that the usual channels of detection of crime or of evasion of taxes would get blocked up. It is for the Court to decide as to whether such communication was in official confidence or not. The phrase "Public Interests" is not a happy formula. Requirements of the due administration of justice are themselves in the highest degree of public interest. Nevertheless, it is no less important to good order and Government that those concerned in all departments of public administration should not be embarrassed or restricted in the loyal discharge of their duties by the fear that what they may confidentially record in the course of their duties should thereafter be made public.² Inter-departmental communications are privileged and cannot be compelled to be produced, unless they be those which had passed between an officer of a State and a private citizen.³ Names of spies, decoys and informers should not be divulged, because that would tell upon the investigation of crimes.⁴

The privilege extends only to a communication upon the subject to which the privilege extends and the privilege can be claimed in exercise of the right or safeguard of the interest which claims the privilege.⁵

Where certain addresses and cables are not communications to a public officer in official confidence, that officer cannot properly claim privilege under Section 124.⁶

In a case in which the State itself is a party, the court must be satisfied that the mind of a responsible officer of the Government has been applied to the question as to whether the safety of the public interest warrants giving or withholding the information. The court must also be convinced that the privilege is not claimed to avoid inconvenient disclosures which may tell against its own side in the litigation or as a matter of mere departmental routine.⁷

The section is designed to prevent the knowledge of official papers, that is to say, papers in official custody, beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. It would normally include all officers, including clerks of superior officers, and might also apply to non-officials to whom such papers were disclosed on the understanding, express or implied, that the

2. *Auten v. Rayner*, (1958) 1 W.L.R. 1300; (1958) 3 All E.R. 566.
3. *K. S. Venkatesan v. State of Madras*, (1959) 1 M.L.J. 288; 72 M.L.W. 340.
4. *State of U. P. v. Randhir*, A.I.R. 1959 All. 727; 1959 All. L.J. 519.
5. *Chaman Lal v. State of Punjab*, (1970) 3 S.C.R. 913; 1970 S.C. Cr. R. 452; (1971) 1 S.C.J. 112; 1970 Cr. L.J. 1266; 1971 M.L.J. (Cr.) 82; 1971 M.L.W. (Cr.) 21; A.I.R. 1970 S.C. 1372 (1375).

6. *Mohd. Hussain Umar v. K. S. Dalip Singh*, (1970) 1 S.C.R. 130; 1970 S.C. Cr. R. 76; 1970 S.C.R. 58; 1969 U.J. (S.C.) 356; 72 Bom. L.R. 774; 1970 M.L.J. (Cr.) 68; 1970 Cr. L.J. 9; A.I.R. 1970 S.C. 45 (52).
7. *Tivtha Ram v. Government of J. & K.*, A.I.R. 1954 J. & K. 11; *State v. Midland Rubber and Produce Co.*, 1971 K.L.J. 278; A.I.R. 1971 Ker. 228 (229).

knowledge should go no further. Since the object is to prevent the disclosure of things not known outside that circle which is in confidence, the section has no application when once there has been a disclosure to a member of the public to whom the contents of such papers have not been made known in confidence.⁸ The object of the section is to prevent disclosure to the detriment of the public interest, and the test to be applied under the section is that the communication was made to a public officer in official confidence. Therefore, the privilege cannot be claimed merely on the ground that its disclosure would cause a scandal in the office.⁹ The section applies only to communications made to a public officer in official confidence. Consequently, statements in proceedings under Section 7 of the Police Act could be summoned and used to contradict a witness who has participated in the previous as well as in the instant enquiry.¹⁰ The reason is that these statements had already stood disclosed at least to the other parties, when the enquiry was on. Moreover the statements were made in the presence of complainants, and hence there could be no question of their having been made in official confidence.¹¹ Privilege can be successfully claimed only with regard to confidential reports or communications. It cannot be claimed with regard to statements of witnesses recorded during the police investigations or documents like site-plans prepared during the investigation.¹² This section refers to official communications made in confidence. When witnesses make statements before the police officer openly, and not in confidence and also when the police officer inspects the locality and prepares a site-plan, it cannot be said that by admitting such evidence communications made in official confidence are being disclosed. Neither Section 123 nor this section places any restriction on the admission of statements of witnesses examined during police investigation or the site-plan, etc., prepared by the police officer even though they are contained in the case diary. Therefore though the case diary containing the confidential communications or reports is privileged yet the statements of witnesses recorded during the police investigations or other allied matters contained therein are not.¹³ In the absence of a definite allegation, the defence is not entitled to make a fishing inquiry into the papers or records of the prosecuting agency. A witness from the Posts and Telegraphs Department cannot be compelled to disclose the record of telegraphic addresses unconnected with the transaction in question.¹⁴

An Industrial Tribunal is bound by the provisions contained in this section. In consequence, an inspection report by the Reserve Bank, of a scheduled bank, might be withheld, since its disclosure might occasion even panic. The Tribunal is therefore not entitled to examine the documents themselves for the purpose of being satisfied on the point whether they relate to the "affairs of State."¹⁵

8. *Chandradhar Tewari v. Deputy Commissioner*, Lucknow, 1939 *Oudh* 65: I.L.R. 14 Luck. 351: 178 I. C. 982.

9. *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228: 52 P.L.R. 153 (F.B.).

10. *Jilka v. State*, A.I.R. 1959 All. 513: 1958 All. L.J. 588.

11. *Ibid.*

12. *Mithabirji v. Prem Narain*, A.I.R. 1965 A. 494: 1964 A.L.J. 989.

13. *Ibid.*

14. *Lakshmandas Chaganlal Dhatia v. State*, 69 Bom. L.R. 346: 1968 Cr. L.J. 1584: A.I.R. 1968 Bom. 400 (424).

15. *Reserve Bank of India v. Industrial Tribunal*, (1959) 1 Lab. L.J. 539.

3. **Applicability.** The provisions of Sections 123 and 124 apply to and govern the trial of election petitions.¹⁶

4. **Distinction between Secs. 123 and 124.** Section 123 relates to evidence as to *affairs of State*, whereas this section relates to disclosure of any *communications* made to a *public officer* in *official confidence*. This section is confined to public officers, though who are such is not defined. The former embraces everyone. Section 123 leaves the discretion with the head of the department; Section 124 makes the officer himself the judge of the propriety of waiving the privilege. In no case has the Court any authority to compel disclosure, if the objection is raised by the proper authority.¹⁷ There is a great deal of difference between Section 123 and Section 124, though they resemble each other in a number of points. There may be cases in which the two sections overlap. Communications may have been made to a public officer which may relate to affairs of State in which case it would be Sec. 123 which would apply and not Sec. 124, but there may be cases in which the communication made in official confidence is not made in a case where affairs of State are involved but where public interests would otherwise suffer by the disclosure. That might be a case, for example, relating to some departmental letter. It may relate to commission of an offence. In such a case, unless it is covered by Sec. 123, the Court may inspect the document or take other evidence to enable it to determine on its admissibility but otherwise the duties of the Court are the same. The Court cannot substitute its opinion for the opinion of the head of the department in case of Sec. 123 or the opinion of the public officer in case of Sec. 124.¹⁸ The principle can be stated thus: if a document is attracted by the terms of Sec. 123, the Court cannot inspect it, although it can take other evidence to determine its character. If, however, it falls under Sec. 124, the Court can inspect it to determine the claim of privilege. As regards the question whether a disclosure will or will not be prejudicial to public interest the head of the department in Sec. 123 or the officer concerned in Sec. 124 is the sole judge. The opinion of the official concerned is conclusive only when he claims privilege on the ground that the public interests would suffer and not on any other ground.¹⁹

But the exercise of the privilege should not be abused and made a cloak to conceal the truth from the court.²⁰ The privilege can be claimed only by public servants and not private parties.²¹

16. C. Subba Rao v. K. B. Reddy, (1966) 2 An. W.R. 401 : 1967 Cr. L.J. 691 : A.I.R. 1967 A.P. 155 (171).

17. Norton, Ev., 309; Jehangir v. Secretary of State, (1903) 6 Bom. L. R. 160; see also Governor-General-in-Council v. Peer Mohammad Khuda Bux, 1950 E.P. 228 : 52 P.L.R. 153 (F.B.) : see notes to Sec. 162, post. Also see Jetha Nand v. State of Rajasthan, 1972 Cri. J. 1496 (Raj.).

18. Governor-General-in-Council v. Peer

Mohammad Khuda Bux, 1950 E.P. 228 at 245 : 52 P.L.R. 153 (F.B.), per Soni, J.

19. State of Andhra Pradesh v. Appanna, 1952 Andh. W.R. 36.

20. Excelsior Film Exchange v. Union of India, 69 Bom. L.R. 878 : 1968 Mah. L.J. 126 : A.I.R. 1968 Bom. 322 (325).

21. Ramaswami Chettiar v. Mahadevan, K. J., 1968 M.L.J. (Cr.) 684 : (1968) 2 M.L.J. 393 : 1968 M.L.W. (Cr.) 4 : 23 S.T.C. 255.

Where a document falls within the ambit of this section, the duty of the Court is to inspect it and determine whether the communication was made in official confidence and whether the public interest will suffer by the disclosure of the contents of the document within the meaning of this section. But if the document comes within the ambit of Section 123, the Court cannot inspect it, although it can take other evidence to determine the character attributed to the document.²²

When a police report about the petitioner, whose services were terminated by the State on the basis of the report, was produced in Court, without prejudice to the claim of privilege under Sec. 123 and this section, it was held that the Court could refuse the petitioner access to the report on the ground that it would react to the detriment of the public interest.²³

5. Public officer. The term "public officer" is not defined in the Act. It cannot be given the same meanings as have been assigned to this term in Sec. 2, Civil Procedure Code. The term "public officer" in this section must, therefore be construed to be an officer with public, as opposed to private duties, who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interest.²⁴ For the purposes of this section, the Court of Wards is a Government office and an officer of the Court of Wards is a public officer.²⁵ The duties of the Vice-Chancellor of a University are undoubtedly of public character and the Vice-Chancellor, when performing these public duties, is acting as a public officer.¹ The Public Officer contemplated by this section need not be the head of the department.²

6. Communication made to him in official confidence. It is not every official communication that can be regarded as privileged under the section. A communication in official confidence requiring protection under this section must be such as to necessarily involve the wilful confiding of secrets with a view to avoid publicity by reason of the official position of the person in whom trust is reposed, under an express or implied promise of secrecy. The test must be, whether the disclosure would result in betrayal of the person confiding by the publication of the communication having regard to the nature thereof.³ Courts have adopted a basic principle, for deciding whether a particular document is a communication made in official confidence to a public officer or not, viz., whether the document produced or the statement made was under the process of law or not. If the former

22. *Ganga Ram v. Union of India*, A. I.R. 1964 Pat. 444.

23. *V. Dasan v. State of Kerala*, A.I.R. 1965 Ker. 63 : I.L.R. (1964) 1 Ker. 374.

24. *Chandradhar Tewari v. Deputy Commissioner of Lucknow*, 1939 Oudh 65 ; *University of Punjab v. Jaswant Rai*, 1946 Lah. 220 : I.L.R. 1946 Lah. 561 : 225 I.C. 169 : 48 P.L.R. 16.

25. *Chandradhar Tewari v. Deputy Commissioner of Lucknow*, 1939 Oudh 65 : 178 I.C. 982 : I.L.R. 14 Luck. 351.

1. *University of Punjab v. Jaswant Rai*, 1946 Lah. 220 : I.L.R. 1946 L. 561 : 225 I.C. 169.

2. *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228.

3. *Bhalchandra Dattatraya Bubane v. Chanbasappa Mallappa Warad*, 1939 Bom. 237 at 247 : 183 I.C. 225 : 41 Bom. L.R. 391 ; *P. P. Andhra Pradesh v. Pocku Syed Esmail*, (1972) 2 An. L.T. 202 : (1973) 1 An. W.R. 31 : 1973 Mad. L.J. (Cri.) 52 : 1973 Cri. L.J. 931.

is the case, Courts have held that it would be difficult to say that a document produced or statement made under the process of law is a communication made in official confidence. If, on the other hand, a document is produced or a statement is made in a confidential departmental enquiry not under process of law but for the gathering of information by the department for guiding them in the future action if any they have got to take, it would be a case of communication made in official confidence.⁴ A communication made to a public officer voluntarily is not one made in official confidence.⁵ Thus in returns submitted to an Income Tax Collector any statement made to him or any order that may be made by him, cannot be said to be made in official confidence within the meaning of this section.⁶ Communications made by the Income Tax Assessing Officers to their superior authorities in regard to assessment and penalties are not privileged.⁷ The privilege cannot be claimed in respect of a statement recorded in the course of an investigation by the Forest Officer.⁸ Statements made by witnesses in an investigation made by a Circle Inspector under the Code of Criminal Procedure cannot be considered to be statements made in official confidence.⁹ The basic principle in all these cases is that the enquiry or investigation was under process of law. On the other hand, a confidential report submitted, as a result of a confidential enquiry held under the orders of a railway officer to enable him to take departmental action, is a privileged document falling within the purview of this section.¹⁰ The words "communication in official confidence" import no special degree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in the performance of their duties. The question whether such communication was made in the course of such performance is for the Court to decide.¹¹

A statement made to the Collector, by a person applying to have his estate taken under the Court of Wards, setting forth his financial position, that is to say, the details of his property and liabilities, was held to be a communication made to a public officer in official confidence within the meaning of this section, and could not therefore be used as an acknowledgment of any liability mentioned therein.¹² A Government Resolution containing opi-

4. *In re* Killi Suryanarayana Naidu, 1954 Mad. 278 : 66 L.W. 927.

5. *B. R. Srinivasan v. Brahma Tantra Mutt*, A.I.R. 1960 Mys. 186.

6. *Bhalchandra Dattatraya Bubane v. Chanbasappa Mallappa Warad*, 1939 Bom. 237 : 183 I.C. 225 ; *Venkatachela v. Sampathu*, (1908) 32 M. 62 : 1 I.C. 705 : 19 M.L.J. 263. referred to in *Collector of Jaunpur v. Jamna*, 1922 All. 87 : 66 I.C. 171 : I.L.R. 44 A. 360, and see *Jadoram v. Bultoram*, (1899) 26 C. 281, but see *Mythili Ammal v. Janki Ammal*, 1940 Mad. 161 : I.L.R. 1940 Mad. 329 : 189 I.C. 722 ; *Jetha Nand v. State of Rajasthan*, 1972 Cri. L.J., 1486 (Raj.).

7. *Union of India v. Shiv Shanker Sita Ram*, 1975 Tax. L.R. 337 : 1974 U.P.T.C. 36 : (1974) 93 I.T.R.

523 : (1975) 2 I.T.J. 33.

8. *Kaliappa Udayan v. Emperor*, 1937 Mad. 492 : 168 I.C. 867 : 38 Cr. L. J. 619.

9. *Natha Apparaq v. N. Sūryaprakasa Rao*, 1951 Mad. 864 (1) : I.L.R. 1952 Mad. 170 : 52 Cr. L.J. 984 (1) ; *Emperor v. Kistayya*, 1935 M. W.N. 1282 ; *Emperor v. Rasulbux*, 1942 Sind 122 : I.L.R. 1942 Kar. 252.

10. *Emperor v. Mir Mahomed Shah*, 1935 Sind 50 : 153 I.C. 651 : 36 Cr. L.J. 412.

11. *Nagaraja Pillai v. Secretary of State*, 1915 Mad. 1113 : I.L.R. 39 Mad. 304 : 26 I.C. 723 ; see also cases cited therein.

12. *Collector of Jaunpur v. Jamna Prasad*, 1922 All. 87 : 66 I.C. 171 : I.L.R. 44 A. 360.

nions of Government officers including a legal adviser is covered by this section.¹³

A report by a police officer under Sec. 202 of the Criminal Procedure Code, not being a voluntary one on his own initiative, but which it is his duty to make, is absolutely privileged.¹⁴ A complaint to a police officer from its very nature as a statement, which the complainant is prepared later, called upon to do so, to substantiate upon oath, is absolutely privileged.¹⁵ A report by a Tahsildar to the Collector was held to be confidential and therefore privileged.¹⁶ Communications, though made to official persons, are not privileged *when they are not made in the discharge of any public duty*; and so letters by a private individual to the Postmaster-General, complaining of the conduct of a postal official, were held not to be protected.¹⁷ In view of the reasons for which demi-official letters are usually written, a demi-official letter addressed by one officer by name to another officer by name must be held to have been written in official confidence.¹⁸ What is stated by a subordinate officer to his superior within the hearing of various people at a conference cannot be said to be a communication in official confidence and can not be privileged under this section.¹⁹ The record kept at the police station about the activity of a suspect and reports made by the Sub-Inspector of Police from time to time, or even by the Inspector to the Superintendent of Police have been held to be not privileged.²⁰ But it has been held that the subject-matter of police diaries would ordinarily be privileged under this section.²¹ Statements recorded by a Railway Station Master in an enquiry held by him and forwarded to the Divisional Superintendent were held to be not protected.²² "Communication made in official confidence" presupposes that the communication is of such a nature as will affect the interests of the State as such and not of a department which has established contractual relations with a subject. It is not every document for which privilege can be claimed or which can be said to have been made in official confidence

13. *Sursingji v. Secretary of State*, 1926 Bom. 590; 99 I.C. 293; 28 Bom. L.R. 1213.

14. *Veni Madho Prasad Singh v. Wajid Ali*, 1937 All. 90; I.L.R. 1937 All. 390; 167 I.C. 433.

15. *Bapalal v. Krishnaswami Iyer*, I.L.R. 1941 Mad. 332; (1940) 2 M.L.J. 536; A.I.R. 1941 Mad 226; *Vettappa Kone v. Muthukaruppa*, 1941 M.L.J. 200; A.I.R. 1941 Mad. 26; *Sanjeevi Reddi v. Koneji Reddi*, I.L.R. 49 Mad. 315; 50 M.L.J. 460; A.I.R. 1926 Mad. 521; *Madhab Chandra v. Nirode Chandra*, I.L.R. (1939) 1 Cal. 574; 43 C.W.N. 775; 184 I.C. 637; A.I.R. 1939 Cal. 477 (so no action for defamation is maintainable); *K. Ramdass v. P. Samu Pillai*, (1968) 81 M.L.W. 505; (1969) 1 M.L.J. 338; 1969 M.L.J. (Cr.) 379; see also *Watson v. M'Ewan*, L.R. (1905) A.C. 480. But see *contra*: *Marog Sathasiv v. Godubai Narayanarao*, A.I.R. 1959 Bom. 443

preferring to follow an earlier decision of the Bombay High Court in *Gangappa Gouda v. Basavayya*, A.I.R. 1943 Bom. 167.

16. *In re Makky Moithu*, 1943 Mad 278; 206 I.C. 25; 44 Cr. L.J. 482.

17. *Blake v. Pilford*, 1 M. & Rob. 198.

18. *Chandradhar Tewari v. Deputy Commissioner*, Lucknow, 1989 Oudh 65; I.L.R. 14 Luck. 351; 178 I.C. 98; *Ghulam Mohiuddin v. State of Jammu & Kashmir*, A.I.R. 1961 J & K. 20 (the privilege is not admissible in respect of communication made to the Government by the party to an action).

19. *Rokim Ali v. Emperor*, 1918 Cal 138; 45 I.C. 284; 22 C.W.N. 451.

20. *Teja Singh v. Emperor*, 1945 Lah 293; 222 I.C. 234.

21. *Emperor v. Dhavam Vir*, 1933 Lat 498; 142 I.C. 854.

22. *Emperor v. Bhagwati Prasad*, 192 Oudh 543; 6 O.W.N. 237.

the bare fact that the production of the documents might adversely tell upon the fortunes of the litigation would not be sufficient to hold that the documents were made in official confidence and that their disclosure would affect adversely the interests of the State.²³

It is not possible to infer from the words 'official confidence' that the section is intended to protect only communications by one official to another. There may be cases in which a private person may make a communication to a public officer in 'official confidence' and it cannot be said that the public officer cannot claim privilege in respect of the same.^{23-a} The nature of the enquiry should be determined first and then the statement of every witness considered individually to find out whether it was made in official confidence. In the instant case, the statements given by the witnesses before the District Revenue Officer were not given in official confidence because the enquiry was open and the witnesses were examined in the presence of others.²⁴ The question whether a party would be entitled to copies of judgments in an inquiry under Police Standing Order 145 would depend on the facts and circumstances of each case.²⁵

7. Claim to privilege—Procedure—Power and duty of Court and officer claiming privilege. The section lays down the rule of public policy and the limits within which the privilege can be exercised, that is, the character and quality of the privilege. It has been well recognised in England that the privilege is a narrow one and must sparingly be exercised.¹ According to Taylor, the principle of the rule is public safety, and accordingly, the rule of exclusion is applied no further than the attainment of that object requires.² That is not the test under the Indian law. *The question that arises under this section is whether the communication in question was made to the public officer in official confidence. That is the condition precedent to the claim, and this question is primarily to be decided by the court before whom the privilege is claimed.*³ The sole criterion for the decision on a question of privilege in respect of a document is whether the disclosure of its contents would injure public interest.⁴

The authorities in England established that the Court has wide powers to determine the validity of the claim to privilege.⁵ In India

23. Tirath Ram v. Jamnu & Kashmir, 1954 J. & K. 11, 14.

23-a. P. P. Andhra Pradesh v. Pocku Syed Ismail, (1972) 2 An. L.J. 202; 1973 1 An. W.R. 31; 1973 Mad. L.J. (Cr.) 52; (1973) 1 A.P.L.J. 431; 1973 Cr. L.J. 931.

24. Subramaniam Chettiar, In re, 1966 M.L.W. (Cr.) 168; (1966) 2 M.L.J. 529; 1966 M.L.J. (Cr.) 861; 1967 Cr. L.J. 1232 (1234); Suryanarayana Naidu, In re, 66 M.L.W. 927; A.I.R. 1954 Mad. 278 (statements by defendants to Taluk Supply Officer—claim of privilege upheld).

25. Subramaniam Chettiar, In re, *supra*.
1. Henry Greer Robinson v. State of South Australia, 1931 P.C. 254; 135 I.C. 625; 35 C.W.N. 1121; 61 M.L.J. 943; 34 L.W. 575.

2. See Taylor, *Ev.*, Sec. 939.

3. Collector of Jaunpur v. Jamna Prasad, 1922 All. 37; I.L.R. 44 All. 360; 66 I.C. 171; 20 A.L.J. 140; Bhal Chandra Dattatraya v. Channabasappa Mallappa Warad, 1939 Bom. 287 at 246; 183 I.C. 225; 41 Bom. L.R. 391.

4. State of Kerala v. Midland Rubber and Products Co., 1971 K.L.J. 278; A.I.R. 1971 Ker. 228 (229) citing Conway v. Rimmer, (1968) 2 W.L.R. 998 (H.L.); (1968) 1 All E.R. 874.

5. Asiatic Petroleum Co., Ltd. v. Anglo-Persian Co., Ltd., (1916) 1 K.B. 322; 85 L.J.K.B. 1272; 114 L.T. 645; 60 S.J. 417; 32 T.L.R. 367; Smith v. The East India Company, (1841) 1 Ph. 50; 11 L.J. Ch. 71; 65 R.R. 927.

those powers exist, but within the limitation stated in this Section. Under it, it is essential for the Court to inquire into the nature of the document and ascertain whether the first requirement of the section is satisfied. In the matter of discovery, where Government is a party, English Courts have insisted upon proof of some collateral evil to society or to the public to justify the rejection of documents on grounds of public policy. The safeguarding of State policy is left entirely by the Indian Legislature to the care of the public officer, if he can satisfy the Court that the documents refer to matters of State or that they are communications made in official confidence. Whilst in England, the Court has to decide the expediency of the application of the exclusionary rule, in India, the only circumstance which the Government or public officer need prove is the confidential character of the communication. He is the sole judge to decide on the question of public policy. Therein lies the difference between English law and Indian law as regards the limits within which privileges can be recognized.⁶ There are two matters involved in this section, first, whether a particular document for which the privilege is claimed, falls within it, that is to say, whether the document is a communication made to a public officer in official confidence. On a proper construction of the section, it is for the Court to decide that question. Secondly, should the Court decide that the document is of the nature contemplated by the section, then the public officer himself is the sole judge as to whether by its disclosure public interests would suffer (that alone being the ground of privilege).⁷ The question, whether a communication was made in official confidence, is also for the Court to decide, but the public officer alone is the sole judge whether he should or should not disclose the communication and he cannot be compelled by the Court to disclose it.⁸ The decision of the public officer should not be arbitrary or capricious.⁹ A Court has inherent powers for refusing disclosure of matters which in the public interest should be kept secret, but that a witness should be allowed to put in a portion of a letter and say which portions of it are to go in and which portions are to be concealed from his opponent is quite unheard of.¹⁰

6. *Bhal Chandra v. Chanbasappa*, 1939 Bom. 237 at 247.

7. *S. S. Vythilinga Pandarasannidhi v. Secretary of State*, 1935 Mad. 342 (1) : 159 I.C. 577 : 68 M.L.J. 596 : 41 L.W. 472 ; see also *Collector of Jaunpur v. Jamna Prasad*, 1922 All. 37 : I.L.R. 44 All. 360 : 66 I.C. 171 : 20 A.L.J. 140 ; *Bhal Chandra Dattatraya v. Chanbasappa Mallappa Warad*, 1939 Bom. 237 at 246 : 183 I.C. 225 : 41 Bom. L. R. 391 ; In re Makky Moithu, 1943 Mad. 276 : 206 I.C. 25 : (1943) 1 M.L.J. 154 : 56 L.W. 74 ; *Chandradhar Tewari v. Deputy Commissioner of Lucknow*, 1939 Oudh 65 : I.L.R. 15 Luck. 351 : 178 I.C. 982 ; In re Mantubhai Mehta, 1945 Bom. 122 : 219 I.C. 290 : 46 Bom. L.R. 802 ; *Ijrat Ali Talukdar v. Emperor*, 1943 Cal. 539 : 209 I.C. 124 : 47 C.W.N. 928 ; In re Killi Suryanarayana Naidu, 1954 Mad.

278 : 66 L.W. 1927 ; *Tirath Ram v. State of Jammu & Kashmir*, 1954 J. & K. 11 ; *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228 at 242 : 52 P.L.R. 153 ; *Public Prosecutor v. D. Venkata Narasayya*, I.L.R. 1957 A.P. 174 : 1957 Andh. Pra. 486 ; *Tilka v. State*, A.I.R. 1959 All. 543 : 1958 A.L.J. 588 ; see also *State of Punjab v. Sodhi Sukdev Singh*, A.I.R. 1961 S.C. 493 ; *State of Kerala v. Midland Rubber & Produce Co.*, A.I.R. 1971 Ker. 228 : 1971 Ker. L.J. 278.

8. *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 E.P. 228 at 242.

9. *Excelsior Film Exchange v. Union of India*, 69 Bom. L.R. 878 (879) 1968 Mah. L.J. 126 : A.I.R. 1968 Bom. 322.

10. *F.A. Morley v. Emperor*, 1936 Rang. 299 : 164 I.C. 369.

In dealing with an objection under the section, the court will have first to decide under Section 162 *post*, whether the communication has been made in official confidence. If the answer is in the negative, the document must be produced. If the answer is in the affirmative, then it is for the officer concerned to decide whether the document should be produced or not. Section 162 of the Act enables the court to inspect the document or take other evidence to determine its admissibility.¹¹

As to when and how the privilege should be claimed, there is no clear-cut rule of procedure. But it seems sufficiently clear that it should be claimed at the earliest opportunity by the public officer concerned when in reply to the summons he produces the document in his control or charge. It is futile to claim the privilege at a very late stage when there has already been a disclosure of the document given in charge of the Court. There is no rule of law requiring in terms that the public officer should state the exclusionary facts in an affidavit. Perhaps there is a difference in procedure and the Court may call for an affidavit or a statement on oath in Court in a case where the public officer or the Government whom he represents is a party and they are called upon to make a general discovery of the documents in their possession. But the Court's powers are untrammelled by rigid rules, in the matter of laying down the procedure, which is the most suitable to the exigencies of each case.¹² The procedure may be summarised as follows: On an application by a party for the production of these documents (that is documents referred to in Sections 123 and 124) summons should be issued to the head of the department concerned. That head of the department must thereupon apply his mind to the documents sought to be disclosed and come to his own conclusion whether public interest would or would not suffer by such disclosure. He has then to claim privilege if he chooses to do so by means of a communication, preferably in the form of an affidavit, claiming privilege and sufficiently indicating why he is claiming the privilege. It is also desirable but not indispensable that the records should be sent in a sealed cover through an officer of the department claiming privilege. The statement of the head of the department would be considered conclusive, unless for compelling reasons to the contrary, and the privilege will be upheld. But, in any event, it is the duty of the Court to apply its own mind as to whether the claim is not arbitrary and capricious, and, if need be, it would be open to the Court to look into the documents and come to its own conclusion.¹³ To ensure that no extraneous or collateral purpose may operate on the mind of person claiming privilege, the claim should be made by Minister or Secretary of the department by means of an affidavit.¹⁴ That is to say, the public officers must come to the conclusion that the disclosure would harm public interest, before claiming protection. Secondly the privilege should be claimed by the officer as such. As a corollary, a voluntary communication to an official would not make it one made in official confidence.¹⁵ In other words, it is obligatory for a person who has been summoned to produce a document in his possession or control, to

11. *Lakshmandas Chaganlal Bhatia v. State*, 69 Bom. L.R. 808 : 1968 Cr. L.J. 1584 : A.I.R. 1968 Bom. 400 (425).
 12. *Per Wassoodew, J.*, in *Bhal Chandra Dattatraya v. Chanbasappa*, 1939 Bom. 237 at 246.

13. *See In re Killi Suryanarayana Naidu*, 1954 Mad. 278.
 14. *Jetha Nand v. The State of Rajasthan*, 1972 Cr. L.J. 1496.
 15. *B. R. Srinivasan v. Brahmatantra Mutt*, A.I.R. 1960 Mys. 186.

bring it into Court, even if there is any objection to its production or to its being admitted in evidence, as, under Sec. 123 or Sec. 124 of the Evidence Act, the Court will decide on the validity of the objection, and he is not entitled to withhold the evidence, if the objection is overruled. In enquiring into the validity of the objection, the Court will of course bear in mind that it should not exercise its powers in such a way as to occasion the mischief, which the law providing for the objection is designed to guard against. If the objection is a claim of privilege under Sec. 123, the Court has no power to inspect the document, but may only take other evidence for the purpose of deciding on the objection. If it is a claim of privilege under Sec. 124, the Court may inspect the document in its discretion. If the Court comes to the conclusion that the evidence proposed to be given will be derived from an unpublished record relating to the affairs of the State, it will have to uphold the privilege under Sec. 123. Then, it will be left to the head of the department concerned to give or withhold permission for the giving of the evidence.

Similarly, if the Court comes to the conclusion that the communication in question was made to a public officer in official confidence, it will have to uphold the privilege claimed under Sec. 124 and leave the public officer concerned to decide whether or not to disclose the communication. The criterion for the head of the department and the public officer is, whether or not the disclosure would cause injury to public interest. But they are the sole judges of that matter and the Court cannot interfere with their discretion, once it upholds their claim of privilege either under Sec. 123 or Sec. 124.¹⁶ Information supplied by a private citizen leading to the search for and recovery of contraband, is privileged because for fear of criminals many persons would be reluctant to give information if such information is disclosed.¹⁷ It may be mentioned here, that Sec. 94, Criminal Procedure Code provides, so far as material, that when any Court considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceedings under the Code by or before such Court, such Court may issue a summons for the production of the document, which it considers necessary or desirable for the purpose of the investigation or trial proceeding before it. The discretion must be exercised judicially, and it should be exercised in such a way as not to conflict with the policy of the Legislature as disclosed in Sec. 162 of the Code and in Secs. 123 to 125, Evidence Act. Statements made to the police are in their nature confidential, and Sec. 162 of the Code illustrates the limited purpose for which their production should be required. It is necessary also to bear in mind, that under Sec. 125, Evidence Act, a police officer cannot be compelled to say whence he got any information as to the commission of an offence.¹⁸ Where no privilege was claimed when the documents were produced and inspected by the parties, and it was claimed so late that the object could not be served even by admitting the claim, it was held that the claim could no more be allowed.¹⁹

16. Public Prosecutor v. D. Venkata Narasayya, 1957 Andh. Pra. 486.

17. P. P., Andhra Pradesh v. Pocku Syed Ismail, (1972) 2 An. L.T. 202 : (1973) 1 An. W.R. 31 : 1973 Mad. L.J. (Cr.) 52 : (1973) 1 A.P.L.J. 431 : 1973 Cr. L.J. 931.

18. Emperor v. Bilal Mahomed, 1940

Bom. 361 : I.L.R. 1940 Bom. 76; 190 I.C. 779 : 42 Bom. L.R. 787.

19. Bhal Chandra Dattatraya v. Chabasappa Mallappa Warad, 1959 Bom 237 at 247 ; see also Rathnamasu v. Secretary of State, 1923 Mac 332 : 72 I.C. 214 : 44 M.L.J. 13; 17 L.W. 415.

Where the claim of privilege in respect of an inter-departmental communication is made neither in proper form nor by the proper authority disclosing reasons for the claim, it cannot be entertained.²⁰

Where the probity of the conduct of a public servant is in issue, the State cannot screen his conduct on the ground that it is sacrosanct.²¹

The production of relevant files and minutes of the authorities (in the instant case the Delhi Administration) will not be ordered for their disclosure would affect the freedom and candour of public servants and thereby cause injury to public interest.²²

²³[125. *Information as to commission of offences.* No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation. "Revenue Officer" in this section means any officer employed in or about the business of any branch of the public revenue.]

s. 118

s. 27 (Information received from ac-

cused.)

s. 165. Prov. 2 (Question by Judge.)

Act XV of 1887, Sec. 13 [see note (1), *infra*]; Act V of 1892, Sec. 12 (ib); Taylor, Ev., 939, 941; Best, Ev., Sec. 578; Steph., Dig., Art. 113; Roscoe, Cr. Ev., 13th Ed., 130, 132; Phipson, Ev., 11th Ed., 244; Rapalje's op. cit., Sec. 276; Wharton, Ev., Sec. 604. Hageman's Privileged Communications, Secs. 301—305.

SYNOPSIS

1. Principle.

2. Information as to commission of offence.

1. Principle. This section rests on public policy.²⁴ While it is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner, on the other hand, it is absolutely essential to the public welfare, that the names of parties who give information should not be divulged; for otherwise, be it from fear, or shame, or the dislike of being publicly mixed up in enquiries of this nature—few men

20. C. C. Mathew v. State of Kerala. 1968 Lab. I.C. 1055 : A.I.R. 1968 Ker. 280 (292).

21. Niranjan Das Sehgal v. State of Punjab. I.L.R. (1968) 2 Punj. 171; 70 P.L.R. 65 : 1968 Lab. I.C. 804 : A.I.R. 1968 Punj. 255.

22. H. L. Rodhev v. Delhi Administration. 1969 Lab. I.C. 974 : A.I.R. 1969 Delhi 246 (257) following State of Punjab v. Sodhi Sukdev Singh. (1961) 2 S.C.R. 371 : A.I.R. 1961 S.C. 493.

23. This section was substituted for the

original Sec. 125 by Act III of 1887, by Sec. 13, Act XV of 1887 and Act V of 1892, Sec. 12; Commandants and Seconds in Command of Military Police, in Burma and Bengal are entitled to all the privileges conferred by this section on Police Officers. As to the meaning of word "compelled" in this section, see R. v. Gopal Dass. I.L.R. 3 Mad. 271.

24. Liladhar v. Emperor, 1911 Sind 45; B.S.L.R. 309.

would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequences would be that many great crimes would pass unpunished.²⁵ For the same reason, counsel for the defence is not entitled to elicit from a witness for the prosecution that he is a spy or informer.¹ But a detective cannot refuse on grounds of public policy to say where he was hidden.²

2. Information as to commission of offence. This section prohibits the disclosure of the source of any information as to the commission of an offence. The Court should decline to sanction any step which would in practice almost necessarily result in the disclosure of the name of the informer, contrary to the provisions of Sec. 125 of the Evidence Act.³ But it does not prohibit evidence as to the custody of any documents or other material objects, that might have been seized and that might be tendered in evidence in support of the commission of the offence. If, in answering the question, instead of giving the name of the person from whom certain books were seized, the Circle Inspector of Police chooses to give the character of the person from whom he seized the books, he has to thank himself for the answer.⁴ There is no reason, why an investigating police officer should not indicate the source of the information upon which he takes action, and it is sometimes of assistance to the Court to know what the source is.⁵ The subject-matter of police diaries would, ordinarily, be privileged under the provisions of Sec. 124, Evidence Act. As regards particular matters they may also be privileged under the provisions of this section.⁶ For the purposes of this section, a Prohibition Officer under the Madras Prohibition Act, X of 1937, is deemed to be a Police Officer.⁷ This section draws no distinction between public and private prosecutions.⁸ Though the section does not, in express terms, prohibit the witness, if he be willing, from saying whence he got his information, the English authorities and a consideration of the foundation of the rule show that the protection does not depend upon a claim being made, and that, it is the duty of the Judge, apart from objection taken to exclude the evidence.⁹ *A fortiori*, if objection is taken, it cannot be made the ground of adverse inference.¹⁰ The rule applies not only upon the criminal trial, but upon any subsequent civil proceedings arising out of it.¹¹ The

25. Taylor. Ev., Sec. 941; *R. v. Hardy*, (1794) 24 How St. Tr. 808, 816; *Home v. Bentinck*, (1820) 2 B. & B. 130; *Hennessy v. Wright*, (1888) 21 Q.B.D. 509, 512, 513.
1. *Amrita v. R.*, 1916 Cal. 183; *I.L.R.*, 42 Cal. 957; 29 I.C. 513.
2. *Ibid.*
3. *Bagumal v. Emperor*, 1917 Sind 43; 37 I.C. 54; 10 S.L.R. 134.
4. *Public Prosecutor v. Govindaraja*, 1954 Mad. 1023; (1954) 2 M.L.J. 239; 67 L.W. 861; *Emperor v. Ram Dhan*, 2 Bom. L.R. 329.
5. *Shyam Kumar Singh v. Emperor*, 1941 Oudh 130; 191 I.C. 466; 1941 O.W.N. 133; see also *Mahomed Aly v. Emperor*, 10 I.C. 917.
6. *Emperor v. Dharam Bir*, 1933 Lah. 498; 142 I.C. 854; 34 P.L.R. 541.
7. *Public Prosecutor v. Shaik Dawood*,

1957 A.P. 977; 1956 Andh. W.R. 642; 1956 Andh. L.T. 392.

8. A distinction which is made in the English rule; see *R. v. Richardson*, (1863) 3 F. & F. 693; *Marks v. Beyfus*, (1890) 25 Q.B.D. 491; *Steph. Dig.*, Art. 113; *In re Moresh Chunder*, (1870) 13 W.R. (Cr.) 1, 10; see *R. v. Richardson*, *supra*, adversely reviewed in *Worthington v. Scriber*, 109 Mass. 487 (Amer.) cited in *Rapalje's op. cit.* p. 456.
9. *Marks v. Beyfus*, *supra*; *Hennessy v. Wright*, 21 Q.B.D. 509, per Wills. J.; *Weston v. Peary Mohun Dass*, 1914 Cal. 396; *I.L.R.* 40 Cal. 898; 23 I.C. 25; 18 C.W.N. 185 (S.B.), per Woodhoffe J.
10. *Weston v. Peary Mohun Dass*, 1914 Cal. 396.
11. *Marks v. Beyfus*, *supra*.

English rule protects not only the names of the persons by, or to, whom the disclosure was made, but the nature of the information given, and any other question as to the channel of communication, or what was done under it.¹² This section protects the name of a spy or secret informant, not the nature of the information. And it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings. Public policy rather requires that the man who lodges an information, which is a complaint should undertake responsibility for his action. This will in no way interfere with the detection of gambling cases. A police spy who does not wish his name to be known will refrain from giving his information on oath. But on that information it would be quite easy for the police to verify the fact and secure a sworn complaint.¹³ The Court has under this section apparently no discretion to compel an answer,¹⁴ even if it considers disclosure necessary to show innocence of the accused.¹⁵

126. *Professional communications.* No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil. by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—

- (1) any such communication made in furtherance of any ¹⁶[illegal] purpose;
- (2) any fact observed by any barrister, pleader, attorney or vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, ¹⁷[pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client:

Explanation. The obligation stated in this section continues after the employment has ceased.

12. Phipson, Ev., 11th Ed., 244; R. v. Hardy, 24 How. St. Tr. 808; Marks v. Beyfus, (1890) 25 Q.B.D. 494.

13. Liladhar v. Emperor, 1914 Sind 45.

14. Section 165, Prov. 2, *post*.

15. According to the rule in Marks v. Beyfus, *supra*.

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16. Subs. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), Sec. 10 for "criminal".

17. Ins. by the Indian Evidence (Amendment) Act, 1872 (19 of 1872), Sec. 10.

Illustrations

(a) A, a client, says to B, an attorney: "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(b) A, a client, says to B, an attorney: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's Account Book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

127. *Section 126 to apply to interpreters, etc.* The provisions of Section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

128. *Privilege not waived by volunteering evidence.* If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Section 126: and, if any party to a suit or proceeding calls any such barrister, ¹⁸[pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

129. *Confidential communications with legal advisers.* No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

s. 32 Explanation (Admission in Civil Cases).

s. 165 (Questions by Judge).

Civil Procedure Code, Orders XI, XII, XIII (Of Discovery and of the Admission, Inspection, Production, Impounding, and Return of Documents).

18. Ins. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), Sec. 10.

Taylor, Ev., Secs. 911—937; Best, Ev., Sec. 581; Roscoe, N. P. Ev., 18th l., 169—172; Roscoe, Cr. Ev., 13th Ed., 127—130, 133—136; Powell, Ev., 1st Ed., 231—241; Steph., Dig., Arts. 115—116; Bray on Discovery, 385—387; Harton, Ev., Secs. 567—608; Stewart Rapalje's op. cit., Secs. 271—274; Hagan's Privileged Communications, Secs. 163-164; Wigmore, Ev., Sec. 2290, seq.

SYNOPSIS

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| 1. Principle. | 11. Communication must be private or confidential. |
| 2. Scope. | 12. Documents. |
| 3. Section 91. Cr. P. C. and Section 126. | 13. In the course and for the purpose of his employment. |
| 4. English and Indian law. | 14. No hostile inference should be drawn from a refusal to let a legal adviser disclose confidential communications. |
| 5. Construction. | 15. Communication in violation of duty; secondary evidence. |
| 6. Rule limited to legal advisers. | 16. Information obtained from third parties for the purpose of litigation. |
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1. Principle. The first two sections apply when the legal adviser or is clerk, etc., is interrogated as witness. The professional adviser of a third party or stranger is privileged, or rather his client is, as well as the professional adviser of a party to the suit. The fourth section applies when the client himself is interrogated and whether such client be a party to the case or not; and by the terms of this latter section, it is only communications which have passed between a person and his legal professional adviser that are privileged.¹⁹ The rule is established for the protection not of the legal adviser but of the client, and the privilege, therefore, may only be waived by the latter; it is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing the fullest and most unreserved communication between the client and his legal adviser. Further, a compulsory disclosure of confidential communications is so opposed to the popular conscience that it would lead to frequent falsehoods as to what had really taken place. It is immaterial whether the communications relate to any litigation commenced or anticipated; it is sufficient, if they pass as professional communications in a professional capacity; if the rule were so limited, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.²⁰ The foundation of these rules is not difficult to discover.

"The rule of law," as pointed out by Lord Sankey, "is the condition of liberty. Amid the cross-currents and shifting sands of public life, the law is

19. v. post.

20. *Greenough v. Gaskell*. (1858) 1 M. & K. 98; *Phipson, Ev.*, loc. cit.; *Wigmore, Ev.*, s. 2291; *Lyell v. Kennedy*, (1884) 9 App. Cas. 81; *Bolton v. Corporation of Liverpool*. (1885) 1 M. & K. 88; *Galley v. Richards*, 19 Beav. 401; *Ex parte Campbell* (1870) 5 Ch. App. 703; cited in *Framji Bhisaji v. Mohanasing Dhansing*. (1893) 18 Bom. 263.

272; *Southwark Co. v. Quick*, (1878) 3 Q.B.D. 315; *Ross v. Gibbs*. L.R. (1869) 8 Eq. 522, 524; *Wheeler v. Le Marchant*, (1881) 17 Ch. D. App. 681, 682; *Minet v. Morgan*. L.R. (1873) 8 Ch. App. 361, 368; *Taylor, Ev.*, s. 911, et. seq.; see judgment of West. J., in *Munchershaw Bezonji v. New Dhurumsey, etc., Company*. (1880) 4 B. 576.

like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice." For it is on the maintenance and enforcement of the Reign of Law that civilization exists. The alternative to the Reign of Law is the life of primitive savagery.

This rule of law in so far as the administration of criminal justice is concerned is ensured by the fundamental concept, viz., that (1) the accused who can be tried only in accordance with law and (2) who can be convicted only in accordance with law—Courts of justice are not Courts of morals—must be able to protect his own interests by all legitimate means against the accusations made against him. This can be done by the only weapon which he possesses, viz., the right to cross-examine his accusers. This cross-examination will be worth nothing, if questions cannot be asked to test the veracity of the witness to discover who he is and what is his position in life and shake his credit by injuring his character (Sec. 146, Evidence Act).

But, unfortunately, most of the accused persons are either illiterate or people unskilled in unravelling the motives, physiological limitations of the powers of observation, etc., the psychological imperfections and the faulty and incoherent deductions of the witnesses. In the few cases, where the accused is able to be his own lawyer and acts as one, he finds owing to several circumstances that he is illustrating once more the old English adage that "a man who is his own lawyer has got a fool for his client". In other words, a man unpractised in speech, unskilled in law should have the aid of one possessing skill and power of speech but professing no personal knowledge or belief of the matters in question and that he should be able by his counsel to say all that he could say himself, given the necessary skill, is an elementary requisite for enforcing the Reign of Law. On this it follows, that there should be absolute confidence between the client and his legal adviser and that this confidence should be protected.

The foundation of this rule embodied in Sec. 126, Evidence Act, is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal profession, or any particular disposition to afford them protection. It is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence in the practice of Courts, and in those matters affecting rights and obligations, which form the subject-matter of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilled person, or would only dare to tell his counsel half his case.²¹

It is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and, it being so absolutely necessary, it is equally necessary, to use the vulgar phrase, that he should be able to

21. *Per Brougham, L.C.*, in *Greenough v. Gaskell*, (1833) 1 Myl. & K. 98

at p. 103.

make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim or the substantiating of his defence; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret unless with his consent (for it is his privilege and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation. That is the meaning of the rule embodied in Sec. 126, Evidence Act.²² The rigid enforcement of this rule no doubt occasionally operates to the exclusion of truth. But as pointed out by Knight Bruce, L. J. in *Pearse v. Pearse*.²³

"Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much, and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."²⁴

Thus, we arrive at the position that an accused, or a party to a proceeding, to protect his own interests, is able to test the evidence of a witness appearing against him by cross-examination as to credit, etc., through an advocate and that the intercourse between him and that advocate is protected unless expressly waived by the client.

It is a fundamental right of the accused under Sec. 340(1),²⁵ Cr. P. C., which has been reproduced in Art. 22(1) of the Constitution that every accused has the right to consult and to be defended by a legal practitioner of his own choice to protect his interests by legitimate cross-examination of the witnesses appearing against him and for that purpose put questions to those witnesses which he, the client, would have put, if he had the necessary professional skill. It has to be seen what is the extent of the privilege of the party and the advocate in putting *per se* defamatory questions.¹

Take the party accused first. The Ninth Exception to Sec. 499, I. P. C., affords protection, when a defamatory statement is made in good faith for the protection of the interests of the person making it. The Exception covers not only such allegations of fact as could be proved true but also expressions of opinion and personal inferences.² But, in order to come within this exception, the imputation must have been made or published by the accused (a) relevantly, (b) for the protection of his interests, and (c) in good

22. *Per Jessel, M. R.*, in *Anderson v. Bank of Columbia*, (1876) 2 Ch. D. 644 at p. 649; *per Brougham, L. C.*, in *Bolton v. Corporation of Liverpool*, (1851 to 55) 1 Myl. & K. 98.
23. (1846) 16 L.J. Ch. 153.
24. *Taylor on Evidence*, Secs. 911 to 913; *Best on Evidence*, s. 581; *Roscoe on Criminal Evidence*, 135 to 136; *Stephen's Digest*, Arts. 115 and 116; *Phipson's Law of Evidence*, 11th Ed., p. 248 et seq.

25. Now see Section 303 of the Code of 1973.

1. In *re Ramaswami Padayachi*, A.I.R. 1916 Mad. 935; 31 I.C. 642; 16 Cr. L.J. 786; In *re Murugesu Naidu*, A.I.R. 1928 Mad. 142; *Pita v. Emperor*, A.I.R. 1925 All. 285; 85 I.C. 719; *Sher Singh v. Emperor*, A.I.R. 1916 Lah. 207; 34 I.C. 641.
2. *Jaffar v. Emperor*, 11 Cr. L.J. 588 (Sind).

faith.³ In good faith, an essential ingredient is honesty of purpose. The accused must first, honestly believe his imputation to be true, and secondly, he must honestly make it from a sense of duty to himself. He must not exaggerate or say unnecessary things. He must not make his duty the cover for spreading the libel. The question for enquiry in such cases will be whether the accused had reasonable grounds for believing the imputation to be true and for believing that it was necessary for his safety to give publicity to them.

The leading cases on the requisites of good faith are: *Subrahmaniah v. Narasinga Rau*.⁴ In the matter of *Shibo Prosad Pandah*⁵ cited with approval in *Promotha Nath v. Emperor*,⁶ and followed in *Muhammad Gul v. Haji Fazley Karim*,⁷ *Empress of India v. Ramanand*,⁸ *Abdul Hakim v. Tej Chander*,⁹ and *Superintendent and Remembrancer of Legal Affairs, Bengal v. Purna Chandra*.¹⁰ Of course, in determining whether the accused should or should not have placed implicit reliance on the credibility of his source of information, courts should not naturally insist upon exacting standards but should take into account the mental attitude of the person, his prejudices and predilections and the surroundings in which he was placed. These indicate the scope of the privilege of an accused or party in making or publishing through his lawyer or by himself. It makes no difference whatsoever that the imputations were *per se* defamatory.

In other words, the privilege conferred upon an accused or party under the Ninth Exception to Sec. 499, I. P. C., is a qualified privilege and not an absolute privilege, as under the Criminal Law of England. On grounds of public policy attempts were made now and then by Judges with strong predilections for engrafting English Common Law on purely Indian problems, but it is now settled that the Court cannot engraft, in Exceptions to Sec. 499, I. P. C., the doctrine derived from the Common Law of England or issued on public policy. It has been so held in *Satish Chandra v. Ram Doyal*¹¹ by a special Bench of the Calcutta High Court, consisting of five Judges in which Meekerjee, A. C. J., has exhaustively reviewed the law on the subject. But the cases on this point were by no means consistent, since a contrary view was currently entertained by the Madras High Court in *In re Venkata Reddy*,¹² *Raman Nayar v. Subramania Ayyar*,¹³ *Nadu Gounden v. Nadu Gounden*,¹⁴ *Padmaraju v. Venkatramana*.¹⁵ *In re Alraja Naidu*,¹⁶ *Queen-Empress v. Govinda Pillai*,¹⁷ *Manjappa v. Sesha Shetty*¹⁸ and *Sullivan v. Norton*.¹⁹ But later, the Full Bench case in *Tiruvengada v. Tripurasundari*,²⁰ has held that, on matters specifically dealt with by the Penal Code, such as this, the English Common Law is not applicable.

3. *Queen-Empress v. Slater*, 15 Bom. 351; *Kewala Nandgir v. Crown*, 317 Punj. L.R. 1913 and *Muhammad Gul v. Haji Fazley Karim*, A.I.R. 1929 Cal. 346; I.L.R. 56 C. 1013.
4. 4 Mys. L.J. 13.
5. 4 Cal. 124.
6. A.I.R. 1923 Cal. 470; 71 I.C. 792.
7. A.I.R. 1929 Cal. 346; I.L.R. 56 C. 1013.
8. 3 All. 664.
9. 3 All. 815.

10. A.I.R. 1924 Cal. 611; 83 I.C. 631.
11. A.I.R. 1921 Cal. 1; 59 I.C. 143.
12. 36 Mad. 216.
13. 17 Mad. 87.
14. 1 Weir 589.
15. 19 M.L.J. 217.
16. 30 Mad. 222.
17. 16 Mad. 255.
18. 11 Mad. 477.
19. 10 Mad. 28 (F.B.).
20. A.I.R. 1926 Mad. 906; 90 I.C. 978; I.L.R. 49 M. 723.

The Allahabad High Court has uniformly held that the liability to prosecution for defamation must always be determined with reference to this section.²¹ The Bombay authorities, which were generally in favour of holding such statements as absolutely privileged, have been departed from in the later Full Bench case in *Shantabai v. Umrao*.²² The Rangoon High Court in *McDonnell v. Emperor*,²³ the Punjab High Court in *Phundi Ram v. Emperor*,²⁴ and the Sind High Court in *Hoondraj v. Emperor*,²⁵ held the same view as the Calcutta High Court. Therefore, as pointed out above, in order to come within the Ninth Exception to Sec. 499, I. P. C., the accused must show that the imputation was made relevantly for the protection of his interest and in good faith.

The liability of an advocate, charged with defamation in respect of words spoken or written in the performance of his professional duty, depends on the provisions of this section; the court will presume good faith unless there is cogent proof to the contrary.¹ The privilege is not absolute but qualified, but the burden is cast upon the prosecution to prove absence of good faith.²

So far as the English law is concerned, it is settled that advocates have absolute and unqualified privilege in respect of questions asked in cross-examination.³ But advocates in India have no absolute privilege on prosecution for defamation.⁴ There is no basis for the doctrine that the Legislature, enacting the Penal Code, intended to leave untouched the provisions of the English Common Law on the question of defamation. This section is meant to be universal in its application. Consequently, for purposes of fixing criminal liability, the English Law of absolute privilege does not apply in this country to statements of advocates in judicial proceedings. The contrary view taken in the following cases is no longer tenable.⁵ When a complaint is made against an advocate or legal practitioner for defamation in respect of a statement made in the course of a judicial proceeding, it is the duty of the court to presume that the statement was made on instructions and in good faith and for the protection of his client's interest, and that, unless circumstances clearly show that the statement complained of

21. *Abdul Hakim v. Tej Chandra*, 3 All. 815; *Isuri Prasad v. Umrao Singh*, 22 All. 234; *Emperor v. Ganga Prasad*, 29 All. 685 and *Kanchan v. Emperor*, 11 Cr. L.J. 894.

22. A.I.R. 1926 Bom. 141; I.L.R. 50 B. 162; 93 I.C. 151.

23. A.I.R. 1925 Rang. 345; I.L.R. 3 R. 524; 92 I.C. 737.

24. 12 Cr. L.J. 193 (Lah.).

25. A.I.R. 1921 Sind 92; 84 I.C. 58.

1. *Nirsu Narayan v. Emperor*, A.I.R. 1926 Pat. 499; 97 I.C. 354; *M. Banerjee v. Emperor*, A.I.R. 1927 Cal. 823; I.L.R. 55 C. 85; 104 I.C. 717 and *Anwaruddin v. Fathim Bai*, A.I.R. 1927 Mad. 379; I.L.R. 50 M. 667; 100 I.C. 537.

2. *In re Nagarji Tikumji*, 19 Bom.

349; *Nikunja v. Harendra Chandra*, A.I.R. 1914 Cal. 255 (1); I.L.R. 41 C. 514; 20 I.C. 1008 and *Upendranath v. F. A. Sari*, 9 Cal. L.J. 259.

3. *Sullivan v. Norton*, 10 Mad. 28 (F. B.); *In re P. Venkatarreddy*, 36 Mad. 216; *Upendranath v. R.*, 36 Cal. 375 and *Nikunja v. Harendra Chandra*, A.I.R. 1914 Cal. 255 (1); I.L.R. 41 C. 514; 20 I.C. 1008.

4. *M. Banerjee v. Emperor*, A.I.R. 1927 Cal. 823; I.L.R. 55 C. 85; 104 I.C. 717.

5. *Sullivan v. Norton*, 10 Mad. 28 (F. B.); 36 Mad. 216; and *Jagat Mohan v. Kalipado*, A.I.R. 1922 Pat. 104; I.L.R. 1 Pat. 371; 66 I.C. 861.

was made wantonly or from malicious or private motive, the complaint should not be entertained.⁶

When a lawyer is acting in the course of his professional duties and is thus compelled to put forward everything that may assist his client, good faith is to be presumed and bad faith is not to be presumed, merely because the statement is *prima facie* defamatory; but there must be some independent allegation and proof of private malice from which, in the circumstances of the case, the Court considers itself justified in inferring that the statement was made not because it was necessary in the interest of the client, but that the occasion was wantonly seized as an opportunity to vent private malice. Even the presence of malice will not override the presumption of good faith, when the statement was obviously necessary in the interests of the client and where the lawyer could not omit to make it without gravely imperilling the interests of his client, and would in fact not be discharging his duty to his client unless he made it.

Under Exception 9, it is not defamation to make an imputation on the character of a witness in good faith, and for the protection of the client. The presumption, therefore, is that a question asked in cross-examination, making such an imputation affords no ground, ordinarily, for a criminal prosecution. It is the duty of the Court, when a complaint is filed against an advocate, ordinarily to presume that the remarks or questions objected to were made on instructions and in good faith. There may be circumstances showing that the remark was made, or the question put, wantonly, or from malice or private motive, but the greatest care should be taken to enquire into the circumstances and an opportunity should be given to the advocate to offer an explanation before summons is issued.⁷

At the same time, while advocates have their privileges, they have also responsibilities, and they ought not to abuse their privileges. An advocate should exercise his own discretion before putting an offensive question.⁸ A pleader must use a certain amount of commonsense and caution in putting defamatory questions to witnesses. If he asks defamatory questions with utter recklessness and without seeking whether there is any truth in them, with a view to injure the reputation of the witness publicly rather than for the proper conduct of his case, he acts in bad faith and is not entitled to claim privilege.⁹

Having set out the rights and limitations of an accused and his advocate in regard to questions *per se* defamatory put to witnesses, what are the remedies open to such a witness when the accused and his advocate

6. T. F. R. McDonnell v. King-Emperor, A.I.R. 1925 Rang. 345 : I.L.R. 3 R. 524 : 92 I.C. 737. Anwaruddin v. Fathim Bai, A.I.R. 1927 Mad. 379 and M. Banerjee v. Emperor, A.I.R. 1927 Cal. 823.
7. M. Banerjee v. Emperor, A.I.R. 1927 Cal. 823 : 46 C.L.J. 227 : 55 Cal. 85 : 28 Cr. L.J. 877 : 104 I.C. 717 : Nikunja v. Harendra Chandra, A.I.R. 1914 Cal. 255(1) : I.L.R. 41 C. 514 : 20 I.C. 1008 ;

Nazir Ahmad v. Jogesh Chandra, 29 Cr. L.J. 589 (Cal.) ; Anwaruddin v. Fathim Bai, A.I.R. 1927 Mad. 379 and T. F. R. McDonnell v. King-Emperor, A.I.R. 1925 Rang. 345 : I.L.R. 3 R. 524 : 92 I.C. 737.

8. M. Banerjee v. Emperor, A.I.R. 1927 Cal. 823.

9. Fakir Prasad v. Kripa Sindhu, A.I.R. 1927 Cal. 303 : I.L.R. 54 C. 137 : 101 I.C. 600.

exceed and abuse their privileges and disentitle themselves to the protection afforded under the Ninth Exception to Sec. 499, I. P. C.?

The remedies contemplated by the law are threefold, viz. : (a) protection by court, (b) self-help in the shape of setting the criminal law in motion, or (c) filing a suit for damages. The extensive powers, which have been granted to the court for protecting witnesses from questions, not lawful in cross-examination, are set out in Secs. 146 to 153 of this Act. The questions lawful are set out in Sec. 146; this does not mean that a witness may be asked questions on irrelevant topics for the mere purpose of contradicting him or of proving contradictory statements. For except in the case of the exceptions mentioned in Sec. 153, his answers to questions tending to shake his credit cannot be contradicted; nor by Sec. 155, can former contradictory statements be proved, unless that part of the witness's evidence, which they contradict, was itself liable to be contradicted.

Sections 147 and 148 protect witnesses against improper questions. The court has the power either of prohibiting questions under Sec. 148, and, if the question be allowed, of drawing or not drawing an inference from a witness's refusal to answer. The exclusions provided in sub-sections (2) and (3) in Sec. 148 and Secs. 151 and 152 indicate with more distinctness than is to be found in the English law, the principles on which the court should proceed in protecting witnesses from reckless and unjustifiable interrogation. A witness is not to have his whole past life raked up and dragged into publicity merely because he comes forward in obedience to the law to give evidence in court; so serious a private inconvenience can be justified only by a real necessity; and it is not so justified, when either the imputation, if true, would not affect the witness's credibility, or when the injury to the witness's character is very serious while the importance of the evidence very small.

A woman who, in some question of petty quarrel, is asked, "Did you not, twenty years ago, have an illegitimate child?" has a right to be protected on the ground first, that if she had, it does not affect her truthfulness, and second, that it is not worthwhile to endanger her reputation for so trifling a cause. Section 149 deals with questions not to be asked without reasonable grounds and the illustrations thereto are very important. This shows the scope of the reasonable grounds which justify such questions and ought to guide the legal practitioners of our courts. Section 150 has already been referred to, and Secs. 151 and 152 empower a court to forbid indecent and scandalous questions and questions intended to insult or annoy, or those needlessly offensive in form. The court has ample power not only to prevent the putting of such questions, as, if answered or unanswered, would have brought about the mischief which was intended to be created, but also hand up the offending practitioner to the High Court and other appropriate authorities for disciplinary action.

This section has been enacted for the protection of the client and not of the lawyer; it is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the two. The privilege is the privilege of the client and not of the

legal adviser. The latter is, therefore, bound to claim the privilege, unless it is waived by the client expressly under Sec. 126 or impliedly under Sec. 128, e.g., by examining the legal adviser as to the privileged communication. A party cannot be compelled to disclose any confidential communication made to his legal adviser unless he offers himself as a witness. The privilege applies to all communications, oral or documentary, in the course of and for the purpose of the employment as legal adviser, and the privilege continues throughout and does not get terminated by the termination of the litigation or the death of the parties.

This rule, however, covers only the private and confidential communications between the client and the lawyer and which cannot be disclosed either by means of direct questions or elicited by means of indirect tactics. It does not, however, preclude the lawyer from replying to the opposite party who wants to proceed against him from stating that all that he did was in pursuance of the instructions given to him and not on his own volition. The rule under Sec. 126 does not require, that a lawyer should vicariously make himself responsible for an offence which he never committed, and in any event he will not be advancing his client's cause by remaining mute, since in that case it is a fair inference to draw that what he did was either in violation or in excess of the instructions given to him, or that he and the client conspired to defame the complainant and in which event both the lawyer and the client would find themselves in the dock, ranged as co-accused. So looked at from any point of view, the rule under Sec. 126, Evidence Act, cannot cover the case of a lawyer acknowledging a notice given to him and replying that what he did was only in pursuance of his instructions and nothing more.¹⁰

2. Scope. The provisos to Sec. 126 prevent the privilege conferred from becoming the shield of crime or illegality. The rule does not apply to all that which passed between a client and his legal adviser, but only to what passes between them in professional confidence, and the contriving of crime or illegality is no part of the professional occupation of a legal adviser; and it can as little be said that it is part of his duty to advise his client as to the means of evading the law.¹¹ The provisions of Section 126 are (in order that they may be the more effectual) made by Sec. 127 to apply to the necessary organs of communications with the legal advisers, viz., interpreters, clerks and servants. As has already been explained, this section has been enacted for the protection of the client and not of the lawyer; and it is founded on the impossibility of conducting legal business without the professional assistance and on the necessity in order to render that assistance effectual, of securing full and unreserved intercourse between the two. The privilege is the privilege of the client and not of the legal adviser. The latter is, therefore, bound to claim the privilege, unless it is waived by his client expressly under Sec. 126, or impliedly under Sec. 128, e.g., by examining the legal adviser as to the privileged communication. A party cannot be

10. *Avesha Bi v. Peer Khan Saheb. A. I.R. 1954 Mad. 741 : 55 Cr. L.J. 1299.*

11. *Russell v. Jackson*, (1851) 9 Hare 392; *Follett v. Jeffreyes*, (1850) 1 Sim. N.S. 38. See also *R. v. Cox & Maitland* (1884) 14 Q.B.D. 188.

Wharton Ev., s. 590, as to testamentary communications v. *ib.*, and *Russell v. Jackson*, *supra* the privilege does not attach to those; *Taylor, Ev.*, s. 928; *Hageman*, §: 84-85.

compelled to disclose any confidential communication made to his legal adviser unless he offers himself as a witness. The privilege applies to all communications, oral or documentary, in the course of and for the purpose of the employment as legal adviser, and the privilege continues throughout and does not get terminated by the termination of the litigation or the death of the parties.¹² The following definition of the privilege, given by Wigmore, brings out all its essentials and groups them in natural sequence :

“Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except when the protection be waived.”¹³ The section does not forbid the disclosure of a fact disclosed.¹⁴ The immunity from disclosure which can be claimed by a client in respect of a communication made to his lawyer is not absolute but limited in its scope. Section 126 prescribes the limits by the two provisos.¹⁵

A solicitor can only take objection to produce a privileged document before a Court or a Commissioner appointed by the Court to take evidence. He cannot say that he declines to come to Court because the document is, in fact, a privileged document. If he does not attend he may become liable to be prosecuted under Sec. 174 of the Penal Code.¹⁶

3. Section 91, Cr. P. C. and Section 126. Section 91(1) of the Code of Criminal Procedure, 1973 (old Sec. 94) provides that whenever any Court considers that the production of any document is necessary or desirable for the purposes of any enquiry, trial or other proceeding under the Code of Criminal Procedure, such Court may summon the person in whose possession or power such document is believed to be, and require him to attend and produce it. The discretion conferred by the Section on the Court is an absolute one, the only condition for its exercise being that, in the opinion of the Court, the production of the document is necessary or desirable for the purposes of the enquiry, trial or other proceeding before the Court. Nothing in that Section affects Sections 123 and 124 of this Act. The provisions of this Section cannot, however, be relied upon to negative the existence of the power of the Court to make an order under Section 91(1). The Court, in an appropriate case, can order under Section 91, which would override the provisions of Section 126. It cannot be urged that an order under Sec. 91(1) is illegal merely because it violates the privilege conferred by this Section. It is true that, in making an order under Sec. 91(1), the Court exercises a judicial discretion, and ordinarily, it would not, in the exercise of its discretion, make an order which violates the privilege conferred by Sec. 126. But it cannot be urged that no order can be made under Sec. 91(1) which infringes the privilege of professional communication embodied in Sec. 126. It seems that the power of the Court to make an order under

12. *Ayesha Bi v. Peer Khan Sahab. A.*
I.R. 1954 Mad. 741 : 55 Cr. L.J.
1299.

13. *Wigmore. Ev.*, S. 2292.

14. *An Attorney In re*, 1925 Bom. 1 :
84 I.C. 353 : 26 Bom. L.R. 887

(F.B.).

15. *K. C. Sonrexa v. State of U. P.*,
A.I.R. 1963 A. 33.

16. *George Burgh McNair v. Campbell*,
1918 Cal. 240 : 42 I.C. 532.

Sec. 91(1) is not limited by the provisions of Sec. 126, but the discretion under Sec. 91(1) is a judicial discretion and it should not ordinarily be exercised in such a way as to conflict with the privilege against disclosure conferred by Sec. 126.¹⁷

4. English and Indian law. The law relating to professional communications between a solicitor and client is the same in India as in England, with the single exception relating to the substitution of "illegal purpose" for "criminal purpose" and, in interpreting Sec. 126, the Court may rightly refer to English cases.¹⁸

5. Construction. "The rule of protection seems to me to be one which should be construed in a sense most favourable to bring professional knowledge to bear effectively on the facts out of which legal rights and obligations arise."¹⁹

6. Rule limited to legal advisers. Legal advisers alone are within the rule; and of these (as it would seem from the wording of the section) only barristers, attorneys, pleaders and vakils. It was decided under Sec. 24, Act II of 1855, that *mukhtars* were not within the rule.²⁰ But that section is different from this section in which the word 'pleader' is added. Under Sec. 4 (1) (r) of the Code of Criminal Procedure, 1898, [now Sec. 2 (q) of Cr. P. C. 1973,] 'pleader' includes '*mukhtar*'. So, it has been held that the restrictions imposed by Sec. 126 of the Evidence Act in respect of what are known as privileged communications extend also to communications made to *mukhtars* when acting as pleaders for their clients.²¹ The protection does not extend to any matter communicated to other persons, e.g., priests and clergymen,²² medical men,²³ clerks,²⁴ bankers,²⁵ steward and confidential friends,¹ and the like, though such communications were made under terms of the closest secrecy. No privilege even attaches to communications made

17. *Chandubhai v. The State*, A.I.R. 1962 Guj. 290 : (1962) Guj. L.R. 833.

18. *Framji Bhicaji v. Mohansingh Dhan-singh*, (1893) 18 B. 263, 271, 278, 279.

19. *Per West, J.*, in *Munchershaw Bez-onji v. The New Dhurumsey, etc.* Co., (1880) 4 B. 576.

20. *R. v. Chunderkant Chuckerbutty*, (1868) 1 B.L.R.A. Cr. 8 : 9 W.R. Cr. Let. 10 ; the reasons given for this decision seem equally to apply to the language of the present section.

21. *Miajan Biswas v. Emperor*, 1933 Cal. 5 : 143 I.C. 682 ; 37 C.W.N. 68.

22. *R. v. Gilham*, (1826) 1 Moo. C.C. 186 ; *Wheeler v. Le Marchant*, (1881) L.R. 17 Ch. D. 681 ; but see *Taylor, Ev.*, p. 789 note, and *Steph., Dig.*, Note xlv, p. 196. Some English Judges have considered

that such evidence should not be given ; see *Broad v. Pitt*, (1828) 3 C. & P. 518 ; *R. v. Griffin*, (1853) 6 Cox. C.C. 219 ; *Wharton, Ev.*, s. 597 ; *Mr. Baddely's work on the Privilege of Religious Confessions* (1865) ; and *Hageman, op. cit.*, ss. 131-142.

23. *R. v. Gibbons*, (1823) 1 C. & P. 97 ; *Taylor, Ev.*, s. 916 ; *Hardco v. Hardless*, 1933 All. 56 : I.L.R. 55 All. 134 : 145 I.C. 845 : 1933 A.L.J. 14.

24. *Lee v. Birrell*, (1813) 3 Camp. 337 ; *Webb v. Smith*, (1824) 1 C. & P. 337.

25. *Lloyd v. Freshfield*, (1826) 2 C. & P. 325 (a banker of one of the parties is bound to answer what such parties balance was on a given day).

1. *Wheeler v. Le Marchant supra Taylor, Ev.*, 916.

to an attorney friend, consulted merely as a friend and not as an attorney,² nor to those passing before the relationship exists, or after it has ceased.³ The rule does not require any regular retainer, or any particular form of application or engagement, or the payment of any fees; it is enough, if the legal adviser be, in any way, consulted in his professional character,⁴ and the protection exists, notwithstanding a *bona fide* mistake in supposing that the solicitor had consented to act,⁵ or the latter's subsequent refusal of the retainer.⁶ So also under Sec. 129, when the client is interrogated, a confidential communication, in order to be protected must be one which has taken place between the client and his legal professional adviser. The mere circumstance that communications are confidential does not render them privileged. Thus, confidential communications between principal and agent, relating to matters in a suit, are not privileged. To be privileged, they must be "confidential communications with professional adviser."⁷

So also, a letter written in answer to enquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements, it will not support an action for libel unless malice is shown; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party.⁸ The communication is equally protected, whether it is made by the client in person, or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction.⁹ It is immaterial (under Sec. 129, as under Sec. 126) whether the communication relates to a litigation commenced or anticipated or not.¹⁰ A pleader engaged for obtaining a succession certificate is privileged from disclosing the contents of will shown to him.¹¹ A communication with a solicitor for the purpose of obtaining legal advice is protected, though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose.¹² But communications between a Crown Prosecutor and his attorney are not privileged.¹³

2. *Smith v. Daniell*, (1875) 44 L.J. Ch. 189; see also *R. v. Brewer*, (1834) 6 C. & P. 363; *Deo v. Jauncey*, 8 C. & Ph. 99, where the relationship between attorney and client was held not to have been established.
3. *Greenough v. Gaskell*, (1833) 1 M. & K. 98.
4. *Foster v. Hall*, 12 Pick. 89; *Bean v. Quimby*, 5 New Hamps. 94; *Taylor, Ev.*, s. 923.
5. *Smith v. Fell*, (1841) 2 Curtis 667.
6. *Cromack v. Heathcote*, (1820) 2 Br. & B. 4.
7. *Wallace v. Jefferson*, (1878) 2 B. 453 following *Anderson v. Bank of Columbia*, (1876) L.R. 2 Ch. D. 644, and *Bustros v. White*, (1876) L.R. 1 Q.B.D. 423; see also *Godall v. Little*, (1851) 1 Sim. N.S. 155.
8. *Webb v. East*, (1880) L.R. 5 Ex. D. 108.
9. *Wheeler v. Le Marchant*, (1881) L. R. 17 Ch. D. 681, 682 or *vice versa*, see *Steele v. Stewart*, (1844) 1 Ph. 471; *Lafone v. Falkland Islands Co.*, (1857) 4 K. & J. 34; *Lawrence v. Campbell*, (1859) 4 Drew. 485; *Taylor, Ev.*, s. 1920.
10. *Munchershaw Bezouji v. The New Dhurumsey etc. Co.*, (1880) 4 B., 576, following *Minet v. Morgan*, L.R. (1873) 8 Ch. App. 361; *In re An Attorney*, 1925 Bom. 1: 84 I.C. 353; 26 Bom. L.R. 887 (F.B.); see *Hageman, op. cit.*, ss. 57—62.
11. *Bai Kanta v. Bhai Lal Chela Bhai Amin*, 1929 Bom. 414: 31 Bom. L. R. 1046.
12. *Wheeler v. Le Marchant*, (1881) L.R. 17 Ch. D. 675, 682.
13. *Bhagwani Choithram v. Deoram*, 1933 Sind. 47: 143 I.C. 345: 27 S.L.R. 72.

In order to get protection under this section, the privilege must be claimed before the advocate is called upon to give evidence.¹⁴

7. Joint interest. No privilege attaches to communications between solicitor and client, as against persons having a joint interest with the client in the subject-matter of the communication, e.g., as between partners,¹⁵ a company and its shareholders,¹⁶ trustee and *cestui que trust*,¹⁷ lessor and lessee as to production of the lease,¹⁸ reversioner and tenant for life as to common title,¹⁹ two persons stating a case for their joint benefit,²⁰ or a husband and wife who are not genuinely but only collusively in contest.²¹ Nor does any privilege attach as between joint claimants under the same client, e.g., between claimants under a testator as to communications between the latter and his solicitor.²² But, where the communications relate to matters outside the joint interest, they are privileged even against a person bearing the expense of the communication,²³ e.g., communications between a plaintiff corporation and its solicitors, as against a defendant rate-payer as to matters not connected with the rates; between a company and its solicitors consisting of confidential advice to the former in an action against a shareholder,²⁴ or between a trustee and his solicitor as against the *cestui que trust*, where the communication is not made for the former's guidance in the trust but to enable him to resist litigation by the latter,²⁵ or where it concerns his character not as trustee but as mortgagee of the client.¹

8. Employment by different parties of same attorney. Where two parties employ the same attorney, the rule is "that communications passing between either of them and the legal adviser in his joint capacity, must be disclosed in favour of the other, e.g., a proposition made by one to be communicated to the other, or instructions given to the solicitor in presence of the other."² But it is also clear, that as between a third party and any one of the two parties who engaged him, his lips are sealed with respect to communications made to him in the course and for the purpose of his employment as a solicitor.³ On general principles, and under Sec. 126,

14. *Antony v. G. S. Naidu*, A.I.R. 1967 M. 394 : (1966) 2 M.L.J. 443.

15. *Re Pickering*, (1884) 25 Ch. D. 247 ; *Gourad v. Edison Gower Bell Telephone Co.*, 59 L.T. 813.

16. *Woodhouse v. W.*, (1914) 30 T.L.R. 559 (C.A.); *Bray on Discovery*, 290. 297.

17. *Talbot v. Marshfield*, (1865) 2 Dr. & S. 549 ; *Re Mason*, (1883) 22 Ch. D. 609 ; *Postlethwaite Re v. Rickman*, (1889) 35 Ch. D. 722, even though the party resisting production has paid for the communication ; *Bacon v. Bacon*, (1876) 34 L.T. 349.

18. *Doc v. Thomas*, (1829) 9 B. & C. 286.

19. *Doc v. Date*, (1842) 3 Q.B. 609.

20. *Attorney-General v. Berkeley*, (1820) 2 J. & W. 291.

21. *Ford v. De Pontes*, (1860) 5 Jur.

N.S. 993.

22. *Russell v. Jackson*, (1851) 9 Hare 387.

23. *Bristol Corporation v. Cox*, (1884) L.R. 26 Ch. D. 678. 683.

24. *Woodhouse v. W.*, *supra*.

25. *Thomas v. Secretary of State for India*, (1870) 18 W.R. 312 (Eng.).

1. *Phipson, Ev.*, 11th Ed., 252, *Johnson v. Tucker*, (1847) 11 Jur. 382.

2. *Phipson, Ev.*, 11th Ed., 250 ; *Taylor, Ev.*, s. 296 ; *Baug v. Cradocke*, 1 M. & R. 182 ; *Perry v. Smith*, 9 M. & W. 681 ; *Shore v. Bedford*, 5 M. & G. 271 ; *Ross v. Gibbs*, L.R. 8 Eq. 522 ; *Rennel v. Sprye*, 10 Beav 51, all followed in *Memon Hajee v. Moulvie Abdul*, (1878) 3 B. 91.

3. *In re An Attorney*, 1925 Bom. 1 : 84 I.C. 353 : 26 Bom. L.R. 887 (F.B.).

there is no privilege to communications made before the creation of relationship of pleader and client. Further, where two persons have a dispute about a claim made by one of them upon the other, and both seek the help of a pleader, and one of them makes a statement to the pleader, the statement so made to the pleader by one of the parties is admissible.⁴ In all these cases, the question would seem to be, was the communication made by the party to the witness in the character of his own exclusive attorney? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged.⁵

9. "At any time". A communication or document "once privileged is always privileged."⁶ The obligation continues after the employment in which the communication was made, has ceased,⁷ nor is it affected by the party ceasing to employ the solicitor, and retaining another, nor by any other change of relation between them, nor by the solicitor's being struck off the rolls,⁸ nor by his becoming personally interested in the property, to the title of which the communications related,⁹ nor even by the death of the client.

10. Waiver. The privilege may, however, be waived by the client himself (though not by the adviser) expressly under Sec. 126, or impliedly under the second portion of Sec. 128 (post); or perhaps, in the event of the client's death, by his personal representative.¹⁰ The client does not waive his privilege by calling the legal adviser as a witness, unless he questions him on matters which, but for such question, he would not be at liberty to disclose,¹¹ and even in that case the cross-examination must be confined to the point upon which the witness has been examined-in-chief.¹² Failure on the part of a client to claim privilege, when he is under cross-examination, does not amount to "express consent", given by him to his legal adviser to disclose a communication which is otherwise privileged under the section.¹³ As to waiver in part, v. post.¹⁴ Disclosures made under Sec. 129 should not be enforced in any case except when they are plainly necessary.¹⁵

11. Communication must be private or confidential. The rule in Sec. 126, however, covers only the private and confidential communications between the client and the lawyer, which cannot be disclosed either

4. Kali Kumar Pal v. Raj Kumar Pal, 1932 Cal. 148 : I.L.R. 58 Cal. 1379 : 136 I.C. 476.
5. Taylor, Ev., s. 926 ; Perry v. Smith, 9 M. & W. 681 ; Rennell v. Sprye 10 Beav 51 ; Wharton Ev., S. 587.
6. Bullock v. Corrie, (1878) 3 Q.B.D. 356 ; Pearce v. Foster, (1885) 15 Q. B.D. 114.
7. See Explanation to S. 126 ; see also In re An Attorney, 1925 Bom. 1 (F.B.) ; Moti Bai v. The State, 1954 Raj. 241 : I.L.R. 1955 Raj. 70.
8. Cholmondeley v. Clinton, (1815) 19 Ves. 268.
9. Chant v. Brown, (1881) 11 Q.B. 780.

10. Bray on Discovery, 386 ; as to waiver by successor-in-title, or personal representative v. ib., 385-387 ; and Taylor, Ev., s. 927.
11. Section 128 ; the rule was otherwise under Sec. 24, Act II of 1855.
12. Taylor, Ev., Sec. 927 ; Valiant v. Dodomead, (1743) 2 Atk. 592 ; R. v. Leverson, 11 Cox. 15.
13. Bhagwani Choitram v. Deoram, 1933 Sind 47 : 143 I.C. 345 : 27 S.L.R. 72.
14. Kay v. Poorunchand Poonalal, (1880) 4 B. 631 : s.c. 5 Ind. Jur. 479.
15. Munchershaw Betonji v. New Dhurumsey, etc., Co., (1880) 4 B. 595.

by means of direct questions or elicited by means of indirect tactics.¹⁶ The communication, which may be verbal or documentary,¹⁷ must be of a private or confidential nature (as is expressly stated in Sec. 129, as shown by the use of the word "disclose" in Sec. 126) to be privileged.¹⁸ It must be made to the adviser *sub sigillo confessionis*.¹⁹ It is immaterial whether the communication was verbal, that is to say, by word of mouth, or by demonstration. It follows that if the client, instead of giving the vakil a verbal description of the process itself, tells him to go himself to see it, or points it out to him, that would equally be a communication within the meaning of the section.²⁰ The privilege mentioned in Sec. 126 is not restricted to oral communications made by the client, but extends to facts observed by the pleader in the course and for the purpose of such employment.²¹ Section 126 has no application where the statement is made, not as confidential but for the purpose of communication.²² It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege only extends to communications made to him *confidentially with a view to obtain professional advice*.²³ Communications made to a vakil during negotiations for a settlement are privileged and cannot be disclosed without the express consent of the client.²⁴ Letters written by one accused to another and alleged to be in the possession of the latter's lawyer are not privileged.²⁵ Letters containing mere *statements of fact* are not privileged; they must be of a *professional and confidential character*.¹ Where defendants, at an interview at which the plaintiff was present, admitted their partnership to their attorney, who was then also acting as attorney for the plaintiff, it was held that the attorney was not precluded from giving evidence of this admission to him: first, because the defendant's statement, having been made in the presence and hearing of the plaintiff, could not be regarded as confidential or private, secondly, because those statements did not appear to have been made to the attorney exclusively in his character of attorney for the defendants, but to have been addressed to him also as attorney for the plaintiff.² A communication made before a friend³ or the other party⁴ or

16. Ayesha Bi v. Peer Khan Saheb, 1954 Mad. 741 : 55 Cr. L.J. 1239.

17. Gopilal v. Lakhpatt Rai, 1918 All. 38 : I.L.R. 41 All. 125 : 48 I.C. 605 : 16 A.L.J. 987.

18. Memon Hajee v. Moulvie Abdul, (1878) 3 B. 91 ; Framji Bhicaji v. Mohansingh Dhansingh, (1893) 18 Bom. 263, 271 ; Greenough v. Gaskell, (1833) 1 M. & K. 98.

19. Ex parte Campbell, In re Cathcart, (1870) L.R. 5 Ch. App. 703, cited in Framji Bhicaji v. Mohansingh Dhansingh, *supra*, 272.

20. Gopilal v. Lakhpatt Rai, 1918 All. 38 : I.L.R. 41 All. 125 : 48 I.C. 605 : 16 A.L.J. 987.

21. Hakam v. Emperor, 1934 Lah. 269 : 152 I.C. 164.

22. R. v. Rodrigues, (1903) 5 Bom. L. R. 122.

23. Framji Bhicaji v. Mohansingh Dhan-

singh, *supra* ; Foakes v. Webb, (1885) 28 Ch. D. 287 ; Gardner v. Irvin, (1879) 4 Ex. D. 49 ; O'Shea v. Wood, (1891) P. 286, 290.

24. Chibcharan Das v. Gulab Chand Chotey Lal, 1936 All. 157 : 160 I. C. 76.

25. Public Prosecutor, Madras v. M. S. Menoki, 1939 Mad. 914 : 185 I.C. 419 : (1939) 2 M.L.J. 634 : 50 L. W. 428.

1. O'Shea v. Wood, (1891) p. 286, 290.

2. Memon Hajee v. Moulvi Abdul, *supra*.

3. In re An Attorney, 1925 Bom. 1 (F. B.) ; but see Bhagwani Choithram v. Deoram, 1933 Sind 47 : 143 I.C. 345 : 27 S.L.R. 72.

4. Kali Kumar Pal v. Raj Kumar Pal, 1932 Cal. 148 : I.L.R. 58 Cal. 1879 : 155 I.C. 476.

published in Court⁵ is not privileged. The section prohibits disclosure not only of any advice given by the professional adviser in the course and for the purpose of his employment, but also the disclosure by an attorney of advice given by another person such as a barrister, attorney, etc.⁶ The legal adviser must have learned the matter in question only as legal adviser and in no other way. If, therefore, he were a party, and especially to a fraud, that is, if he were acting for himself though he might also be employed for another, he would not be protected from disclosing; for in such a case his knowledge would not be acquired solely by his being employed professionally.⁷ There is no privilege, where, in any correctness of speech, there is no communication; as where for instance, a fact that something was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally cognisant,⁸ or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney makes himself a subscribing witness, and thereby assumes another character for the occasion, and adopting the duties which it imposes, becomes bound to give evidence of all that a subscribing witness can be required to prove.⁹ But an attorney may not be called upon to disclose matters which he can be said to have learned by communication with his client, or on his client's behalf, matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know.¹⁰ The mere circumstance, however, that a solicitor or client obtains, by means of confidential communication, information about a fact does not protect him from disclosing what he already knew about the fact.¹¹ But knowledge, whether of adviser or client, derived solely from privileged communications, is itself privileged.¹² The communication must be made by, or on behalf of, the client (Sec. 126); when the adviser (or client) has his knowledge independently of any communication from the client (or adviser) or from collateral quarters, there is no privilege,¹³ nor in respect of knowledge derived by the adviser from the employment, but not from the client, as to mere facts patent to the senses.¹⁴ Section 126 does not, however, preclude the lawyer from replying to the opposite party who wants to proceed against him from stating that what all he did was in pursuance of the instructions given to him and not on his own volition. The rule under Sec. 126 does not require that a lawyer should!

5. *Rebecca Mondal v. Emperor*, 1947 Cal. 278 : 228 I.C. 15 : 50 C.W. N. 545 ; *Pratti Raganima v. Prate Chintaiiah*, (1972) 2 A.P.L.J. 62 : (1972) 2 An. W.R. 253 : 1972 Mad. L.J. (Cri.) 652 : 1973 Cri. L.J. 1489 (notice already produced in court in defamation case).

6. *In re An Attorney*, 1925 Bom. 1 (F. B.).

7. *Greenough v. Gaskell*, (1833) 1 M. & K. 98, 104 ; *Taylor, Ev.*, s. 910.

8. *Greenough v. Gaskell*, (1833) 1 M. & K. 98, 104 ; *Framji Bhicaji v. Mohansingh Dhansingh*, (1893) 18 Bom. 263, 275, 276.

9. *v. post.*

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10. *Greenough v. Gaskell*, *supra*, 101, 105 ; see *Gopilal v. Lakhpat Rai*, 1918 All. 38 : 41 A. 125 : 48 I.C. 605 : 16 A.L.J. 987.

11. *Lewis v. Pennington*, (1860) 29 I. J. Ch. 670.

12. *Ivell v. Kennedv.* (1883) 9 App. Cas. 81 ; *Proctor v. Smiles*, (1886) 55 L.J.Q.B. 527.

13. *Wheatley v. Williams*, (1836) 1 M. & W. 533 ; *Sawyer v. Birchmore*, (1835) 3 M. & K. 572 ; *Manser v. Dix*, (1855) 1 K. & J. 451.

14. *Brown v. Foster*, (1857) 1 H. & N. 736, per Pollock, C. B. ; *Kennedv v. Lyell*, (1883) 23 Ch. D. 387.

vicariously make himself responsible for an offence which he never committed, and, in any event, he will not be advancing his client's cause by remaining mute since in that case it is a fair inference to draw that what he did was either in violation or in excess of the instructions given to him or that he and the client conspired to defame the complainant and in which event both the lawyer and the client would find themselves in the dock, ranged as co-accused. So looked at from any point of view, the rule under Sec. 126 cannot cover the case of a lawyer acknowledging a notice given to him and replying that what he did was only in pursuance of his instructions and nothing more.¹⁵ The privilege that can be claimed under Section 126 is not an absolute but qualified privilege, as can be seen from the Illustrations to the section.¹⁶ When a lawyer puts a question to a witness in cross-examination and the question is defamatory in character without any reasonable ground, it is not a communication made for the purpose of the employment as a lawyer. The disclosure of such a communication is not protected by Section 126.¹⁷ The privilege conferred by Section 126 is not intended for committing any offence. If the accused wanted to commit the offence of defamation by putting the defamatory questions through his Advocate, he cannot claim any privilege having regard to proviso 1 to Section 126.¹⁸ Where a solicitor claims privilege under Sec. 126, he is bound to disclose the name of his client. The fact that the name of that person had been communicated to him in the course, and for the purpose, of his employment as solicitor, by another client, affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed.¹⁹ He may also be compelled to prove "mere collateral facts known without confidence," e.g., client's address, if not confidentially disclosed;²⁰ mere matters of observation such as handwriting,²¹ identity,²² e.g., having sworn an affidavit, or put in a pleading; facts showing the client's mental capacity;²³ the fact of the retainer²⁴ but not, as it would seem its character,²⁵ and the retaining of counsel come within the rule respecting confidential communications.¹ Communications which are not necessary for the purpose of the employment, e.g., a prosecutor's remark that "he would give a large sum to have his ad-

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15. *Ayesha Bi v. Peer Khan Sahib*, A. I.R. 1954 Mad. 741 : 55 Cr. L.J. 1239.
 16. *Deepchand v. Sampathraj*, 16 Law Rep. 235 : (1969) 1 Mys. L.J. 606; 1969 M.L.J. (Cr.) 504 : 1970 Cr. L.J. 260 : A.I.R. 1970 Mys. 34 (36) (defamation can be committed by proxy through mouth of vakil).
 17. *Deepchand v. Sampathraj*, *supra*, dissenting from *Palaniappa Chettiar v. Emperor*, 1935 M.W.N. 460 and referring to *Ayesha Bi v. Peer Khan, Sahib*, *supra*.
 18. *S. Antony v. G. S. Naidu*, 1966 M. L.W. (Cr.) 174 : (1966) 2 M.L.J. 443 : 1966 M.L.J. (Cr.) 797 : 1967 Cr. L.J. 1527 : A.I.R. 1967 Mad. 395.
 19. *Framji Bhicaji v. Mohansingh Dhansingh*, (1893) 18 Bom. 263 ; following *Bursill v. Tanner*, (1885) 16 Q.B.D. 1.
 20. *Campbell*, Ex parte, In re Cathcart, (1870) L.R. 5 Ch. & App. 703, cited in *Framji Bhicaji v. Mohansingh Dhansingh*, *supra*, 272 ; *Re Arnott*, (1889) 60 L.T. 109 ; *Ramsbottom v. Senior*, (1869) L.R. 8 Eq. 575.
 21. *Dwyer v. Collins*, (1852) 7 Ex. 639.
 22. *Greenough v. Gaskell*, (1833) 1 M. & K. 98 ; *Studdy v. Sanders*, (1823) 2 D. & R. 347.
 23. *Jones v. Goodrich*, (1844) 5 Moo. P.C. 16, 25.
 24. *Levy v. Pope*, (1829) 1 M. & M. 410 ; *Gollard v. Bates*, 6 M. & W. 347 ; *Forshaw v. Lewis*, (1855) 1 Jur. N.S. 263.
 25. *Bekwith v. Benner*, (1834) 6 C. & P. 688 appears to be disapproved of in *Framji Bhicaji v. Mohansingh Dhansingh*, *supra*, 280.
 1. *Foot v. Hayne*, (1824) 1 C. & P. 545.

versary hanged,² are not, but all necessary professional and confidential communications, legal opinions, drafts and the like, are privileged.³

A solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment. Section 126 protects from publicity, not merely the details of the business, but also its general purport unless it be known, *aliunde*, that such business, or the communications made in respect of it, fall within the first or second proviso to the section. If this be known *aliunde*, and a foundation be thus laid for asking the question and admitting the evidence, e.g. if, in a particular case, the facts proved make it probable that the visit to the adviser really was intended for a criminal or illegal purpose, the adviser may be rightly questioned as to the nature of his employment.⁴

Disclosure implies that which was not already made known to others. If the communication alleged to contain defamatory statements made by the client to the Advocate is put in the form of a (reply) notice, then there is already a disclosure; and when such an Advocate is called upon to give evidence, he is not disclosing any fact for the first time but is substantiating what is already disclosed. Section 126, therefore, does not stand in the way of summoning the Advocate for this purpose.⁵

12. "Documents". The privilege regarding communication extends to original documents coming into possession of an advocate from his client.⁶ The legal adviser will not be permitted to state the contents or condition of any document with which he has become acquainted by virtue of professional confidence.⁷ But he cannot withhold documents, unless his client is so entitled.⁸ He may not state whether a document, while in his possession, was stamped, endorsed or bore erasures, for that is condition,⁹ nor the date when, or the purpose for which, it was entrusted to him,¹⁰ but he may prove

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2. *Annesley v. Anglesea*, (1743) 17 St. Tr. 1139; see also *Cobden v. B. Kendrick*, (1791) 4 T.R. 431.
 3. *Munchershaw Bezoni v. The New Dhurumsey Co.*, (1880) 4 B. 576; *Reece v. Trye*, (1846) 9 Beav. 316; *Penraddock v. Hammond*, (1847) 11 Beav. 59; *Bunbury v. Bunbury*, (1839) 2 Beav. 173 (case for opinion and opinions); *Mostyn v. The West Mostyn Coal & Iron Co.*, 34 L.T. 531 (drafts of agreement, lease or conveyance); *Lowden v. Blackey*, (1889) 23 Q.B.D. 332 (draft advertisement settled by counsel); *Ward v. Marshall*, (1887) 3 T.L.R. 578; *Woolley v. N. L. Ry.* (1869) L.R. 4 C.P. 602; *Ryrie v. Shivshanker*, (1890) 15 B. 7 (notes of interviews or communications by solicitor or client).
 4. *R. v. Cox & Railton*, (1881) L.R. 14 Q.B.D. 153, and see *Framji Bhicaji v. Mohansingh Dhansingh*, (1893) 18 Bom. 263 at 279, 280, 281; cf. *Taylor. Ev.*, s. 912.
 5. *P. Rajamma v. P. Chantaiah*, (1972) 2 Andh. W.R. 253 (254).
 6. *Chandubhai v. The State*, A.I.R. 1962 Guj. 290; (1962) Guj. L.R. 833.
 7. Section 126; see *Dwyer v. Collins*, (1852) 7 Exch. 646; *Davies v. Waters*, (1842) 9 M. & W. 680; *Cleave v. Jones*, (1852) 7 Ex. 421; *Doe v. James*, 2 M.R. 47; *Moore v. Terell*, (1833) 4 B. & Ald. 870; *Iycl v. Kennedy*, (1884) 9 App. Cas. 81.
 8. *Bursill v. Tanner*, (1885) 16 Q.B. D. 1.
 9. *Wheatley v. Williams*, (1836) 1 M. & W. 533; but see *Brown v. Foster*, (1857) 1 H. & N. 736.
 10. *Turquand v. Knight*, 2 M. & W. 98; *Framji Bhicaji v. Mohansingh Dhansingh*, *supra*.

the fact that a particular document is in his possession, so as to let in secondary evidence, if it be not produced on notice.¹¹ but not in whose possession or custody it is, or when or where he saw the same, if he came to the knowledge of the fact inquired after in the course of confidential communication with his client in his professional capacity.¹² He may prove that his client put in a pleading, or swore an affidavit, for these are matters of publicity.¹³ A solicitor employed to obtain the execution of a deed, and who is one of the witnesses, is not precluded, on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid.¹⁴ "If an attorney puts his name to an instrument as a witness, he makes himself thereby a public man and is no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the connection and preparation of the deed, or at any other time, and not connected with the execution of it."¹⁵

Documents which the client intends others to see as well as the solicitor, documents of a public nature, documents entrusted to the solicitor for purposes outside the ordinary scope of professional employment, e.g. a book describing the lands and given him for the purpose of collecting the tithes, are not privileged.¹⁶ Names of parties, witnesses merely as such, proofs of witnesses, whether disclosure be sought before, or at the trial, are privileged;¹⁷ but not names of parties, witnesses when constituting material facts in the action, e.g. those of persons in whose presence a slander was uttered.¹⁸ Draft pleadings in the same or former action are privileged. But instructions to counsel are only privileged in the sense that they are protected from disclosure to an opponent; they are not protected from enquiry by the Court. Thus, a Judge can ask counsel whether he makes a charge on instructions and, if so, on whose.¹⁹ And counsel is not protected by his instructions; for it is his duty to satisfy himself that there are reasonable grounds for a charge before making one.²⁰ But there is a presumption of good faith on his part, and to tax him with defamation it must be proved

11. *Dwyer v. Collins*, (1852) 7 Exch. 646; *Bevan v. Waters*, (1828) 1 M. & M. 235.

12. *Cotman v. Orton*, (1840) 9 L.J. Ch. 268; see also *Banner v. Jackson*, (1847) 1 D.G. & S. 47; *Robson v. Kemp*, (1803) 5 Esp. 52.

13. *Studdy v. Sanders*, (1823) 2 D. & R. 347; *Greenough v. Gaskell*, (1833) 1 M. & K. 98.

14. *Chawcour v. Salter*, (1881) 18 Ch. D. 30.

15. *Robson v. Kemp*, (1803) 5 Esp. 52, per Lord Ellenborough.

16. *Phipson, Ev.*, 11th Ed., 256; *R. v. Woodley*, (1834) 1 M. & R. 390; *Doe v. Hertford*, (1849) 19 L.J.Q. B. 526; but copies or extracts from public or non-privileged private documents are privileged if the collection is the result of the soli-

citor's (or his agent's) labour and skill and might disclose his view of the client's case, *ib.*,; *Lyell v. Kennedy*, (1884) 27 Ch. D. 1; *Walsham v. Stainton*, (1863) 2 H. & M. 1. 17. *Ibid.*; *Marriott v. Chamberlain*, (1886) 17 Q.B.D. 154; *London Gas Co. v. Chelsea*, 6 C.B.N.S. 411; *Fenner v. S. F. Co.*, L.R. 7 Q.B. 767; *Eade v. Jacobs*, (1877) 3 Ex D. 335, mentioned in 20 Ch. D. 529; see also *Mackenzie v. Yeo*, (1841) 2 Curt. 866; *Taylor Ev.*, s. 932.

18. *Ibid.*; *Roselle v. Buchanan*, (1886) 16 Q.B.D. 656; *Marriott v. Chamberlain*, *supra*.

19. *Weston v. Peary Mohun Dass*, 1911 Cal. 396, per Woodroffe, J.

20. *Ibid.*

that he was actuated by an improper motive personal to himself.²¹ Endorsements on counsel's brief of an order of Court, and any other matters *publici juris* contained therein, e.g. copy of pleadings in former action are not privileged;²² communications between opposite parties, merely as such, or between co-plaintiffs, or co-defendants, *simpliciter*, are not,²³ but communications between co-plaintiffs or co-defendants, when directed to be admitted to a joint solicitor, are privileged.²⁴ So also, are letters written by the solicitor of two plaintiffs to the solicitor of a third plaintiff, as against the defendant claiming their production; and the fact that portions of them had been read to the defendant's solicitor is no waiver of the privilege as regards the parts which were not read.²⁵ A person relying upon the privilege is undoubtedly bound to bring himself clearly and distinctly within it.¹

13. In the course and for the purpose of his professional employment. The communication need not, as has been seen, relate to any actual or prospective litigation, but the matter of the communication must be within the ordinary scope of professional employment,² e.g. the sale, purchase and conveyance of estates,³ or negotiations for a loan,⁴ but not communications to a solicitor acting merely as undersheriff,⁵ rent-collector,⁶ patent agent⁷ or trustee,⁸ nor communications in furtherance of a fraud or crime, whether the solicitor is a party to or ignorant of the illegal object,⁹ nor probably are forged documents, though entrusted to the solicitor in professional confidence, privileged.¹⁰

21. *Nikunja Behari Sen v. Harendra Chandra Sinha*, 1914 Cal. 255 (1) : I.L.R. 41 Cal. 514 : 20 I.C. 1008.
22. *Nikunja Behari Sen v. Harendra Chandra Sinha*, 1914 Cal. 255 (1) : I.L.R. 41 Cal. 514 : 20 I.C. 1008 ; *Walsham v. Stainton*, 2 H. & M. 1 ; *Lamb v. Orton*, 22 L.J. Ch. 713 ; *Nicholls v. Jones*, 2 H. & M. 588 (In this case it was also said that counsel's endorsement is a note on which the Court always acts and on which great reliance is placed) ; *ib.*, 595 ; *Haslam v. Hall*, 3 T.L.R. 776 as to notes of evidence and proceedings in open Court, see *Rawstone v. Corporation of Preston*, 30 Ch. D. 116 ; *Robson v. Warwick*, 38 Ch. D. 370.
23. *Phipson, Ev.*, 9th Ed., 210 and cases there cited and see note to Sec. 23 *ante*, as to communications "without prejudice"; the rule, however, applies where the attorney is a co-defendant ; *Hamilton v. Nott*, L.R. 16 Eq. 112.
24. *Jenkins v. Bushby*, 1 R. 2 Eq. 548.
25. *Kay v. Poorrunchand Poonalal*, (1880) 4 B. 631.
1. *Framji Bhicaji v. Mohansingh Dhan-singh*, (1893) 18 Bom. 263.
2. *Carpmael v. Powis*, 1 Phill. 687.

- 692 : a correlative test is whether the nature of the employment would give the Court summary jurisdiction over the solicitor ; *Turquand v. Knight*, 2 M. & W. 101. As to knowledge acquired in course of employment, see *Gopilal v. Lakhpat Rai*, 1918 All. 38.
3. *Carpmael v. Powis*, 1 Phill. 687, 692.
 4. *R. v. Farley*, 2 C. & K. 313.
 5. *Wilson v. Rastall*, 4 T.R. 753.
 6. *Stratford v. Hogan*, (1812) 2 Ball & B. 164 (Irish) ; *Doc v. Hertford*, 19 L.J. Q.B. 526.
 7. *Mosely v. The Victoria Rubber Co.*, 35 L.T. 482.
 8. *Tugwell v. Hooper*, 10 Beav. 318.
 9. Section 126, *Proviso* ; *R. v. Cox & Raiton*, 14 Q.B.D. 153 ; *R. v. Downer*, 14 Cox 486 ; *Re Arnott*, 60 L.T. 10 ; *Postlethwaite v. Rickman*, L.R. 35 Ch. D. 722 ; *Sara Upadhaya v. S. R. M. A. Firm*, 1933 Rang. 61 (2) : 144 I.C. 175 (there must be definite charge of fraud and something to support it).
 10. *Phipson, Ev.*, 9th Ed., 205 ; *R. v. Hayward*, 2 C. & K. 334 ; *R. v. Avery*, 8 C. & P. 596, 599 ; *R. v. Jones*, 1 Den. 166 ; *R. v. Brown*, 9 Cox 281 ; *R. v. Downer*, *supra* ; *Taylor, Ev.*, s. 929.

14. **No hostile inference should be drawn from a refusal to let a legal adviser disclose confidential communications.** "The exclusion of such evidence is for the general interest of the community, and, therefore to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection, which for public purposes the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice."¹¹ There is a distinction between such cases as these and those in which evidence is improperly kept out of the way.¹²

15. **Communication in violation of duty: secondary evidence.** If the solicitor, in violation of his duty, should voluntarily communicate to a stranger the contents of an instrument with which he was confidentially entrusted, or should permit him to take a copy, the secondary evidence so obtained would, it seems, be admissible, provided that notice to produce the original was duly given and the production was resisted on the grounds of privilege.¹³ "Indeed it has been more than once laid down, that the mere fact that papers and other subjects of evidence have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue. For the Court will not notice whether they were obtained lawfully or unlawfully, nor will raise an issue to determine that question."¹⁴

16. **Information obtained from third parties for the purpose of litigation.** Sections 126—129 refer to communications between clients and their legal advisers alone. As regards documents governed by these sections, they are absolutely privileged, and the Court has no power whatever to order production.¹⁵ There are certain cases, however (for which the Act does not make specific provision, and in which the question of privilege generally arises on application for discovery or inspection before trial), in which communications made for the purpose of litigation between third persons and the adviser, or third persons and the client, for the purpose of submission to the adviser, are under the discretion given by Sec. 30 of the Civil Procedure Code, which discretion, if exercised according to the practice of the Court,¹⁶ is protected from disclosure. Such communications are only protected when they have been made in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And this protection is given because the solicitor is then preparing for the defence or for bringing the action, and all communications he makes for that purpose and the communications made to him (directly or to the client for transmission to

11. *Per Lord Brougham in Bolton v. The Corporation of Liverpool*, 1 M. & K. 88, 94.

12. *Wentworth v. Lloyd*, 10 Jur. N.S. 961.

13. *Cleave v. Jones*, 21 L.J. Ex. 106; *Lloyd v. Mostyn*, 10 M. & W. 481, 482, *Taylor v. Blacklow*, 3 Bing. N.C. 235.

14. *Taylor, Ev.*, s. 920 and cases there cited.

15. *Vishnu Yeshwant v. New York Life Insurance Co.*, (1908) 7 Bom. L.R. 709; and see *Umbica Churn Sen v. Bengal Spinning Co.*, (1894) 22 C. 105.

16. *Ibid.*

im) for the purpose of giving him the information, are, in fact, the rief in the action.¹⁷

The rules relating to the privilege may be summarised as follows. The information may be called into existence or obtained either by (A) the client, or (B) the solicitor :

Case A. (a) Information (oral or documentary) from third persons called into existence by the client, and given in relation to an intended action whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not) is privileged, if it has been so called into existence for the purpose of submission to the solicitor, either for the purpose of advice or of enabling him to prosecute or defend an action,¹⁸ so short- and notes of interviews held between a superior and subordinate employee of a plaintiff company or between the chairman of the same company and an employee, in order to obtain information on a subject of expected litigation for submission to the company's solicitors were held to be privileged,¹⁹ and so also were reports obtained by a party from his subordinates for a similar purpose.²⁰ But letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible future litigation, with the intention that, in that case, they should be laid before a solicitor, are not privileged. It is for the party claiming the privilege to show that the documents were prepared for the use of his solicitor; that they came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him to prosecute or defend an action, as Cotton, L. J., or as Brett, L. J., says, 'merely for the purpose of being laid before the solicitor for his advice or consideration.'²¹ If communications prepared to be laid before solicitors for the purpose of taking their advice are privileged,²² it follows that, *a fortiori*, the advice given with reference to such communications must also be privileged, and it is immaterial that such communications pass from agent to principal, or *vice versa*, before or after they are communicated to the solicitor. The same rule must apply to the advice of the solicitor.²³ Documents which record the steps taken by the plaintiffs, from time to time in prosecuting their claim against the defendant are not privileged.²⁴

17. *Wheeler v. Le Marchant*, L.R. 17 Ch. D. 675, 684, 685. "You have no right to see your adversary's brief and no right to see the materials for his brief". Per James, L. J. in *Anderson v. Bank of Columbia*, L.R. 2 Ch. D. 644 and see remarks of Blackburn, J. in *Feme v. S. E. Ry. Co.*, L.R. 7 Q.B. 767.

18. *Southwark & Vauxhall Water Company v. Quick*, (1878) L.R. 3 Q. B.D. 315, followed in *Bipro Dass v. Secretary of State*, (1885) 11 C. 655; *Vishnu Yeshwant v. New York Life Insurance Co.*, (1905) 7 Bom. L.R. 709.

19. *Southwark & Vauxhall Water Company v. Quick*, *supra*; *Yang Tszze Insurance Association, Ltd. v. Bri-*

tish Indian Steam Navigation Co., Ltd., 1915 L.R. 83 30 I.C. 974.

20. *London & Tilbury Ry. Co. v. Kirk*, (1885) 28 S.J. 688; *Haslam v. Hall*, (1888) 5 T.L.R. 776.

21. *Bipro Dass v. Secretary of State*, (1885) 11 C. 655; *Southwark & Vauxhall Water Company v. Quick*, *supra*; see also *Cook v. North Met. Tram. Co.*, (1889) 6 T.L.R. 22; *Westinghouse v. Midland Ry.*, 48 L.T. 462.

22. *Southwark & Vauxhall Water Company v. Quick*, *supra*. But see as to case drawn up by attorney for counsel's opinion, *Chandreshwar v. Bisheshwar*, (1926) 5 Pat. 111.

23. *Rvrio v. Shivshankar Gopalji*, (1890) 15 B. 7.

24. *Ibid.*

(b) But information (oral or documentary) obtained by the client otherwise than for submission to the solicitor, e.g., reports and communications made by agents or servants in the ordinary course of their duty, are not privileged even though litigation be anticipated.²⁵ The rule has been thus stated by Brett, L. J.: "Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced; but if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is, whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal, as to whether he should maintain or resist litigation."¹ Accordingly, an answer to a letter from a principal stating that certain claims had been made and asking the agent for information as to the facts,² or made to the principal to be submitted "in the event of litigation" to the latter's solicitor, have been held not to be privileged.³

Case B. (a) Information (oral or documentary) from third persons "which has been called into existence by the solicitor (or by his direction, even though obtained by the client) for the purpose of litigation, e.g., information to be embodied in proofs of witnesses,⁴ notes of evidence of party's witness given to his counsel for preparing his brief,⁵ reports made by medical men at the request of the solicitors of a Railway company, as to the condition of a person threatening to sue the company for injury from a collision,⁶ and anonymous letters sent to solicitor and counsel⁷ with reference to, and for the purpose of, a trial, are privileged.⁸

25. *Woolley v. North London Ry. Co.*, (1869) 1 L.R. 4 C.P. 602; *Wallace v. Jefferson*, (1878) 2 B. 459; see also *Cook v. North Met. Tram. Co.*, (1889) 6 T.L.R. 22; *Central India Spinning Co. v. G. I. P. Railway*, 1927 Bom. 367; 102 I.C. 425; 29 Bom. L.R. 414.
1. *Woolley v. North London Ry. Co.*, 1 L.R. (1869) 1 L.R. 4 C.P. 602 at pp. 615, 614.
2. *Anderson v. Bank of Columbia*, (1876) 1 R. 2 Ch. D. 644, followed in *Wallace v. Jefferson*, (1878) 2 B. 459; see also *London Gas Co. v. Chelsea*, (1859) 6 C.B.N.S. 411; *English v. Tottie*, (1875) 1 Q.B.D. 141.
3. *Cook v. North Met. Tram. Co.*, (1889) 6 T.L.R. 22; *Westinghouse v. M. R. Co.*, (1883) 48 L.T. 462; *Bipro Dass v. Secretary of State*, (1885) 11 C. 655.
4. *Dinbai v. Fromroz*, 1916 Nag. 77;

43 I.C. 71.

5. *Dulhin Genda Kunwar v. Hamandan Prasad Singh*, 1916 P.C. 157; 33 I.C. 790; 20 C.W.N. 617; 50 M.L.J. 624.
6. *Woolley v. N. L. Ry. Co.*, *supra*; *Frain v. L. C. & D. R. Co.*, 2 Ex. D. 457; and see *Wheeler v. Le Marchant*, L.R. (1881) 17 Ch. D. 681; *Proctor v. Smiles*, (1886) 55 L.J. Q.B. 527; *Bustros v. White*, (1876) 1 Q.B.D. 423; *McCorquodale v. Bel*, (1876) 1 C.P. D. 471.
7. *Re Holloway*, (1887) 12 P.D. 167; but anonymous letters sent by stranger to client are not privileged (*ib.*) "when a solicitor is employed on behalf of his client, the information which he gets in reference to the litigation in which his client is concerned is protected", *Ibid.*
8. *Phipson*, Ev., 11th Ed.; 258, 259.

(b) But there is no privilege in respect of such information "not called into existence by the solicitor, though obtained by him for purposes of litigation, e.g., copies of letters written before action by third persons to the client;⁹ or called into existence by the solicitor, though not for the purposes of litigation—e.g. a report made by the surveyor at the solicitor's request as to the state of a property upon which the client was about to lend money;¹⁰ or as to matters in respect of which litigation was not at the time contemplated, although it afterwards arose."¹¹

130. *Production of title deeds of witness not a party.* No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

131. *Production of documents which another person, having possession, could refuse to produce.* No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

§. 3 ("Document").

§. 139 (Cross-examination of persons called to produce a document).

§. 165 (Production of document).

§. 165 Prov. 2 (Power of Judge to compel production of document).

Act XIX of 1853, Sec. 26; Act X of 1855, Sec. 10; Act XVIII of 1891, Sec. 5 (Banker's Books); Steph., Dig., Arts. 118, 119; Starkie, Ev., 111; Best, Ev., Sec. 128; Roscoe, N.P. Ev., 18th. Ed., pp. 156-159; Taylor, Ev., Secs. 458, 918, 919, 1464; Bray's Discovery, 313, 203-206; Civ. Pro. Code, Order XI, Rules 6 and 14; Hageman, op. cit., Secs. 117, 118; Wigmore, Ev., Sec. 2211.

SYNOPSIS

1. Principle.

2. Production of privileged documents.

1. **Principle.** Section 130 embodies a rule of legal policy founded in English law upon a consideration of the great inconvenience and mischief to individuals which might, and would, result to them from compelling them to disclose their titles by the production of their title deeds.¹² The object of the privilege, as to not producing title-deeds, is that the title may not be disclosed and examined.¹³ The ethics of the rule has been said to be ques-

9. Chadwick v. Bowman, 16 Q.B.D. 561.

10. Wheeler v. Le Marchant, (1881) L. R. 17 Ch. D. 681.

11. Westinghouse v. M. R. Co., (1883) 48 L.T. 462; Phipson, Ev., 11th Ed., 259; see also preceding para-

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graph.

12. Starkie, Ev., 111; see Best., Ev.; s. 128; see also Taylor, Ev., s. 1464.

13. Phelps v. Prew, (1854) 3 E. & B. 441, per Erle, J.

tionable. Nevertheless, in England the law's failure to protect titles adequately by registration, and the inevitable risks which were thereby created for even *bona fide* titles, furnished a sufficient explanation if not a justification. But under a system of compulsory public registration there is in such a privilege neither necessity nor utility. Those, and they are few, who do not register voluntarily, take the risk of loss, and their situation does not justify special protection. Those who do register have no need of protection, for their title in general stands or falls by what is publicly recorded, not by what they privately possess.¹⁴ As to Sec. 131, see Commentary; and as to criminating documents, see Commentary and Sec. 132, post.

2. Production of privileged documents. The rule enacted by these sections, in so far as they relate to witnesses not parties, and the class of persons contemplated by Sec. 131, is in general accordance with that of the English law on the same subject.¹⁵ The first section applies only in the case of a witness who is not a party to the suit in which he is called. But where discovery is sought under the provisions of the Civil Procedure Code, a witness, if a party, cannot be compelled to produce documents which he swears relate solely to his own title or case, and do not in any way tend to prove or support the title or case of his adversary. But the production of other relevant and material documents will ordinarily be compelled.¹⁶ The privilege, in the case of a party, is not confined to title-deeds. "The word 'title' produces confusion, because, in many cases, it is not a question of title at all, and the proposition ought to be that a plaintiff is not entitled to see any document that does not tend to make out his case."¹⁷ The oath of the witness is conclusive as to the nature of the document.¹⁸ *Quære*: Whether a party can, on an application for discovery, be compelled to answer interrogatories, or to produce documents of a criminating character. In England (where, however, the rule relating to criminating evidence is different from that under this Act) he would not be so compelled.¹⁹

No protection is given by this Act against such answer or production, which (Sec. 1) does not apply to affidavits, and the party interrogated is not a witness and is therefore not entitled to the protection given by this section. The question must be decided under Order XI, Rule 6 of the Civil Procedure Code. It has been said that probably the question may be dealt with as if the party interrogated were in the witness-box, and that all questions will be allowed which the party interrogated would be bound to answer, if

14. Wigmore. Ev., s. 2211. In the United States there is no such privilege.

15. Taylor. Ev., ss. 458, 918; Pickering v. Noyes, (1823) 1 B. & C. 263; Adams v. Lloyd, (1858) 3 H. & N. 551; Whitaker v. Izod, (1809) 2 Taunt. 115 and text-books cited, ante.

16. Morris v. Edwards, (1890) L.R. 15 App. Cas. 309, affirming Morris v. Edwards, 23 Q.B.D. 287; see Bolton v. Corporation of Liverpool, (1833) 1 M. & K. 88.

17. Per Kindersley, V. C. in Jenkyns v. Bushby, (1866) 35 L.J. Ch. 820;

see Bewicke v. Graham, (1880) 7 Q.B.D. 400; Morris v. Edwards, 23 Q.B.D. 287; (1890) L.R. 15 App. Cas. 309.

18. Morris v. Edwards, (1890) L.R. 15 App. Cas. 309; 23 Q.B.D. 287.

19. Cf. Civil Procedure Code, Order XI, rr. 6, 16; Hill v. Campbell, (1875) L.R. 10 C.P. 222; Atherley v. Harvey, (1877) 2 Q.B.D. 524; Fisher v. Owen, (1878) 8 Ch. D. 645; Webb v. East, (1878) 5 Ex. D. 108; Bray on Discovery, 313. As to discovery in criminal cases, see Mohamed Jackeriah v. Ahmed Mohamed, (1887) 15 Cal. 109.

he were a witness.²⁰ If this be so, the defendant would be bound to answer. On the other hand, it is one of the inveterate principles of English law, that a party cannot be compelled to discover that which, if answered, would tend to subject him to punishment,²¹ and this is so, though there is not the faintest prospect of any criminal proceedings being taken against him.²² It is, therefore, an open question whether a party interrogated, who is apparently without the statutory protection given to a witness, should or should not be protected by the application of the general principles above mentioned. Where a witness is not compelled to produce a deed, he cannot be compelled to answer questions as to its contents, otherwise the protection would be perfectly illusory (*v. post*).²³ In a case to which Sec. 130 applies, it is entirely optional for the witness to produce his title-deeds and to raise any objection whatever.²⁴ Section 131 extends to the agent the same protection which Sec. 130 or any other section of this or any other Act, provides for the principal; and so, where a principal would be entitled to refuse production of a document, it cannot be compelled from his solicitor, trustee, or mortgagee.²⁵ But, in so far as the object of the privilege is that the title may not be disclosed and examined, it has been held in England that production may be enforced for the purpose of identification, which must not extend to a perusal of its contents.¹ It has also been held that, unless it appears that the title of the persons possessing the document will, in some way, be affected by its production, the rule will not prevail.² It would appear from the terms of Sec. 131 that, though the persons contemplated by that section cannot be compelled to produce documents in their possession they will yet, if they so choose, be permitted to do so; and therefore, for example, though a legal adviser holding a document confidentially for his client, may justify his refusal to produce it under this section, and is forbidden (by Sec. 126) to state the contents of any document with which he has become acquainted in the course, and for the purpose, of his professional employment, he will yet be permitted to produce the document itself, if it happens to be in his possession and he chooses to do so.³ The fact, that the production of the document will expose the person producing it to a civil action, affords no ground for protection.⁴ A witness, not a party, need not produce a criminating document, but he must answer any criminating question, save, it is submitted, any question as to the contents of any such criminating document, as, by the provisions of Sec. 130,

20. See remarks of Alderson, B., in *Osborn v. London Dock Co.* (1855) 10 Ex., 698, 702; *Lyell v. Kennedy*, (1883) 8 App. Cas. 217.

21. Per Bowen L. J., in *Redfern v. Redfern*, P.D. 1891 p. 139.

22. *Odgers on Libel*, 580.

23. *Davies v. Waters*, (1842) 9 M.W. 608, 612; *Few v. Guppy*, (1836) 13 Beav. 457; and this notwithstanding S. 132, *post.*, but see *Bajjnath v. Raghunath Prasad*, 1914 Cal. 767; I.L.R. 41 Cal. 6; 24 I.C. 765 (a party can interrogate on facts directly in issue and thus on details of a hundi) distinguishing *Ali Kader Syed Husain Ali v. Gobind Dass*, (1890) 17 C. 840.

24. *R. v. Moss*, (1893) 16 A. 88, 100.

25. *Bursill v. Tanner*, (1885) 16 Q.B. D. 1; *Steph., Dig.*, Art. 119; *Taylor, Ev.*, ss. 458, 918.

1. *Phelps v. Prew*, (1854) 3 E. & B. 430; see also *Volant v. Soyer*, (1858) 13 C.B. 231.

2. *Taylor, Ev.*, s. 459; *Lee v. Merest*, (1869) 39 L.J. Ecc., 53; *Doc v. Langdon*, (1848) 12 Q.B. 711.

3. *Taylor, Ev.*, ss. 458, 919; *Roscoe; N.P. Ev.*, 156; *Hibberd v. Knight*, (1848) 2 Ex. R. 11; as to the giving of secondary evidence in the case of non-production, see note to S. 65, *ante*.

4. *Doc v. Date*, (1842) 3 Q.B. 609; *Taylor, Ev.*, ss. 460, 1464.

he is not bound to produce.⁵ Before any proceedings are ordered to be taken against him for non-production of an alleged title-deed, the nature of the documents should be determined, for, if it is a title-deed of his own or of some other person, he could not be compelled to produce the document.⁶ As to a witness who is a party, *v. ante*. In all cases, notwithstanding any objection there may be, the document itself must be brought to Court, when the Judge will decide as to the validity of the objection.⁷ As to the liability of a witness for damages in case of failure to give evidence, or to produce a document see Acts XIX of 1853⁸ and X of 1855.⁹ A witness called on his *subpoena duces tecum*, who objects to the production of documents, has no right to have the question of his liability to produce argued by his counsel retained for that purpose.¹⁰ A witness cannot withhold production of a document called for as evidence, on the ground of any lien he may have upon it;¹¹ unless perhaps the party requiring the production be himself the person against whom the claim of lien is made;¹² for, in such case, the right to use the document evidentially might, on the facts, practically annul the value of the lien, and there seems no reason why this should be permitted to him. So though a solicitor, having a lien on a deed, may not be bound to produce it at the instance of the client against whom the lien exists, yet if the client is bound to produce it for the benefit of a third person, as e.g., under a *subpoena duces tecum*, so too is the solicitor.¹³ A banker is not compellable to produce his books in legal proceedings to which the bank is not a party.¹⁴ But, in England, it has been held that the fact that a banker had received a document upon the terms that it shall not be delivered up except with the consent of the depositor is no answer to a *subpoena duces tecum*.¹⁵ Where a witness, not party to the suit, is summoned to produce the original of a document, and he does not produce it on the ground that it is his title-deed, the party who summoned him is entitled to use as secondary evidence a certified copy of the document.¹⁶

5. Section 132, *post*; *Davies v. Waters*, (1842) 9 M.W. 608, 612.
6. *Bhagabat Prasad Singh v. King-Emperor*, 11 I.C. 794 : 14 C.L.J. 120.
7. Section 162, *post*.
8. Section 26 (in force in Bengal, N. W.P. and Oudh).
9. Section 10 (in force in the Presidencies of Madras and Bombay).
10. *Rowcliffe v. Egremont*, (1841) 2 M. & Rob. 386; see also *Lee v. Merest*, (1848) 39 L.J. Ecc., 53, 56.
11. *Hunter v. Leathley*, (1830) 10 B. & C. 858; *Ley v. Barlow*, 1 Ex. 801; *Taylor, Ev.*, s. 458. and cases there cited.
12. This is suggested in *Brassington v. Brassington*, (1823) 1 Sim. & St. 455, and acted upon in *Kemp v. King*, (1842) 2 M. & Rob. 437; see also *Hope v. Liddell*, (1855) 24 L.J. Ch. 691; *Re Cameron's Co.*, (1857) 25 Beav. 1; *Taylor, Ev.*, s. 458; *Bray's Discovery*, 203—206; *Wigmore, Ev.*, p. 3001. But it seems to be opposed to *Hunter v. Leathley*, (1830) 10 B. & C. 858, in which a broker, who had a lien on a policy

for premium advances, was compelled to produce it in an action against the underwriter by the assured who has created the lien (*Steph.*, Dig. Art. 118); see also *Fowler v. Fowler*, (1881) 29 W.R. (Eng.) 800. See *Lockett v. Carey*, (1864) 10 Jur. N.S. 144, where a solicitor was a party to the action, and Indian Contract Act (IX of 1872), ss. 171, 221. As to right of a mortgagee to withhold production of mortgage deeds or title-deeds, see *Beattie v. Jetha Dungarsi*, 5 Bom. H.C.R., O.C.J. 152.

13. *Cordery's Law relating to Solicitors*, 3rd Ed., 365; *Lush's Practices*, 3rd Ed., 335, 336; as to lien in insolvency, administration, and in winding-up proceedings, see *Bray's Discovery*, 205.
14. *Bankers' Books Evidence Act*, Act XVIII of 1891, s. 5.
15. *R. v. Daye*, (1908) 2 K.B. 333 (Div. Ct.).
16. *Inrit Chamar v. Sridhar Pandey*, 13 I.C. 120 : 15 C.L.J. 7.

132. *Witness not excused from answering on ground that answer will criminate.* A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso. Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

s. 130 (Criminating Documents).

ss. 148-149 (Criminating Questions in cross-examination).

Steph., Dig., Art. 120; Taylor, Ev., Secs. 1453-1468; Best, Ev., Secs. 126-129; Bray on Discovery, 311-349; Roscoe, N.P. Ev., 18th Ed., 167-169; Powell, Ev., 9th Ed. 221-228; Cr. P. C., Secs. 161-175; Stewart Rapalje's Law of Witnesses, Secs. 261-269; Wharton, Ev., Secs. 533-540; Hageman's Privileged Communication, Secs. 256-271.

SYNOPSIS

1. Principle.
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1. **Principle.** The general rule is otherwise in England, where (with certain exceptions) a witness need not answer any question the tendency of which is to expose the witness, or the wife or husband of the witness, to any criminal charge, penalty or forfeiture,¹⁷ the maxim being *nemo tenetur prodere seipsum*.¹⁸ The privilege is based on the principle of encouraging all persons to come forward with evidence, by protecting them, as far as possible from injury or needless annoyance in consequence of so doing.¹⁹ This privilege was repealed in India by Sec. 32, Act II of 1855, which is reproduced

17. See *R. v. Gopal Dass*, (1881) 3 M. 271, 279-282 (F.B.); Best, Ev., ss. 126-129; Taylor, Ev., ss. 1450-1468; Bray on Discovery, 311-349; Roscoe, N.P. Ev., 18th Ed., 167-169; Phipson, Ev., 11th Ed., 260, 261; Powell, Ev., 9th Ed., 221-228; Steph. Dig., Art. 120; *R. v. Boyes*, (1861) 1 B. & S. 311; *Ex parte Reynolds*, (1882) L.R. 20 Ch. D. 294 (oath of the witness not conclusive; claim must be bona fide).

18. For a criticism of this rule. see Bentham, *Rationale*, Book IX. Part IV

Chap. 3; Stephen's History of the Criminal Law I, 342, 441, 535, 542, 565; Wigmore, Ev., s. 2251, where he deals with the subject of judicial cant towards crime and with what a writ has called "Justice tempered with mercy".

19. Best, Ev., s. 126, a compromise has, however, been adopted in several modern statutes by compelling the disclosure, but indemnifying the witness from its results; see Phipson, Ev., 11th Ed., 261.

in the present section.²⁰ The state of the law, while the privilege existed, tended, in some cases, to bring about a failure of justice, for the allowance of the excuse, when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision. In order to avoid this inconvenience and to obtain evidence which a witness refused to give, the witness was deprived of the privilege of claiming excuse; but, while subjecting him to compulsion, the Legislature, in order to remove any inducement to falsehood, declared that evidence so obtained should not be used against him, except for the purpose in the Act declared.²¹ The necessity under which the privileged witness formerly lay of explaining how the answer might criminate him amounted in some cases to a virtual denial of the privilege. This necessity for an enquiry as to how the answer to a particular question might criminate is now avoided. The rule enacted by this section thus secures (1) the benefit of the witness's answer to the cause of justice, and (2) the benefit of the rule, that no one shall be compelled to criminate himself, to the witness (claiming his privilege), when a criminal proceeding is instituted against him.²²

1-A. Application to interrogations under Sea Customs Act. The Indian Evidence Act is a complete Code repealing all rules of evidence not found therein—see Section 2(1), ante. As the Act does not apply to interrogations by a Customs Officer exercising powers under Section 171-A of the Sea Customs Act, 1878 (now Section 108 of the Customs Act, 1962), Section 132 of the Indian Evidence Act cannot be attracted. Section 171-A of the Sea Customs Act does not limit interrogations to questions, the answers to which may not incriminate the person interrogated.²³

2. "Witness". The rule laid down in Art. 20(3) of the Constitution that "No person *accused of any offence* shall be compelled to be a witness against himself" is narrower than the Anglo-American rule, since the privilege has been kept confined to persons "*accused of any offence*". Witnesses in India have been left untouched by the Constitution and continue to be governed by Sec. 132 and other provisions of the Evidence Act.²⁴ When an accused person is making a statement under Sec. 342²⁵ of the Code of Criminal Procedure, he can refuse to answer any question. But, as a witness, he is not excused from answering any question as to any matter relevant to the matter in issue.¹ In a case, where an accused person is put on oath for the purposes of assisting the defence of another accused, the evidence of such accused person could, under no circumstances, be tenderable as against him under this section, so as to incriminate him. The very act of putting an accused person on oath, in such a case, means compulsion, and the case

20. Sec E. Peddappa Reddi v. I. Varada Reddi, 1929 Mad. 236 ; I.L.R. 52 Mad. 432 : 116 I.C. 337.

21. Per Turner, C.J., in R. v. Gopal Dass, *supra*, 279, 280 (F.B.).

22. *ib.*, per M. Ayyar, J. at pp. 286, 287. So a co-accused in separate case can be called as defence witness under the protection of this section; Raja Ram v. Emperor, 1924 Lah. 247 : 73 I.C. 521 ; 5 L.L.J. 429.

23. Hira H. Advani v. State of Maha-

rashtra, (1970) 1 S.C.R. 821 : (1970) 2 S.C.A. 10 : (1970) 2 S.C.J. 192 : 73 Bom. L.R. 112 : 1971 Cr. L.J. 5 : 1970 M.L.J. (Cr.) 490 : 1971 Mah. L.J. 359 : A.I.R. 1971 S.C. 44 (56).

24. Subedar v. State, 1957 All 396 : 1957 A.L.J. 263.

25. Now see section 313 of the Code of 1973.

1. *Empress v. Durant*, 1898 I.L.R. 23 Bom. 213.

stands on an entirely different footing from cases where the very offence is not being tried but where the matter in issue is something quite different either in a civil or criminal proceeding, and where the witness in answer to questions which are relevant to the matters in issue makes the statement which incriminates him as to some other act of his own, which has got nothing to do with the matters in issue to be decided in that proceeding, either civil or criminal. But, where the man is examined in the inquiry of the very offence with which he is subsequently charged, the matter stands on an entirely different footing. It is repugnant to all principles of criminal law, as administered in this country, to compel a person to give evidence in the very matter in which he is accused, or is liable to be accused, and then to base the charge on such evidence, and at the trial of the accused to use such evidence, given on oath as a statement tending to prove the guilt of the accused.² Where prosecution witnesses, who have given evidence against an accused, are themselves made accused persons, it is not sufficient to say that their evidence would not be taken into consideration. There should be a definite order to expunge it from the record. It is wrong to leave their evidence on the record. Further, it is desirable that the trial should start afresh before another Magistrate.³ Where an accomplice is examined as a witness, though, if compelled to answer incriminating questions by the Court, he cannot be prosecuted for those answers and can claim the protection of this section, still he may be prosecuted on the strength of any other evidence which may be available, and he is therefore at the mercy of the police.⁴ Where a person was once a co-accused, but has since ceased to be such by reason of the separation of his trial with the other accused, he cannot be denied the benefit of the proviso to this section. He is as much a witness as any other, when once he is not an accused person within the meaning of Sec. 342.⁵ Criminal Procedure Code. The legal position of such a witness does not differ from the position of any other ordinary witnesses, and there is nothing that can prevent such a person from taking benefit under the proviso to this section. When an oath could be administered to such a person, then naturally the incidents to this section also attach themselves to such a person as a witness.⁶

Proceedings under Sec. 185 of the Indian Companies Act (1913) (now Section 468 of the Companies Act, 1956), are not in the nature of criminal proceedings; nor is the person interrogated an 'accused' within the meaning of Art. 20(3) of the Constitution. Therefore, there is nothing to bar the application of this section in such cases. The privilege under this section is in the nature of a prohibition against involuntary subjection to question. What is prohibited is the forced disclosure of something by an accused in a criminal trial. Obviously, the rights under this section do not extend to a proceeding which does not involve punishment in a criminal Court.⁷ So

2. *Emperor v. Kazi Dawood*, 1926 Bom. 144 : I.L.R. 50 Bom. 56 : 43 I.C. 225.

3. *Province of Bihar v. Bhim Bera*, 1947 Pat. 284 : I.L.R. 25 Pat. 539.

4. *Keshav Vasudeo Kortikar v. Emperor*, 1935 Bom. 186 : I.L.R. 59

Bom. 355 : 156 I.C. 592.

5. Now see section 313 of the Code of 1973.

6. *In re Kandasami Gounder*, 1957 Mad. 727, 734 : I.L.R. 1957 Mad. 715.

7. *People's Insurance Co. v. Sardul Singh Cavasheer*, I.L.R. (1962) 1 Punj. 468 : A.I.R. 1962 Punj. 101.

also, when a person is summoned to appear before the Sea Customs Authorities under Sec. 171-A of the Sea Customs Act, 1878 (now Section 108, Customs Act, 1962), he is bound to answer all questions put to him, because this section applies only to judicial proceedings in or before any Court, which a proceeding under that provision is not.⁸

3. **"Shall not be excused"**. The section provides sufficient protection for a witness compelled to give answers to particular questions tending to incriminate him, but he cannot be excused from appearing as a witness.⁹ This section gives the Judge no option to disallow a question as to matters relevant to the matter in issue. Section 148 gives him an option to compel or excuse an answer to a question as to a matter which is material to the suit, *only so far as it affects the credit of the witness*.¹⁰ Statements made by a witness on matters, not relevant to the issue, are not protected by this section.¹¹ As to interrogations see notes to Sec. 130, ante.

4. **"Relevant to the matter in issue"**. This section does not, in terms, deal with all criminatory questions which may be addressed to a witness, but *only with questions as to matters relevant to the matter in issue*. Irrelevant questions should not be allowed, and it may be implied from the limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant.¹² On the very language of this section, the witness can always claim to be excused on the ground of the irrelevancy of the question.¹³

5. **"Criminate; penalty; forfeiture"**. Though the section does not so expressly provide, it follows, *a fortiori* that a person is not excused from answering any question, only because the answer may establish or tend to establish that he owes a debt or is otherwise liable to a civil suit either at the instance of the Crown or of another person.¹⁴

6. **"Shall be compelled to give"**. The section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer; and gives him a protection in the latter of these cases only.¹⁵ Protection is afforded only to answers which a witness has objected to give, or which he has asked to be excused from giving, and which then he has been compelled to give, and not to answers given voluntarily. "As these words stand, they presuppose an objection by the witness, which has been overruled by the Judge and a constraint put upon the witness to answer the particular question". If, therefore, the witness wishes to prevent his statement from being thereafter used against him, he

8. Sankar Lal v. Collector of Central Excise, A.I.R. 1960 Mad. 225 : I. L.R. 1960 Mad. 267.

9. Raja Ram v. Emperor, 1924 Lah. 247 : 73 I.C. 521.

10. R. v. Gopal Dass, (1881) 3 M. 271, 280 (F.B.).

11. Kashi Ram v. Emperor, 1930 All. 493 : 129 I.C. 707 : 1930 A.L.J. 1121 : Haider Ali v. Abru Mia, (1905) 32 Cal. 756 : 2 C. L. J. 105 : 9 C.W.N. 911.

12. R. v. Gopal Dass, 3 Mad. 271, 278,

per Turner, C.J. (F.B.).

13. ib., 283, per Innes, J.

14. See 46 Geo. III, Chap. 47 ; Steph., Dig., Art. 120 and note ; as to the meaning of "tendency to criminate", see Lamb v. Munster, (1883) 10 Q. B.D. 111, 114.

15. Cavaram v. Shanti Kunwar, 1971 I.L.J. 197 (201) : 1971 M.P.W.R. 326 : 1971 M.P.L.J. 284. ('compulsion' denotes 'compulsion by court').

must object to reply, and only answer on being compelled by the Court.¹⁶ The compulsion, contemplated in this section, is something more than being put into the box and being sworn to give evidence; the compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words, or that the asking for protection should be in a particular form. If the witness is made to understand, that he must answer all questions without exception, it would amount to compulsion. In all cases, it is a question of fact, whether there was or was not compulsion. Whether the witness seeks the protection of the Court in a set form of words, or not, if the witness is made to understand directly or indirectly that he had no option in the matter but to answer all the questions put to him, he would bring himself within the proviso to this section. The words of the proviso should be understood in the ordinary sense, and the word "compelled" means forced or insisted upon to answer the question. The witness may not know that he should apply for protection; but any reasonable man ought to know that any statement defamatory of another would expose him to a charge of defamation. If he hesitates to answer, and the Court tells him he must answer the question, it must be held that the hesitation and the direction of the Court to the witness to answer would bring the witness within the proviso.¹⁷ Where a witness examined-in-chief gave answers of his own accord which were defamatory, he could not be said to have been "compelled to give answers". "*Compulsion*" denotes *compulsion by the Court*. The giving of evidence is a matter of duty and not of "compulsion."¹⁸ This provision may well be contrasted with Exception (8) to Sec. 499, I. P. C. The latter excludes a statement from the definition of "defamation" altogether; but Sec. 132 proviso excludes prosecution for defamation and bars proof of the accusation in a trial for defamation. It assumes that the accusation contained in the answers is defamatory and punishable as such. Therefore, it will apply, even

16. R. v. Gopal Doss. 3 Mad. 271, 278 (F.B.) per Curiam, Kernan and Ayyar, JJ., dissent; R. v. Ganu. (1888) 12 B. 440, per Curiam, Birdwood, J., dissent; Emperor v. Cunna, 1920 Bom. 270 (F.B.); 59 I.C. 324; 22 Bom. L.R. 1247 (F.B.); R. v. Samiappa, (1891) 15 M. 63, per Curiam, Muttusami Ayyar and Parker JJ., Mohr v. R., (1893) 21 G. 392, per Curiam, Trevelyan and Rampini JJ. R. v. Moss. (1893) 16 A. 88, 100; Haider v. Abru. (1905) 32 C. 756; 2 C.L.J. 105; 9 C.W. N. 911; Kashi Ram v. Emperor, 1930 All. 493; 129 I.C. 707; 1930 A.I.J. 1121; Sadaruddin v. R. (1904) 31 C. 715 at pp. 720, 721; 8 C.W.N. 910; Bai Shanta v. Umrao. 1926 Bom. 141; I.L.R. 50 Bom. 162; 93 I.C. 151. As to the law under Sec. 32, Act II of 1855, see R. v. Jamira. (1866) B.L.R. Sup. Vol. pp. 521, 524, 526, 630; Joseph Peety v. Official Assignee, 1920 Cal. 941; I.L.R. 47 Cal.

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- 254; 56 I.C. 778; Kallu v. Sital. 1918 All. 260; I.L.R. 40 All. 271; 43 I.C. 828; 10 Cr. L.J. 231; Ganga v. R., 1920 All. 140; I.L.R. 42 All. 257; 54 I.C. 890; see also Jagannath v. Emperor, 1934 Oudh 386; 151 I.C. 435; Ghan-shanudas Gian Chand v. Nanumal, 1934 Sind 114; 152 I.C. 346; 28 S.L.R. 251; Ram Dayal v. Emperor, 1933 Oudh 370; 146 I.C. 438; 10 O.W.N. 735; Elavarthi Peddappa Reddi v. I. V. Reddi, 1929 Mad. 236; I.L.R. 52 Mad. 492; 116 I. C. 337; Surajmal v. Ram Nath, 1928 Nag. 58; 105 I.C. 820; Ramchand v. Emperor, 1926 Lah. 385; 98 I.C. 599; Rasool Bhai v. The King, 1939 Rang. 371; 184 I.C. 566; 1939 R.L.R. 479 (protection must be claimed directly or indirectly in some way or other).
17. Elavarthi Peddappa Reddi v. I. V. Reddi, 1929 Mad. 236 at 238, 239.
18. Chotkan v. State. A.I.R. 1960 All. 606; 1960 All. L.J. 668.

though the statement is not made in good faith; consequently, it will not be covered by Exception (8) to Sec. 499, I. P. C.¹⁹ It is difficult to draw a distinction between compulsion, express and implied. In every case, compulsion is express, although it may be couched in different words, and may give intimation to the witness that he is bound to answer not only the question which he has objected to but every other question which may on a particular point be put to him. An intimation of that nature might relieve the witness of objecting to every question which is put to him and which exposes him to an action, but, before he can be said to have been compelled to answer a question, he must object to answer such questions, or, at any rate, the very first question on the same point so as to invite the attention of the Court to apply its mind to the question and to decide whether he is to be compelled to answer the same or not.²⁰

The answer given under compulsion, unless it be false, cannot be a ground for any subsequent criminal proceeding; apparently, it might be made use of in a subsequent civil suit. The objection should, in strictness, come from the witness himself,²¹ or the counsel or pleader representing him.²² *Quære*, however, whether the Judge ought not (though he is not bound) to advise the witness of his right.²³ It has been held that, although a voluntary statement made by a witness may stand on a different footing, an answer given by a witness in a criminal case on oath to a question put to him either by the Court or by counsel on either side, especially when the question is on a point which is relevant to the case, is within the protection afforded by this section, whether or not the witness has objected to the question asked to him.²⁴ More recently still it has been held that the question, whether a witness is "compelled" to answer, is, in each case, a question of fact, although it may be said that in the case of an ordinary layman unacquainted with the technical terms of this section, he is "compelled to answer on oath questions put either by the Court or by counsel."²⁵

In States where the Judges are permitted to simply make notes of the deposition of a witness, it is difficult to know whether a witness voluntarily made a statement or was "compelled" to make it in answer to a relevant question. So, the mere record of a deposition is not, by itself, sufficient evidence of the compulsory or voluntary nature of the statement of a witness.¹

19. *Chotkan v. State*, A.I.R. 1960 All. 606 : 1960 All. L.J. 668 ; see also *Haji Ahmed Hussain v. State*, A.I.R. 1960 All. 623 : 1960 All. L.J. 109.
20. *Ghanshamdas Gianchand v. Nenumal*, 1934 Sind 114 at 118.
21. *Thomas v. Newton*, (1826) 1 M. & W. 48n ; *R. v. Adey*, (1831) 1 M. & Rob. 94 ; *Boyle v. Wiseman*, (1855) 10 Ex. R. 647.
22. *R. v. Pramatha Nath Bose*, (1910) 37 C. 878 : 6 I.C. 782 : 14 C.W. N. 957.
23. *Fisher v. Ronalds*, (1852) 12 C. B. 762 ; *Paxton v. Douglas*, (1809) 16 Ves. 239 ; *A. G. v. Radloff*, (1854) 10 Ex. 88 ; *R. v. Gopal Dom*, 3 Mad. 271, 286 (F.B.) ; 8.

- 148, post especially refers to warning by Judge. As to the power of the Judge to question the witness, see *R. v. Hari*, (1885) 10 B. 185.
24. *Chatur Singh v. Emperor*, 1921 All. 362 : I.L.R. 43 All. 92 ; see also *Jagannath v. Emperor*, 1934 Oudh 386 ; *Sheo Karan Lal v. Bandi Prasad*, 1943 Pat. 117 : I.L.R. 21 Pat. 778 : 205 I.C. 531 and cases cited therein.
25. *Emperor v. Banarsi*, 1924 All. 381 : I.L.R. 46 All. 254 : 77 I.C. 829 ; *Elavarthi Peddappa Reddi v. I. V. Reddi*, 1929 Mad. 236 ; *Sheo Karan Lal v. Bandi Prasad*, 1943 Pat. 117.
1. *Sulajmal v. Ram Nath*, 1928 Nag. 58.

A person is not compelled to be a witness if he voluntarily gives evidence in his defence.² A person who voluntarily answers questions from the witness-box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others.³

The provisions of Section 478 (5) of the Companies Act, 1956 (power to order public examination of promoters, directors, etc.), override the provisions of Section 132 of the Indian Evidence Act and the answers given by the officer who is being examined, which can tend to criminate him or be used in civil as well as criminal proceedings that might ensue. No question of granting him protection under the proviso to Section 132 of the Indian Evidence Act arises at all in regard to such answers, even though he may be compelled to give the same by reason of the provisions of Section 478 (5) of the Companies Act, 1956.⁴

7. Extent of protection. The law on the question of the extent of the protection privilege to be accorded to litigants and witnesses for statements made in the course of judicial proceedings in India has been the subject of considerable diversity of opinion, and it is now recognized in the decisions of some of the High Courts that the law is different when the question arises for decision in a civil suit for damages for defamation, from what it would be if the question arose for decision in a criminal prosecution for such defamation under the provisions of the Indian Penal Code.

When defamatory statements are made in the course of judicial proceedings, the English rule of absolute privilege must be applied and no suit will lie for damages for defamation.⁵ In the case of *Baboo Ganesh Dutt Singh v. Mugnee Ram*,⁶ their Lordships stated: "It concerns the public and the administration of justice that witnesses giving evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suit for damages; but the only penalty which they should incur, if they have given their evidence falsely, should be an indictment for perjury." The question of extent of protection was considered by a Full Bench of the Calcutta High Court in *Satish Chandra v. Ram Dayal*,⁷ where after an exhaustive review of the authorities, their Lordships held:

(i) "If a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined by reference to the provisions of Sec. 499, Indian Penal Code.

2. *Tukaram G. Gaonkar v. R. N. Shukla*, (1968) 3 S.C.R. 422 : (1969) 1 S.C.A. 189 : (1969) 2 S.C.W.R. 176 : (1968) 2 S.C.J. 727 : (1968) 2 Umb. N.P. 70 : 70 Bom. L.R. 718 : 1968 M.P.L.J. 19 : 1968 Mah. L.J. 703 : 1968 Cr. L.J. 1234 : A.I.R. 1968 S.C. 1050 (1053).

3. *Laxmipat Choraria v. State of Maharashtra*, (1968) 2 S.C.R. 624 : (1968) 1 S.C.A. 682 : 1968 S.C.D. 743 : (1968) 2 S.C.J. 589 : 70 Bom. L.R. 595 : 1968 Cr. L.J. 1124 : 16 Law Rep. 473 : 1968 M.

L.J. (Cr.) 614 : 1969 M.P.L.J. 109 : 1969 Mah. L.J. 153 : A.I.R. 1968 S.C. 938 (942).

4. *Gill & Co. (P), Ltd. v. Shri Madhav Mills Ltd.*, 72 Bom. L.R. 679 (694, 695) : 1971 Mah. L.J. 282 (301) : (1971) 41 Comp. Cas. 70.

5. *Ma Mya Shwe v. Maung Maung*, 1925 Rang. 15 : I.L.R. 2 Rang. 333 : 84 I.C. 977.

6. (1872) 11 Beng. L.R. 321 : 17 W. R. 283 (P.C.).

7. 1921 Cal. 1 : I.L.R. 48 Cal. 388 : 59 I.C. 143.

Under the Letters Patent, the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; the Court cannot engraft thereupon exceptions derived from the common law of England or based on grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in Sec. 499, Indian Penal Code.

(ii) "If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his, liability, in the absence of statutory rules applicable to the subject, must be determined with reference to principles of justice, equity and good conscience. There is large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the common law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code."

So the English common law doctrine of absolute privilege does not apply to a criminal prosecution for defamation and a person prosecuted, for defamation in respect of a statement made by him as a witness has in order to escape liability to show either that the statement falls within one or more of the exceptions to Sec. 499 of the Indian Penal Code or that he is protected by the proviso to this section.⁸ In the undermentioned case⁹ it was held by the Allahabad High Court that if a witness, while giving evidence, makes a statement which amounts to defamation, he may be prosecuted under Sec. 499 of the Penal Code, and it lies on him to show that the statement falls within one or other of the exceptions to that section, or that he is protected by the proviso to this section. It has been held that a prisoner's thumb-impression, which had been taken out of Court and without objection by him, was admissible against him in a later trial for giving false evidence.¹⁰ This decision was based on the grounds that the taking of the thumb-impression was not equivalent to the asking and answering of a question and that it had been done without objection and not in the course

8. Bai Shanta v. Umrao, 1926 Bom. 141 : I.L.R. 50 Bom. 162 : 93 I. C. 151 : 28 Bom. L.R. 1 (F.B.) ; Elavarthi Peddappa Reddi v. I. V. Reddi, 1929 Mad. 236 : I.L.R. 52 Mad. 432 : 116 I.C. 337 ; Tiruvengada Mudali v. Tripurasundari, 1926 Mad. 906 : I.L.R. 49 Mad. 728 : 96 I.C. 978 (F.B.) ; Narayana Ayyar v. G. Veerappa Pillai, 1951 Mad. 34 : I.L.R. 1951, Mad. 661 : (1950) 2 M.L.J. 686 : 64 L. W. 1040, Chotey Lal v. Phulchand, 1937 Nag. 138 : I.L.R. 1937 Nag. 425 : 169 I.C. 429 ; Surajmal v. Ramnath, 1928 Nag. 58 : 105 I.C. 820 ; Rasool Bhai v. Fhe King, 1939 Rang. 371 : 181 I.C. 566 ; Jagannath v. Emperor, 1934 Oudh 386 : 151 I.C. 435 ; Ghansham Das Gian Chand v. Nenumal, 1934 Sind 114 :

- 152 I.C. 346 ; Ma Mya Shwe v. Maung Maung, 1925 Rang. 15 : I. L.R. 2 Rang. 338 : 84 I.C. 977.
9. R. v. Ganga, (1907) 29 A. 685 (Knox and Aikman, JJ., but Richards, J., dissented), held that no prosecution for defamation could lie against a witness ; for conflict of decision on this point, see Kari v. R., (1913) 40 C. 433 : 18 I.C. 660 : 17 C.W.N. 297 ; Venkata In re, 36 M. 216 : (1915) 14 I.C. 659 : 23 M.L.J. 39 : 11 M.L.T. 416 : 1912 M.W.N. 476 (F.B.) ; Satish v. Ram, 1921 Cal. 1 : 48 Cal. 388 : 59 I.C. 143 (S.B.) ; Dinshaji v. Jchangir, 47 B. 15 : 1922 Bom. 381 : I.L.R. 47 Bom. 15 : 69 I.C. 94 and post, Examination of witnesses.
10. Tunoo v. R., (1911) 39 C. 349.

of a trial. In another later case, where a party to a suit had made in a deposition of a self-criminating statement in answer to questions objected to by his pleader and relevant only as affecting his credit, it was held that this statement was not admissible against him under this section in a subsequent trial for giving false evidence.¹¹ In this case it was stated, that overruling an objection will not necessarily amount to compelling a witness to answer.

The compulsion in Sec. 132 is not the general latent compulsion over every witness, but something definite and express. The record itself should indicate that the witness was really unwilling to make the statement concerned and was being pulled up by an insistent Court to give an answer. It may not be necessary for him to prove that the Court expressly threatened him with consequences if he refused to answer; but compulsion should be clearly indicated. The proper course for the witness is to ask the Court if he was bound to answer, and if the Court still insisted, there would be compulsion attracting the proviso. But, if the witness goes on without showing the least hesitation or asking the Court to excuse him, then on facts, there is no compulsion. A witness who voluntarily makes a statement is not protected under the proviso to this section.¹²

Where in answer to a question put to the defendant, while under cross-examination in a civil suit, the defendant said that he knew the plaintiff as being the nephew of one who had become insolvent and had come to stay with plaintiff, such statement cannot in any manner be considered to be either one concerning the subject-matter of the judicial proceeding or one made under compulsion and the defendant would not be entitled to the protection under the proviso to this section and would be guilty under Sec. 500, I. P. C., unless he can bring his case within one of the exceptions to Sec. 499, I. P. C.¹³

It seems that the principles governing the privilege of a witness are not the same in criminal as in civil defamation. Under Sec. 499, I. P. C. the absolute privilege enjoyed by a witness under the English law has been reduced to a qualified privilege. But, in civil defamation, there being no statute governing the law of tort, the principles of the English law, which are based on justice, equity and good conscience, are applied unless they are inapplicable due to social conditions prevailing in this country. Where a witness is asked the question in any civil or criminal proceeding, he can under the provisions of this section object to answer the question on the ground that the answer will criminate, or may tend directly or indirectly to criminate him, or that it will expose, or tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The proviso to the Section lays down that if the witness is compelled to give an answer to such a question, the answer shall not subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false

11. *R v. Pramatha Nath Bose*, (1910) 37 C. 878 : 6 I.C. 782 : 14 C.W. N. 957 ; distinguishing *Thomas v. Newton*, (1827) 1 Moo. and M. 481 and *R. v. Adey*, (1831) 1 Moo. and Rob. 94.
12. *Cir Raj v. Sulla*, A.I.R. 1965 A.

597 : 1965 A.W.R. (H.C.) 2 ; *Gayaram v. Shanti Kunwar*, 1971 J. L.J. 197 (201) : 1971 M.P.W.R. 326.
13. *Hemraj v. Babulal*, A.I.R. 1962 M.P. 241 : 1962 M.P.L.J. 305.

evidence by such answer. It follows that if a witness making a statement in a judicial proceeding, is subsequently sued for defamation for having given that answer, he can claim absolute privilege, though it is otherwise, if it is shown that the statement was made without any reference to the proceedings before the Court and had no connection with them. The question, in each case, is, whether the offending answer was absolutely privileged. If the answer had no reference to the proceedings before the Court, the privilege cannot be claimed. Whether the privilege can or cannot be claimed would depend upon the facts and circumstances of each case.¹⁴

8. Persons examined by police officers. Persons examined by police officers, investigating cases under the provisions of Secs. 161 and 175,¹⁵ Criminal Procedure Code, are not bound to answer criminating questions put by such officers.¹⁶ Because, although an investigation under Chapter XIV, Criminal Procedure Code, may be a proceeding, it is not a civil or criminal proceeding. Moreover, the person interrogated is not a witness; a witness is one who enters the witness box and is sworn in.¹⁷ As to criminating documents, see Sec. 130, ante; and as to the penalties for refusing to give evidence, and for perjury, and the protection afforded to witnesses in respect of what they may say whilst under examination, see Introduction to Chapter X.

133. Accomplice. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

S. 114. Illust. (b) (Presumption as to accomplice evidence.)

Taylor, Ev., Secs. 967-971; Best, Ev., Secs. 170, 171; Foster's Crown Law 352; Roscoe, Cr. Ev., 13th Ed., 108-113; Criminal Procedure Code, 1973 Secs. 306 to 308 (Tender of pardon to accomplice); Stewart Rapalje's Law of Witnesses, Secs. 226-228; Burr. Jones, Ev., Secs. 786-788; Wharton's Criminal Ev., Secs. 439-446; Wigmore, Ev., Sec. 2056, et seq.

SYNOPSIS

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14. See *Rajindra Kishore v. Durga. A.* I.R. 1967 A. 476 : 1967 A.L.J. 158.

15. Now see Sections 161 and 175 of 1973 Code.

16. Cr. P. C., Ss. 161, 175 ; see also

Kusana Kuroo v. Raja Ram Paiku. 1952 Nag. 68 : 1952 N.L.J. 294.

17. *Haji Ahmed Hussain v. State, A.I.* R. 1960 All. 628 : 1960 All. L.J. 109.

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1. Introduction: Accused as a witness. A person, who implicates himself in the crime, may give evidence on behalf of the prosecution against another associate of his. In certain cases, he may be tendered a pardon, the procedure for which is laid down in Sections 337 and 338 (now Sections 306 and 307) of the Criminal Procedure Code, but, under the Indian Law, there is no bar placed on any person to give a statement on oath implicating himself and others guilty along with him even without being tendered a pardon. The only condition is that he should not be arraigned along with the other accused persons against whom he gives a statement, because, in such a case, Sec. 342 (now Sec. 313), Cr. P. C., is a definite bar.¹⁸ In India, the general rule as to the competency of a person as witness is enacted in Sec. 118 of this Act, which provides that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions. Section 132 of the Act is general in its terms. It does not make any distinction between a witness who is called for the prosecution and one who is called for the defence.¹⁹ Further, this section provides that an accomplice shall be a competent witness against an accused person. The bar of Sec. 342 (now Sec. 313), Cr. P. C., comes in the way when an accomplice is arraigned with his associate against whom he is to depose. This section enacts that when the accused is examined under the provisions of this section he is not to be administered an oath. An amendment of the Criminal Procedure Code has sanctioned the administering of the oath to an accused person, and provision is made therefor in Sec. 342-A (now Sec. 315), Cr. P. C. But, under this section, he can only depose for the defence and may give evidence in disproof of the charges made against him or any person charged together with him at the same trial. That is, the accused in such circumstances cannot depose against himself or any other accused arraigned along with him.

That a witness must be administered an oath as provided under the Indian Oaths Act, 1969, Sec. 4, unless he is a child under twelve years of age and the court or the person having authority to examine such witness is of the opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or an affirmation. In the same Section 5, it is provided that nothing therein contained shall render it lawful to administer, in criminal proceeding, an oath or affirmation to an accused person, of course, except for the case provided for in Sec. 342-A (now Sec. 315), Cr. P. C. The combined effect, therefore, of Sec. 342 (now Sec. 313), Cr. P. C. and the Indian Oaths Act, Sec. 4, is that no accused person can be a witness against himself or any other person arraigned along with him at the same trial. An accomplice has to be removed from the dock before he can depose against other accused. But how that removal is brought about whether by giving him a pardon under Sec. 337 (now Sec. 306) or Sec. 338 (now Sec. 307) or by adopting the procedure under Sec. 494 (now Sec. 32

18. In re Kandaswami Gounder, I.L.R. 1957 Mad. 715 : A.I.R. 1957 Mad.

19. Joseph v. Emperor, I.L.R. 3 Raj 11 : 85 I.C. 236 : 1925 Raj 109

of the Cr. P. C. or even by not proceeding against him from the very beginning is altogether a matter for the prosecution. Such an accused may have been already convicted, or may be waiting his trial in a separate proceeding, but, in such a case even he will be a competent witness.

(a) *English law : Co-accused as a witness :* Roscoe, in his *Criminal Evidence*, writes that notwithstanding the common law rule which formerly prevailed, that witnesses who were interested in the inquiry were not admissible, an exception was always made in the case of an accomplice who was willing to give evidence; and this exception has been stated to be founded on necessity. "It is no exception against a witness that he hath confessed himself guilty of the same crime, if he has not been indicted for it; for, if no accomplices were to be admitted as witnesses, it would frequently be generally impossible to find evidence to convict the greatest offenders."

"Although the uncorroborated evidence of an accomplice is strictly admissible, it is a rule of practice, which has now the force of rule of law, that it is the judge's duty to warn the jury that it is always dangerous to convict on such evidence alone, and in his discretion he may advise them not to do so."²⁰ The Court usually considers not only whether defendant can be convicted without such evidence, but also whether he can be with it. If, therefore, there be sufficient evidence to convict without, the Court will refuse to allow him as a witness. So, if there be no reasonable probability of a conviction even with his evidence, the Court will refuse. In *R v. Salt and others*²¹ where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness. Similarly in *R v. Sparks*²² where the prosecution asked to call an accomplice who had pleaded guilty, Hill, J., refused, until the other evidence had been given, in order to see whether there was sufficient corroboration.

Where the accomplice has been jointly indicted, and before the trial begins, it appears that his evidence will be required, the usual practice is before opening the case, but after arraignment, to apply to have him acquitted by offering no evidence²³ or of that of first convicting and sentencing, *if practicable. If the case proceeds against all defendants, but no evidence appears against one of them, the Court may, on application of the prosecutor, order that one be acquitted for the purpose of giving evidence against the rest.²⁴

(b) *Indian law.* The law in India allows an accomplice to depose for the prosecution and his evidence has always to be received, if the prosecution tenders him for that purpose. The only bar that is imposed by our procedure is when he is an accused in terms of Sec. 342 (now Sec. 313), Cr. P. C. When does he fall in such a category therefore remains to be resolved.

(c) *Accused.* The word 'accused' has not been defined in the Code of Criminal Procedure. It is true that the word 'accused', or 'accused persons' has been used in many places in Chapter XII of the Code of Criminal Procedure, 1973 which deals with investigations by the police on information

20. Phipson on Evidence, 11th Ed., Para 1571.

21. Russ. Cri. 2284.

22. (1858) 1 F. & F. 388.

23. Rowland. 1826, Ry. & Moo 401

24. Frazer. 1797, 1 M. Nally. Rules of Evidence. 56, 1797.

or otherwise, as designating supposed offenders who have not yet come under the cognizance of any official but the police, and who in Chapter V of the Code are called "persons arrested". Similar words are used in Secs. 496 and 497 [now Secs. 136(1) and 437] about the bailing of persons arrested or detained by the police and in Sec. 344 (now Sec. 309) about postponing a trial not yet commenced. In Sec. 167, also the word 'accusation' is used. This language seems to show that the words are not confined to persons accused before a Magistrate or persons already before the Magistrate, or who have been brought under his notice by reports or recognizances. But the question is not what the meaning of the word 'accused' is but what the meaning of the words, 'the accused' as used in the last sentence of Sec. 342 (now Sec. 313) "No oath shall be administered to the accused".²⁵

(d) *Accused illegally pardoned.* In *R. v. Hanmanta*¹ M and R were arrested under warrants issued by a Magistrate and they were brought before him. The Magistrate illegally tendered them a pardon, and took their evidence as witnesses and they gave evidence also at the Sessions trial. It was held in this case (a case of an accused illegally pardoned) that, being accused persons and not having been legally pardoned, they could not be legally examined as witnesses until they had been acquitted, or discharged or convicted. Their evidence was therefore, rejected as absolutely inadmissible.

The learned Judges gave the following reasons: "M and R were before the Magistrate as accused persons and Section 343 (now Sec. 316) provides that no influence is to be used to induce disclosure except as provided in Sec. 337 (now Sec. 306). Cr. P. C. Section 342 (4) [now Sec. 313 (2)], applied to them. The effect of these sections is to render it illegal for a Magistrate to convert an accused person as a witness except when a pardon has been lawfully granted under Sec. 337 (now Sec. 306)." Their Lordships declined to take *Rudd's case*² as an authority on the law of evidence and evidently held that the action of the Magistrate did not remove M and R from the category of the 'accused persons' within the meaning of those words in the sections quoted.

The case of *R. v. Remedios*³ was probably decided on the same ground. These two cases were approved and followed by the Allahabad High Court in *R. v. Asghar Ali*,⁴ where also Sec. 24 of the Evidence Act quoted along with Sec. 344 of the Code of 1872 as making the evidence of the illegally pardoned witness inadmissible. He was there treated still as an accused person. *R. v. Hanmanta*⁵ was also followed as an authority in *R. v. Dala Jiva*.⁶

(e) *Suspected but discharged.* In *R. v. Lilladhar*⁷ quoted in *R. v. Mona Puna*⁸ the reasoning in *Hanmanta's* case was extended to the case of an accused person against whom the Magistrate illegally allowed the charge to be withdrawn and his subsequent evidence as a witness was held inadmissible.

25. Per Jardine, J., in *R. v. Mona Puna*. (1892) I.L.R. 16 Bom. 661 and in Sec. 5 of the Oaths Act.

1. (1877) I.L.R. 1 Bom. 610.

2. 1 Cowp. 331.

3. 3 Bom. H.C.R. 59.

4. (1879) I.L.R. 2 All. 260.

5. (1877) I.L.R. 1 Bom. 610 at p. 619.

6. (1885) I.L.R. 10 Bom. 190.

7. Cr. Rule 18 of 1889.

8. (1892) I.L.R. 16 Bom. 661.

In *R. v. Behary Lal*⁹ it was held: "There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence being afterwards admitted as a witness for the prosecution."

Then in *R. v. Mona Puna*¹⁰ all the above cases were discussed. In this case several persons were arrested by the police in the course of an investigation into a case of house-breaking and theft and one of such arrested persons, named Hari, made certain disclosures to the police, and pointed out several houses which had been broken into by his accomplices. Thereupon, the police discharged him and made him a witness. The question was whether Hari's evidence was admissible in evidence. The Magistrate in rejecting his evidence argued that a pardon could not be granted in a case triable by a Magistrate and if a Magistrate could not pardon, the police could not do so, and there was no section which allowed the police to release persons who had been arrested and to make them witnesses and no person arrested by the police could be discharged except by a Magistrate. It was, on the other hand, contended for the Crown that a person arrested by the police on suspicion was not an accused person and the term meant only one who was accused before a Magistrate, and that even if the discharge was illegal, Hari was a competent witness under Sec. 118 of the Indian Evidence Act. Jardine, J., held that the evidence was admissible. While conceding that the expression 'accused or accused persons' as used in the Cr. P. C. was not confined to persons accused before a Magistrate, the point, said Jardine, J., was whether an arrested person so discharged was a competent witness. The earlier cases including *Hanmanta's* case were held not to touch the point as in none of these cases the arrested persons were brought to the notice of the Magistrate.

In the course of this case, the learned Judge referred to a Burma case in which on a report from the Superintendent of Police, the District Magistrate asked the Superintendent of Police to tender pardon to one S who promised to make a full confession as to certain dacoities and to assist in recovering stolen properties. There was no case of dacoity pending before the Magistrate and Sec. 337 (now Sec. 306) evidently did not apply. On the question, if S's evidence was admissible, the Judges differed and the case was accordingly referred to the High Court of Calcutta which held (Ramesh Chunder Mitter and Field, JJ.) that the evidence was admissible though it would have to be carefully weighed. They said apparently with reference to Rudd's case: "Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems might operate to exclude, are under the Act to be taken into consideration in judging of the value to be allowed to evidence when admitted."

Jardine, J. distinguished the above Burma case from *Mona Puna's* case on the ground that the accused person in the former case had not been actually placed before the Magistrate or released on bail with condition to reappear before a Magistrate, though the Magistrate illegally forwarded the pardon under which the said person gave evidence as a witness. It was finally held by the learned Judge that if he were to follow *Hanmanta's* case (laying down that an accused continues to be accused until he is discharged, etc.) the decision could best be explained by holding that by the words "the

9. (1867) 7 W.R. (Cr.) 44.

10. (1892) I.L.R. 16 Bom. 661.

accused" is meant a person over whom the Magistrate or other Court is exercising jurisdiction and on the whole this restricted meaning best suited the context.

(f) *Restricted meaning in Sec. 342 (now Sec. 313), Cr. P. C.* In *R. v. Durant*,¹¹ Candy, J. critically examined the scope of Sec. 342 (now Sec. 313), Cr. P. C., clause (4), and the ruling in *R. v. Hanmanta*¹² which was called upon for the broad proposition that a person so long as he is accused of a crime could not be examined as a witness. It was pointed out by him that *Hanmanta's* case was decided under the Code of Criminal Procedure of 1872 in which Sec. 315 corresponding to Sec. 342 (now Sec. 313), clause (4), stood by itself as a separate section and not as a part of the procedure for examining an accused as now enacted in Sec. 342 (now Sec. 313) and that the decision was based on the combined effect of Sec. 343 (now Sec. 316) and Sec. 342 (now Sec. 313), clause (4) of the Code of Criminal Procedure (Act X of 1872). Candy, J. observed that the provision that no oath shall be administered to an accused person was in the Code of 1882 a part of Sec. 342 (now Sec. 313) which dealt with the examination of an accused person at the trial of that accused person, and provided that for the purpose of that examination in that trial no oath shall be administered to that accused person. Regarding *Hanmanta's* case the learned Judge remarked: "That the decision required a restricted application was evidently felt by Jardine, J., in *R. v. Mona Puna*¹³ and I would go further and even say that 'the accused' in Sec. 342 (now Sec. 313) must mean the accused then under trial and under examination by the Court. It cannot include an accused over whom the Court is exercising jurisdiction in another trial. I may be trying a murder case in the High Court, and an important witness, either for the Crown or for the defence, may be an accused person who has pleaded to a charge of house-breaking, and whose trial is to come on directly after the murder case. It would be absurd to say that no oath shall be administered to that accused person when he is tendered as a witness in the murder case. As the Judge said in *Asghar Ali's* case¹⁴ "an accused person cannot be put on his oath or examined as a witness in the case in which he is accused."

So, also, it was held in *Akhoy Kumar Mookerjee v. R.*¹⁵ "that the provision in Sec. 342, clause (4) of the Cr. P. C. (now Sec. 313(2)) regard being had to its context, applies only to the accused under trial, and it appears to us that the language of the Oaths Act is capable of and should receive a like interpretation. The accused person in a criminal proceeding¹⁶ is the accused who is the subject of that particular proceeding." This view is in accord with the English practice. In India, the law was laid down as above so long as the year 1868 by Couch, C. J. and Newton, J., in *R. v. Narayan*.¹⁷ "It is true that the Oaths Act had not then been passed but Sec. 204 of the first Cr. P. C. (Act XXV of 1861) was to the same effect as the corresponding provision in the present Code to which we have referred." It may be that some difficulty has since been created in this connection by certain decisions relating to illegal or irregular pardons. The earlier cases are referred to and distinguished or explained in *R. v. Mona Puna*.¹⁸ In these and other cases the true question appears to be whether several persons having been placed

11. (1898) I.L.R. 23 Bom. 213.

12. (1877) I.L.R. 1 Bom. 610 at p. 619.

13. (1892) I.L.R. 16 Bom. 661.

14. (1879) I.L.R. 2 All. 260.

15. (1917) 22 C.W.N. 405.

16. Vide Sec. 4. Oaths Act, 1969.

17. (1878) 5 Bom. H.C.R. (Cr.) 1.

18. (1892) I.L.R. 16 Bom. 661.

on their trial together, the proceedings against one of them have come to an end so as to remove the impediment to his being examined as a witness for or against the others.¹⁰ "On this question, as it has arisen in particular cases or in particular circumstances, there may have been some conflict of opinion and the decisions may not be entirely reconcilable. Possibly, too traces may be found of some confusion between the competency of a person as a witness and the admissibility of any evidence such persons may have to give." It was accordingly held in *Akhoy Kumar's* case that when two persons, though they may be accused of complicity in the same offence, are tried separately, each is a competent witness at the trial of the other.

The above interpretation of the words "the accused" has been accepted in several cases noted below.²⁰

(g) *Sec. 133 of Cr. P. C.* It will thus appear from the above that the bar to the examination of an accused person, arising from the provisions of Sec. 342 (now Sec. 313) and the Oaths Act, is confined to the case where the witness is an accused in the very inquiry or trial in which he is presented as a witness.²¹ Hence, while a joint trial for the same offence or different offences is proceeding, one accused person is not a competent witness for or against the other.²² But, if the person is an accused in another enquiry or trial²³ or in an outside proceeding, such as a transfer application under Sec. 526 (now Sec. 407), Cr. P. C.²⁴ or an application for leave to appeal under Sec. 449 (1) (c) (no corresponding Sec. in Cr. P. C. of 1973), he can be sworn.²⁵ It follows also from the above that where, from the very nature of the proceeding, the person cannot be considered to be an accused in the case, he can be sworn. Thus, a person, against whom proceedings under Sec. 133 (now Sec. 133), Cr. P. C., have been taken is not an accused person and therefore can be examined on oath.¹

A pleader who is proceeded against under the Legal Practitioners Act is an accused person according to the Madras High Court and cannot be

19. *Subramania Iyer v. R.*, (1901) I.L.R. 25 Mad. 61 and *R. v. Hussein Haji*, (1900) I.L.R. 25 Bom. 422.
20. *R. v. Durant*, (1898) I.L.R. 22 Bom. 213; *Govind Balwant v. R.*, 34 I.C. 976; 18 Bom. L.R. 266; 1916 Bom. 229; *Akhoy Kumar v. R.*, I.L.R. 45 Cal. 720; 45 I.C. 999; A.I.R. 1919 C. 1021; *Govinda Sambhuji Mali v. R.*, 58 I.C. 449; 1920 Nag. 255; (1920) 21 Cr. L.J. 769; *R. v. Vinayak Gogsewar*, (1902) 15 C.P.L.R. 122; *R. v. Nga Po Min*, I.L.R. 10 Rang. 511; 141 I.C. 89; A.I.R. 1932 Rang. 190 (F.B.); *Jhoja Singh v. R.*, I.L.R. 28 Cal. 495; *R. v. Mutsadi Lal*, I.L.R. 21 All. 107; *Sardar Khan v. R.*, 1 Cr. L.J. 1066; *R. v. Har Prasad Bhargawa*, (1922) 25 Cr. L.J. 497; *Amdumiyani Patel v. Emperor*, I.L.R. 1937 Nag. 315; 166 I.C. 582, 587; 1937 Nag. 17 (F.B.); *Keshav v. Emperor*, 1935 Bom. 186; *Emperor v. Karamalli*, 1938 Bom. 481; *Province of Bihar v. Bhim Bera*, 1947 Pat. 284.
21. *Govinda Sambhuji Mali v. R.*, 58 I.C. 449; 1920 Nag. 255; (1920) 21 Cr. L.J. 769.
22. *In the matter of A. David*, (1886) 5 C.L.R. 574; *Akhoy Kumar v. R.* (supra); *Muhammad Yusuf v. R.*, (1931) I.L.R. 58 Cal. 1211; 131 I.C. 142; A.I.R. 1931 C. 341.
23. *Bepin Chandra Pal v. R.*, (1908) I.L.R. 35 Cal. 161; *Akhoy Kumar v. R.*, supra.
24. *Sada Sheo v. R.*, 145 I.C. 445; 1933 Nag. 201; *R. v. Pir Kadir Baksh*, I.L.R. 6 Lah. 31; 91 I.C. 530; A.I.R. 1925 Lah. 812; *Prag Datt v. R.*, (1930) 31 Cr. L.J. 600.
25. *Gallagher v. R.*, (1927) I.L.R. 54 Cal. 52; 101 I.C. 657; A.I.R. 1927 C. 307.
1. *Hirananda Ojha v. R.*, 2 C.L.J. 149.

solemnly affirmed.² But the Calcutta High Court has taken a different view.³ None of the parties litigating under Sec. 145, Cr. P. C.,⁴ can be called an accused person and therefore can be examined as witnesses in the case.⁵

It would also follow from what has been stated above that *a person over whom the Magistrate or Court is not exercising any jurisdiction whatsoever, or is not exercising it at the time when he deposes, is a competent witness.* Hence, a person who at the time he is examined is not on his trial in any proceeding and as such is not an accused, can be examined. Thus in *R. v. Narayan Sundar*⁶ and *Govinda Sambhuji v. R.*⁷ B was one of the persons apprehended and brought before the Magistrate for trial. He was not even discharged but he was examined as a witness. Couch, C. J., and Newton, J., held that the witness B was not at the time he was examined, charged with the accused and upon his trial, although he had been apprehended and that he was by law a competent witness. Similarly a person, who is alleged to have been associated with the accused in the commission of an offence but who has not been sent up for trial along with the accused, is a competent witness against the latter.⁸

In *Nga Thein Pe v. The King*,⁹ their Lordships said, that there was nothing improper in tendering an accomplice as a witness, apart from any question of pardon. There is plenty of authority for saying that such a person is a competent witness and there is no irregularity in not sending up for trial every person against whom any suspicion appears to exist.

Two persons were shown in the charge-sheet as accused persons not sent up for trial. The police had found evidence against them sufficient to incriminate them, but it thought to put them up as witnesses for the Crown and so did not arrest them or send them up before the Magistrate to stand their trial. Later on, they were examined as witnesses for the prosecution. It was held by the High Court that the police, no doubt, ought to have sent up these men along with the other accused to stand their trial; in any case, the Magistrate, before whom the trial was held, ought to have these persons arrested and brought before him when he had found that there was evidence against them. But all this, the Court held, did not in any way touch the point of their competency as a witness. Section 342, Cr. P. C.,¹⁰ provides that no oath shall be administered to the accused; but it is clear from the earlier part of the section, that the accused there referred to means an accused person under trial, who has to be questioned by the Court in respect of the evidence against him. However irregular the conduct of the police in not sending up the two persons as accused, these two persons having not been proceeded against in the trial and as such not coming within the terms of the connotation given to the word 'accused' therein, were competent witnesses. There is no provision of law which makes their evidence inadmissible.¹¹

2. *Kotha Subha Chetti v. R.*, (1933) 1.L.R. 6 Mad. 252.

3. *R. v. Rajani Kanta Bose.* (1922) 1.L.R. 49 Cal. 732 : A.I.R. 1922 C. 515.

4. Now see Section 145 of the Code of 1973.

5. *Choudhari Muhammad Ayub v. Choudhari Sarfaraz Ahmad*, 83 I.C. 630 : 1925 Oudh 286.

6. (1868) 5 Bom. H.C.R. (Cr.) 1.

7. 1920 Nag. 255.

8. *Joseph v. R.*, 85 I.C. 236 : 1.L.R. 3 Rang. 11 : A.I.R. 1925 Rang. 122; *Nga Thein Pe v. The King*, A.I.R. 1939 Rang. 361 : 184 I.C. 545.

9. A.I.R. 1939 Rang. 361 : 184 I.C. 545.

10. Now see Section 313 of the Code of 1973.

11. *Keshav v. Emperor*, 1.L.R. 59 B. 355 : 156 I.C. 392 : 1935 Bom. 186.

In *Sadar Khan v. R.*¹² it was held by Clark, J. that an accomplice who had been pardoned by the Local Government in a case not triable exclusively by the Court of Session was a competent witness, and his sworn testimony was admissible in evidence, as against persons accused of the crime when he was sent up not as an accused but merely as a witness in the case. The Magistrate, in such a case, does not exercise jurisdiction over him, and there is no bar to his examination as a witness.

But, in *Mahandu v. R.*¹³ dissented from in *R. v. Har Prasad*,¹⁴ a different view was expressed. In this case, on the authority of the Local Government, a promise of immunity from prosecution was made to an accomplice on the 6th June, 1918 on condition that he spoke the truth. This was made in a case not triable exclusively by a Court of Session. On the 11th June, the man was sent up by the police as an accused with a note in the *chalan* that a promise as above was made to him and it appeared that the accomplice was an accused person at the commencement of the inquiry by the Magistrate. There was no written order of the Magistrate discharging him. He was examined as a witness in the case. It was held, that the promise was not a discharge, and it was necessary that he should be discharged by a written order before he could cease to be an accused person.¹⁵ The Supreme Court has, however, held that *the moment the pardon is tendered to the accused by an authority competent to tender such pardon, he must be presumed to have been discharged, whereupon he ceases to be an accused and becomes a competent witness. An absence of a formal order of discharge would not invalidate his evidence.*¹⁶ The accomplice, after having been arrested, would not cease to be an accused person by the mere fact that the police did not send him up for trial. In this case, the ruling in *Banu Singh v. R.*,¹⁷ was referred to, and the ruling in *Sadar Khan v. R.*,¹⁸ was dissented from and also distinguished on the ground, that, in the case of *Sadar Khan*, the accomplice was sent up before the Magistrate as a witness, whereas in the present case he was sent up as an accused person.¹⁹

*A person, never arrested, and against whom no process was issued is a competent witness even if a principal offender.*²⁰ Where A and B are charged with theft but process is issued by the Magistrate only against A, B is a competent witness in the trial against A.²¹

In *Amdumiyar Guljar Patel v. Emperor*,²² one Shrawan, described as a ringleader of the gang, was arrested by the police and was in custody during the major part of the investigation. At a later stage, he, along with others, was released on bail by the Magistrate before whom they were produced for remand. The police, before *challaning* the case, applied for and obtained

12. (1904) 1 Cr. L.J. 1066.

13. (1919) 21 Cr. L.J. 599

14. 25 Cr. L.J. 497.

15. *Banu Singh v. R.* (1906) 10 C.W. N. 962.

16. *A. J. Peiris v. State of Madras*. 1954 S.C. 616.

17. (1906) 10 C.W.N. 962.

18. (1904) 1 Cr. L.J. 1066.

19. See *Govinda Sambhuji v. R.*, 1920 Nag. 255 ; *R. v. Har Prasad*. (1922)

25 Cr. L.J. 497.

20. *Tinkler's case*. 1 East P. C. quoted in *R. v. Mona Puna*, 16 B. 661.

21. *Mahesh Chandra Kapali v. Mahesh Chunder Dass*. (1882) 10 C.L.R. 553 ; *R. v. Nanda Gopal Roy*. 35 I. C. 988 ; 1917 Cal. 261 ; see also *R. v. Darya Singh*, 1927 Lah. 666.

22. 1937 Nag. 17 ; 166 I.C. 582 (F. B.).

an order from the Magistrate cancelling the bail bond of Shrawan. As such, he was removed from the array of accused persons and was later on produced as a witness in the Court. The question posed before the Full Bench was whether the police could, irrespective of Sec. 337, Cr. P. C.,²³ refrain from prosecuting an accused person against whom there is sufficient evidence, and thus indirectly pardon his offence and secure his evidence; the answer given was, that such a course no doubt was reprehensible, but since there is no provision of law which would preclude the Court from administering the oath to such a person, he must be held to be a competent witness. The Court held, that it was true that such a person would suffer from the drawback of testifying under a deep shadow of suspicion that his evidence was procured by threat or promise, but that could not affect the competency, although it was bound to detract from his credibility.

(h) *Trial separated.* A charge-sheet against certain accused including one Aziz was put up before the Court, and, on the same date, the prosecution made an application to the Magistrate to make Aziz an approver under Sec. 337, Cr. P. C.²⁴ The Magistrate declined to entertain this application and as such no pardon could be tendered to Aziz. The hearing of the case was then postponed to another date and on that date the prosecution applied that Aziz should be tried separately from the other accused. It was stated, in the application, that the prosecution desired that Aziz should be examined as a witness and it was prayed therefore that in order that he should be so examined, his name should be deleted from the charge-sheet and placed on a separate charge-sheet. The application was opposed on behalf of the other accused, but the Magistrate held that there was no objection and allowed it. Aziz was later on examined as a witness for the prosecution. An objection having been taken to the competency of Aziz as a witness, the High Court held that he was a competent witness. *He was not an accused for the purposes of Sec. 342,²⁵ nor for the purposes of Sec. 343.¹* In any case, the Court held, as regards the latter section, that *there was no evidence of any promise or inducement having been made to him which would render his evidence inadmissible.²*

(i) *Pardoned accomplice.* In the case of *Haji Ayub Mandal v. R.*³ although pardon was granted to the approver and although he was examined before the Committing Magistrate, he was mentioned in the commitment order as an accused person and committed along with the other accused to the Sessions Court, where his plea was recorded by the Judge. The mistake was subsequently corrected and his evidence was taken. It was contended before the High Court that the evidence was not admissible without a tender to and acceptance by him of a fresh pardon in the Sessions Court. It was held that, at the Sessions trial, the Judge corrected the mistake by removing the approver from the dock to the bar and that *he was not an accused in the trial and was a person competent to give evidence.*

(j) *Discharged accused.* So, a person who has been discharged for want of evidence ceases to be an accused person and can be examined. In *R. v. Behari Lall Bose*,⁴ it was held by the High Court of Calcutta (Norman and

23. Now see section 306 of the Code of 1973.

24. Now see section 306 of the Code of 1973.

25. Now see section 313 of the Code of 1973.

1. Now see section 316 of the Code of

1973.

2. *Emperor v. Karamalli*, 1938 Bom. 481; 178 I.C. 706.

3. (1927) I.L.R. 54 Cal. 539 : 28 Cr. L.J. 689 : A.I.R. 1927 C. 680.

4. (1868) 7 W.R. Cr. 11

Steno-Carr, JJ.) that there is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence being afterwards admitted as a witness for the prosecution.

In *R. v. Hanmanta*,⁵ it was held, with regard to the evidence of certain witnesses who had been discharged, that their evidence was admissible as they were not accused persons when they were admitted as witnesses.

(k) *Convicted and sentenced.* An accused person who has been convicted and sentenced is obviously not an accused person after such sentence. In *Ruhini Kumar Bhattacharyya v. Emperor*,⁶ the Calcutta High Court has suggested that as a statement of a co-accused is not evidence and a conviction cannot, therefore, be based on such statement, if the prosecution wishes to rely upon such statement, it should ask for a separate trial and examine the co-accused as a witness. But, if he is not convicted after a plea of guilty or sentenced at once, the question arises if he is still an accused.

(l) *Tendered pardon.* Where a Court of Session under Sec. 338,⁷ of the Cr. P. C., tendered a pardon to an accused person who had been charged jointly with two others for the same offence and who had pleaded guilty but was not convicted, and the tender was accepted and such person was examined as a witness against the other accused, it was held by Petheram, C. J., and Duthcit, J., that the evidence of the approver was admissible.⁸ A contrary view seems to have been taken in the case of *Sukdeb Tewari v. R.*,⁹ where Holmwood and Ryves, JJ., held that until an accused person who had pleaded guilty was convicted or acquitted, he was still an accused person and was, therefore, not a competent witness against the co-accused.

(m) *Convicted but not sentenced.* In *R. v. Annaya*,¹⁰ some of the accused pleaded guilty and were at once convicted, but their sentences were postponed till the end of the trial. They were then examined as witnesses against the rest of the accused. It was held by Candy, J., that they were competent witnesses as they were no longer accused persons but convicts, and the fact that they had not been sentenced would affect the value of their evidence as they might naturally think that it would be to their advantage to tell a story as much as possible in favour of the prosecution. They were considered as accomplices; while Fulton, J., held that the contention that the trial ends with the conviction and not with the sentence can hardly be maintained in India. No oath can therefore be administered to them and the evidence was inadmissible.

But in the Full Bench case of *N. A. Subramania Aiyar v. Queen-Empress*,¹¹ a different view from that of Justice Fulton was taken. There two persons were put upon their trial for a certain offence. On behalf of the Crown an application was made that a conditional pardon might be tendered to the second accused. The Judge declined to consider the application until the

5. (1877) I.L.R. 1 Bom. 610 at p. 619.

6. 199 I.C. 384 : 43 Cr. L.J. 556 : A.I.R. 1942 Cal. 426.

7. Now see section 807 of the Code of 1973.

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8. *R. v. Kallu*, (1884)* I.L.R. 7 All. 160.

9. (1909) 9 Cr. L.J. 291.

10. 3 Bom. L.R. 437.

11. 10 Mad. L.J. 147.

second accused had pleaded to the charges preferred against him. The second accused then pleaded guilty. The Judge then tendered a pardon under Sec. 338¹² and the second accused was removed from the dock to the witness-box. White, J., in whose judgment the majority of the Judges concurred (Davies, J., dissenting) said: "In the case of *Windsor v. R.*,¹³ it was held by the Exchequer Chamber, on a writ of error from the Court of Queen's Bench, that when two prisoners were jointly indicted and pleaded not guilty, but only one was given in charge to the jury, the other was admissible witness although his plea of not guilty remained on the record undisposed of. Unless precluded from so doing by any express provision of the Law of India, I should be prepared to apply the principle of this decision to the facts of the present case and to hold that *when the second accused had pleaded guilty, as between him and the Crown, no issue remained to be tried, and that his incompetency to give evidence was removed notwithstanding that, at the time he gave his evidence, his plea of guilty remained on the record undisposed of.*

"In support of the view that the evidence of the second accused was inadmissible it has been argued that the plea of guilty, in itself, did not amount to conviction, that at the time he gave his evidence the trial of the second accused was not at an end, and that he was an 'accused person' and therefore incompetent to give evidence on oath. Our attention was drawn to a number of sections of the Code of Criminal Procedure [Secs. 243, 245, 246, 255, 257, 263 (g) and (h), 305, 306, 307, 309, 412, 562]¹⁴ as showing that the Code of Criminal Procedure contemplates some further proceeding by the tribunal before which the admission of guilt is made or the plea of guilty is pleaded before the admission or the plea becomes a 'conviction'. The word 'conviction' with its cognate expressions would seem to be used somewhat loosely in the Criminal Procedure Code. For example, in Sec. 271¹⁵ 'convicted' seems to mean nothing more than 'sentenced' since the Code contains no other provision for dealing with an accused person who pleads guilty. It may be that it would have been more strictly regular if the learned Judge, after recording the plea of guilty, had stated or recorded in set terms that he convicted the second accused on his plea of guilty. But in my judgment, the question of the admissibility of the evidence of the second accused ought not to be decided on the narrow and technical ground that he had not been 'convicted' in the sense in which the word is used in certain sections of the Code of Criminal Procedure, but on the broad ground that *when he gave evidence he was not in charge of the jury and no issue remained to be tried as between him and the Crown.*"

(n) *Convicted principal referred to higher Court for punishment.* In *R. v. Tirbeni Sahai*,¹⁶ one Ram Narain was tried for an offence under Sec. 403, I. P. C., and was convicted by a third class Magistrate but was sent under Sec. 349¹⁷ Cr. P. C., to the Cantonment Magistrate to be sentenced. Whilst his case was pending before the Cantonment Magistrate, Tirbeni Sahai, being on his trial separately for the abetment of the offence for which Ram Narain had been tried, applied to have Ram Narain to be summoned as a witness on

12. Now see section 807 of the Code of 1973.

13. I.L.R. 1 Q.B. 390.

14. Now see sections 252, 252(1) and (2), 255 (3), 246, 247 read with sections 243, 263 (g) and (h) (no corresponding sections for sections

305, 306 and 307, 235, 375 and 360 respectively).

15. Now see sections 226 and 229 of the Code of 1973.

16. (1898) I.L.R. 20 All. 426.

17. Now see section 325 of the Code of 1973.

his behalf. The Magistrate declined to summon Ram Narain on the ground that he was debarred from so doing by Sec. 342,¹⁸ Cr. P. C. Dillon, J., observed: "On a careful perusal of that section it will be apparent that the examination of the accused person for which that section provides, is an examination touching the matter on which he is being tried, and the inference is therefore obvious that the prohibition contained in the last clause of Sec. 342¹⁸ applies to examination referred to in that section, and does not apply to an examination in another case in which the person who is being examined is not himself an accused person. If the Magistrate's view were correct, it would follow that no man while he stood charged with a criminal offence could possibly be examined as a witness in any criminal trial whatever. I do not think that the Legislature intended this." For the foregoing reasons a person acquitted is a competent witness.

There is a divergence of opinion if he is so during the time when he is re-arrested and put under custody pending an appeal by the Local Government against his acquittal.

(o) *Acquitted accused when appeal by Government is pending.* In *R. v. Karim Baksh*,¹⁹ one Kamal was tried for an offence punishable under Sec. 328, I. P. C., and was acquitted by the Sessions Judge. The Local Government appealed to the High Court against his acquittal. Before the appeal was admitted Kamal was arrested by the order of the Magistrate of the District. While the appeal was pending and Kamal was in custody, he was made by the Magistrate a witness for the prosecution in the case against one Karim Baksh who was charged with being concerned in the same offence as that for which Kamal was tried and acquitted by the Sessions Judge. While the appeal was still pending, Karim Baksh was committed to the Sessions Judge for trial on charges under Secs. 328 and 392 of the Indian Penal Code, and was tried and acquitted. The Sessions Judge observed with reference to the evidence of Kamal which was taken at the trial as follows: "His evidence is worthless; it affords no proof of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth."

The Local Government appealed to the High Court against the acquittal of Karim Baksh, contending, among other things, that the evidence of Kamal should not have been rejected by the Sessions Judge.

Stuart, C. J., held that the statement made by Kamal after his re-arrest and pending his appeal was admissible in evidence and it ought to have been considered by the Judge, and he considered it along with the other evidence in the case. He further observed: "Such evidence would be admissible in an English Court (6 and 7 Vict., c. 85, ss. 1, 16 and 17 Vict., c. 30, s. 9) and I know of no law, regulation, or ruling in India excluding it. In one case the English law appears to have been followed by the Calcutta High Court²⁰ and in the present instance there is the less reason for excluding such evidence, seeing that a precisely similar statement by Kamal was deliberately made in his own case, the facts of which were identical with the present case, which resulted in his conviction by this Court, and which statement very naturally influenced our decision.

18. Now see section 313 of the Code of 1973.

19. 2 All. 386 at p. 390.

20. *R. v. Ashraf Sheikh*, 6 W.R. (Cr.) 91.

"I have only to add that I do not see that Kamal's statement can be said to have been given under duress, meaning, as that expression does, under illegal restraint or arrest: Kamal was simply by means of his arrest in safe custody for the purposes of the Government's appeal, and he was legally so."

Spankie, J., took a different view. He said: "After Kamal had been acquitted by the Sessions Judge, he was re-arrested by the Magistrate, and though under duress and awaiting the result of the appeal made on the part of the Crown against the order of acquittal, the Magistrate examined him as a witness against Karim Baksh. If the Magistrate regarded Kamal as still in the position of an accused person, though he had been acquitted he should not have made him a witness against Karim Baksh. It may be that re-apprehension of Kamal on the same charge after his acquittal by the Sessions Judge was unlawful. The appeal of the Crown had not been admitted when the arrest was made, at least this would appear to be the case. Section 118 of the Indian Evidence Act makes all persons competent to testify who are able to understand the questions put to them and can give rational answers to those questions. But if the Magistrate looked upon Kamal as still in the position of an accused person under trial, he should not have made him a witness against Karim Baksh against whom the enquiry preliminary to commitment for the same offence for which Kamal had been committed was proceeding. The position of Kamal was not that of an accused person admitted to give evidence under pardon, nor was it that of a person who had been separately tried and convicted of an offence, and who was afterwards made a witness against another person charged with the same offence. Nor was this a case where several persons were jointly accused, and where any one of them was called as a witness either for or against his co-defendants. Assuming, however, that the re-apprehension of Kamal after an acquittal and on the same charge was unlawful, and that when he made his statement he was a free man, it may be that under Sec. 118 of the Act already referred to his evidence was admissible, but it is not evidence on which a Court would place much reliance, and the Sessions Judge, perhaps, has not overstated the case respecting it, when he remarks that 'it affords no proof in respect of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth'."

(p) *Value of evidence of a person neither tendered pardon nor against whom case withdrawn.* As discussed already, there is ample authority to state that apart from the question of tendering a pardon to an accomplice or withdrawing a case against him, he is a competent witness for the prosecution. It may, on occasions, be desirable, to include the evidence of an accomplice for what it is worth without tendering him a pardon. About the weight however to be attached to the evidence of such a person the Rangoon High Court stated in the case of *Nga Thein Pe v. The King*²¹ that the man who does not know what may happen to him will naturally have a strong motive for minimising his own part in any criminal transaction, and his evidence must be treated with even greater caution than that of an established approver. Similarly, the Nagpur High Court stated in the Full Bench case in *Amdumiyar Guljar Patel v. Emperor*,²² that the evidence of a person

21. 1939 Rang. 361 : 184 I.C. 545.

22. 1937 Nag. 17 : 166 I.C. 582 (F.B.).

whom the police procures by the back door must ordinarily be of less value than that of a person who has been granted a valid pardon, and is no longer under fear of a prosecution.

(q) *Accused against whom case has been withdrawn*: Propriety of withdrawal. A person against whom the case has been withdrawn ceases to be an accused person and can be examined. In *R. v. Hussein Haji*²³ followed in *Balwant v. R.*²⁴ and *Kasem Ali v. R.*,²⁵ the Public Prosecutor with the consent of the Court withdrew from the prosecution two of the accused who were thereupon discharged under Sec. 494,¹ Cr. P. C., and then examined as witnesses for the prosecution. It was contended that such persons could not be examined as witnesses. Candy and Ranade, JJ. (Withworth, J., dissenting) held that the persons so discharged were competent witnesses. Candy, J., distinguished the cases in which the accused were illegally tendered pardon and cited the case of *R. v. Narayan Sundar*² and *R. v. Hanmanta*³ as authorities to show that as these persons had been discharged, although some of them were undoubtedly accomplices, they were not accused persons when they were admitted as witnesses, and therefore their evidence was admissible. The case of *R. v. Liladhar*⁴ was distinguished on the ground that the case was a warrant case in which a pardon could not be tendered under Sec. 337⁵ or in which the complaint could not be allowed to be withdrawn under Sec. 248⁶ and as there was a Public Prosecutor, action could be taken under the special provision of Chapter XXXVIII, Sec. 494,⁷ the consent given by the Magistrate could not be attacked, and that the evidence, whatever might be its weight, was admissible. With regard to the argument that it was not intended to allow the police to choose what accused persons should get off scot-free and be turned into witnesses, the learned Judge said: "The answer is that the special provision of Sec. 494⁷ can only be brought into force on the application of the Public Prosecutor, when there is one in the case, and with the consent of the Court. The provisions of Sec. 248 (now Section 257 of 1973 Code) are used when the complainant applies for permission to withdraw his complaint and the Court consents." It was also held in this case that Sec. 343 (now Section 316 of 1973 Code) referred to the examination of the accused under Sec. 342 (now Section 313 of 1973 Code) and did not apply where, as in this case, the persons voluntarily offered their information and no doubt were told that the Public Prosecutor would be asked to make an application for the prosecution against them to be withdrawn and if the Court consented to that they would then be examined as witnesses.

(r) *Legality of withdrawal*. The question of legality of the withdrawal is sometimes raised in this connection. Under the Indian law, such withdrawal can be made by a Public Prosecutor, if there is one in the case (Sec. 494),⁷ or by the officers mentioned in Sec. 495.⁸ In a summons case, the

23. (1900) I.L.R. 25 Bom. 422.

24. 17 Cr. L.J. 256.

25. (1919) I.L.R. 17 Cal. 154 : 55 I. C. 994 : A.I.R. 1920 C. 87.

1. Now see section 321 of the Code of 1973.

2. 15 Bom. H.C.R. (Cr.) 1.

3. (1877) I.L.R. 1 Bom. 610 at p. 119.

4. (1889) Cr. Rule No. 18 quoted in

R. v. Mona Puna, (1892) I.L.R. 16 Bom. 661.

5. Now see section 306 of the Code of 1973.

6. Now see section 257 of the Code of 1973.

7. Now see section 321 of the Code of 1973.

8. Now see section 302 of the Code of 1973.

Magistrate may permit the complainant to withdraw his complaint for sufficient reason (Sec. 248).⁹ Section 333¹⁰ gives such power to the Advocate-General in cases tried before the High Court.

It has been held that Sec. 494¹⁰⁻¹ and Sec. 248⁹ are not restricted to cases where there is only one accused on trial.¹¹

Section 494¹⁰⁻¹ does not expressly require any reasons to be stated by the Magistrate for allowing the withdrawal of the case, but gives him the discretion to consent to the withdrawal by the Public Prosecutor. It has been held by the Calcutta High Court that the discretion is a judicial discretion and that reasons are to be recorded by him in order to allow the Revisional Courts to see that a discretion has in fact been exercised.¹²

The failure to record the reasons for the withdrawal is at best an irregularity.¹³

In *Sital Singh v. R.*¹⁴ the case against one of the accused Ramraj was withdrawn and he was discharged and was thereafter examined as a witness. A question was raised before the High Court whether the pleader who appeared for the Crown was the Public Prosecutor and had authority to withdraw the case. The High Court observed: "This is immaterial. Whether the case against Ramraj was properly withdrawn or improperly withdrawn, the fact remains that the Magistrate by discharging him, separated his case from the case of the co-accused. He ceased to be on trial and he therefore became a competent witness." The High Court followed *Akhoy Kumar Mookerjee v. R.*¹⁵

In *Banu Singh v. R.*,¹⁶ the Local Government tendered conditional pardon to Mohendra Bind, one of the accused persons on trial under Sec. 101, I. P. C., an offence not exclusively triable by the Court of Session. It was held by the High Court, that the Local Government had no authority to grant the pardon. At the time of the trial, the Public Prosecutor withdrew the charge against Mohendra Bind but the order of discharge was not written as required by clause (a) of Sec. 494. Mohendra Bind was examined as a

9. Now see section 257 of the Code of 1973.

10. No corresponding section in the Code of 1973.

10-1. Now see section 321 of the Code of 1973.

11. Per Candy, J., in *R. v. Hussein Haji*, (1900) I.L.R. 25 Bom. 422.

12. *Umesh Chandra Roy v. Satish Chandra Roy*, 22 C.W.N. 69 : 41 I. C. 998 : A.I.R. 1918 C. 485; *Jagat Chandra Roy v. Kalimuddi Sardar*, 26 C.W.N. 880 : 71 I.C. 698 : 1924 C. 382. *Contra*: *Sirhwardy, J.* in *G.V. Raman v. R.*, (1929) 33 C.W.N. 468 : I. L.R. 56 C. 1023 : A.I.R. 1929 C. 319 ; as to the grounds justifying the withdrawal see *Giribala Dasi v. Mader Gazi*, (1932) 36 C.W.N. 928 : A.I.R. 1932 C. 699 ; but the Patna High Court has held otherwise *Gulli Bhagat v. Narayan Singh*, I.L.R. 2 Pat. 708 : 77 I.C.

734.

13. *Bawa Faquir Singh v. R.*, (1938) 42 C.W.N. 1252 (P.C.).

14. (1918) 30 C.L.J. 255; *Abdul Latif Khan v. R.*, (1918) I.L.R. 40 All. 416 : 44 I.C. 929 : A.I.R. 1918 A. 111 (2); *Govind Balwant v. Emperor*, A.I.R. 1916 Bom. 229, *Deputy Legal Remembrancer v. Bana Singh*, (1907) 10 C.W.N. 962; *Sherali v. R.*, 1915 Cal. 184; *Kasim Ali v. R.*, (1929) I.L.R. 56 Cal. 1023 : A.I.R. 1929 C. 319; A.I.R. 1924 Pat. 283; *Sadam Chandra Bag v. R.*, 1933 Cal. 148; *Chapapua v. R.*, 1922 Lah. 235; *Mahadeo v. R.*, 1926 Nag. 426 : 45 I.C. 471.

15. (1919) I.L.R. 45 Cal. 720 : 22 C.W.N. 405 : 45 I.C. 999 : A.I.R. 1919 Cal. 1021.

16. (1906) I.L.R. 33 Cal. 1353 (1360, 1361 : 10 C.W.N. 962.

witness in the case. Whether the fact that the accused who was examined on oath was not actually tried along with other accused made his evidence admissible, was not decided in the case. The High Court observed: "There is, however, a view of the case in which the evidence of Mohendra Binday, in strict law, be held to be admissible according to some of the authorities. Though not legally tendered pardon, discharged or acquitted, the proceedings show that *he was not tried along with the other persons accused with him. He could thus be tendered as a witness and examined on oath.*" In *R. v. Mona Puna*,¹⁷ Jardine, J., held that the evidence of an accomplice illegally discharged by the police was admissible. In *R. v. Durant*,¹⁸ Candy, J., allowed an accomplice, who was being separately tried, to be called as a witness for one of the persons accused and tried for the same offence. Such a view is in accordance with the rule in England, and it seems to us that Mohendra Bind having ceased to be tried along with the other persons, though not formally discharged, might, if the authorities cited be correct in applying the English law in this country, be examined as a witness on oath. If we eliminate from our consideration the irregular proceedings that ended in the examination of Mohendra Bind as a witness, if we suppose that he continued to be one of the accused, though for the purpose of being examined as a witness against whom the prosecution was withdrawn, with the possibilities of its being revived at any time, he might, under the above authorities, be a competent witness. Neither the tender of conditional pardon by the Local Government, even if it was actually tendered, nor the conditional pardon tendered by the Magistrate could be efficacious in the matter. *The withdrawal of the prosecution may be the only ground for holding that Mohendra Bind might be examined as a witness on oath against the appellants, but it is doubtful having regard to the circumstances under which the withdrawal was made leaving the witness still in vinculis, whether it would so operate.*"

The High Court proceeded: "The utmost caution is, however, necessary in admitting or refusing the evidence of an approver. It not only requires corroboration in material particulars for its use, but its evidentiary value depends considerably upon the circumstances under which his evidence is tendered." The High Court after quoting the observations of Cockburn, C. J.,¹⁹ went on to say: "Blackburn, Mellor and Lush, JJ., were of opinion that the evidence of an accomplice not tried under the same indictment was admissible, but that the evidence though admissible was tainted and subject to strong observation as to its weight. Lord Blackburn said that before an accomplice was called, 'the temptation to strain the truth should be as slight as possible'." In *R. v. Payne*,²⁰ Lord Cockburn stated in the course of argument of counsel, that though the evidence of an accomplice under such circumstances was admissible, it was inconvenient to admit such evidence.

"The practical effect of our holding that Mohendra Bind was legally competent to be examined as a witness is the same as if we held the contrary, because we must discard his evidence before the Deputy Commissioner as utterly worthless. The admissibility in law of the evidence carries us no further than that we must reject it on another ground. His miserably bad character coupled with his strong desire to get an immunity for himself at the sacrifice of those with whom, according to himself, he associated as a

17. (1892) 1 L.R. 16 Bom. 661.

18. (1898) 1 L.R. 28 Bom. 215.

19. *Winson v. R.* (1866) L.R. 1 Q. B. 390.

20. L.R. 1 C.C.R. 394.

principal in acts of great heinousness, prevents our placing the slightest reliance on him."

In *Muhammad Nur v. R.*²¹ the applicants and one Majida were prosecuted under Sec. 401, I. P. C. In the course of the trial, but before any charge was framed, the Public Prosecutor withdrew from the prosecution of Majida, and tendered him as a witness against the other accused. As a matter of fact, no formal order of discharge was passed in respect of Majida under Sec. 494 (a) [now see Section 321 (a) of 1973] Cr. P. C. The case coming before the High Court in its revisional jurisdiction, it was held by Piggot, J., that in view of the fact that *there had been a valid and effective withdrawal of the prosecution* as against Majida, and the fact that his position as a witness could not be adversely affected even though the Court did not comply with the clear provisions of Section 494 (a) [now see Section 321 (a) of 1973 Cr. P. C., *his evidence as a witness was admissible* as against the other accused persons. It was further held that where "an accused person is in fact discharged from custody by virtue of a withdrawal of his prosecution and the Magistrate trying the case takes judicial notice of such withdrawal, the omission to use the formal words 'I discharge this accused' would be at most an irregularity curable by the provisions of Sec. 537 (now see Section 464 of 1973 Criminal Procedure Code." In this case, Majida was released from the police custody long before his examination. It was pointed out in this case that the point of law considered by the learned Judges in *Banu Singh v. R.*²² was complicated by the fact that there had been a wholly irregular and invalid tender of a conditional pardon to the accomplice witness and consideration of the judgment as a whole shows that the Court carefully refrained from affirming definitely that the evidence of the accomplice in that case was wholly inadmissible. Referring to *R. v. Mona Puna*²³ and *R. v. Durant*²⁴ the learned Judge remarked: "They are based upon the principle that there is no objection in law to the evidence of an accomplice, in respect of whom no order of discharge or acquittal has yet been passed, being taken in a case, provided only that the said accomplice is not being tried along with the accused persons in the case in which his evidence is tendered. If it were necessary for me to decide the case upon this point only, I would be prepared to accept the rulings of the Bombay High Court subject to the reservation that the value, though not the admissibility, of the evidence of an accomplice might be seriously affected by consideration arising out of the position in which the witness himself stood at the time when his evidence was taken."

(s) *Ground of withdrawal.* The question, whether the necessity of examining an accused as a witness on behalf of the prosecution is a valid and sufficient ground for permitting withdrawal, was considered in *R. v. Raman*.²⁵ It was contended in this case that the evidence of a co-accused against another could not be obtained otherwise than under Sec. 337 (now see Section 306 of 1973), Cr. P. C. and that the above section was the only section which enabled the Crown to call a guilty person against his co-accused. Section 494 (now see Section 321 of 1973 Code), it was contended, was confined to cases where there was no sufficient evidence against the accused and that

21. (1910) 11 Cr. L.J. 21.

22. (1906) 10 C.W.N. 972.

23. (1892) I.L.R. 16 Bom. 661.

24. (1898) I.L.R. 23 Bom. 213.

25. (1929) 33 C.W.N. 468. See *Giribala v. Madar Gazi*, (1932) 36 C.W.N. 928; *Harihar Sinha v. R.*, (1936) 40 C.W.N. 876 (F.B.),

if Sec. 494 (Now see Section 321 of 1973 Code) could do duty for Sec. 337 (Now see Section 306 of 1973 Code), Cr. P. C., there could be no necessity for retaining the latter section and that the Amending Act of 1923 by including in Sec. 337 (Now see Section 306 of 1973 Code), Cr. P. C., offences other than those triable exclusively by the Court of Session practically gave effect to the dissentient judgment in *R. v. Hussein Haji*.¹

Justice Mitter (with whom Suhrawardy, J. concurred) held: "We are unable to agree with this contention. Section 494 (Now see Section 321 of 1973 Code) *stands by itself*. The effect of the section is that as soon as an accused is discharged under that section, he is taken away from the category of an accused person and becomes under the general principles of law a competent witness against co-accused. The question is: 'Is there anything wrong in law in allowing the Public Prosecutor to withdraw the case against B, in order that he may be cited as a witness for the prosecution'." After referring to various English authorities and text-books the learned Judge held: "It is a right of the Crown at any stage of a trial but before judgment is pronounced, to enter a *nolle prosequi*. Section 333 (No corresponding section in 1973 Code) gives the power to the Advocate-General in cases tried before the High Court. In other cases, the Public Prosecutor performs a similar function (Sec. 494) (Now see Section 321 of 1973 Code). In the case of withdrawal by Public Prosecutor, consent of the Court is necessary under the Criminal Procedure Code. My conclusions, therefore, are (i) that Sec. 337 (Now see Section 306 of 1973 Code) of the Code of Criminal Procedure does not suggest the idea that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon with all the safeguards mentioned in the said section, and (ii) that the language of Sec. 494 is very wide and gives a discretion to the Magistrate as to whether he would consent to the withdrawal of a prosecution by the Public Prosecutor—such discretion to be exercised not arbitrarily but must be based on correct legal principles." Suhrawardy, J., concurred in the above view with these words: "I do not think that Sec. 337 (Now see Section 306 of 1973 Code) and Sec. 494 (Now see Section 321 of 1973 Code) of the Code of Criminal Procedure should be read together and held that the former governs the latter and abridges in any way the wide words of Sec. 494 (Now see Section 321 of 1973 Code). Section 337 (Now see Section 306 of 1973 Code) appears in another connection and deals only with granting pardon to an undertial prisoner in some serious cases. If he satisfies the condition of the pardon he gets acquitted; if not, he may be tried for the offence. But if a case is withdrawn under Sec. 494 (Now see Section 321 of 1973 Code), the accused, if he is discharged, may be tried for the offence which he admits in his examination as a witness to have committed; and if he is acquitted he cannot be retried even though he refuses to give his evidence for the prosecution."

In the case of *Sudam Chandra v. R.*² it was held, that a Magistrate trying a case has a discretion to permit the Public Prosecutor to withdraw from the prosecution of one of the accused in order that his evidence might be available for the charge against the other accused tried jointly with him.

In *Mahadeo v. R.*,³ it was held that there is nothing illegal in the procedure of withdrawing a criminal case against one of the accused and

1. (1907) I.L.R. 25 Bom. 422.

148.

2. 144 I.C. 74 : A.I.R. 1933 Cal.

3. 95 I.C. 471 : 1926 Nag. 426.

examining him as a prosecution witness after his discharge against the other accused, though the moral relation and reasonable procedure would be to offer a pardon to him and make him an approver.

The Calcutta High Court in its Full Bench case has dealt with the propriety of withdrawing from the case under Sec. 494 (Now see Section 321 of 1973 Code) to secure the evidence of an accomplice. The opinion of the Full Bench was that in cases where Sec. 337 (Now see Section 306 of 1973 Code) is available it is better that the accused should be dealt with under that section, but that is far from saying that even where Sec. 337 can be applied, it is contrary to law to discharge the approver under Sec. 494 (a) (Now see Section 321(a) of 1973 Code). It must be remembered that the approver dealt with under Sec. 337 (Now see Section 306 of 1973 Code) gives his testimony with a contingent charge hanging over his head; also that the evidence of an accomplice whether dealt with under Sec. 337 (Now see Section 306 of 1973 Code) or discharged under Sec. 494 (a) (Now see Section 321(a) of 1973 Code) or acquitted under Sec. 494 (b) (Now see Section 321(b) of 1973 Code) is the evidence of an approver and as such open to suspicion. Mukherji, J., in the same case held that Legislature not having defined the circumstances under which a withdrawal is permissible it would not be right to attempt to lay down any hard and fast rule circumscribing the limits within which the withdrawal may be made. Section 494 (a) (Now see Section 321(a) of 1973 Code) contemplates action to be taken, more often than not upon circumstances extraneous to the record of the case; inexpediency of a prosecution for reasons of State, necessity to drop the case on the ground of public policy, credible information having reached the Government as to the falsity of the evidence by which the prosecution is supported and other matters of that description. If the prosecution, in order to avail of the evidence of an accused as against his co-accused, considers it necessary to withdraw from the prosecution as against him, the section would warrant such a course on the ground of public policy. But the withdrawal is dependent on the consent of the Court; and therefore the Court in order to see whether it should consent or not will have to enquire into the reasons which prompt the withdrawal. And if the Court finds that Sec. 337 (Now see Section 306 of 1973 Code) with its statutory safeguards is open to be availed of, it will be a sound exercise of its discretion to withhold consent. So also the Court would be justified in withholding consent if it finds that the expected evidence will not be relevant or material or necessary. Similarly perhaps, the Court would be right in refusing to consent if it finds that the accused in whose favour the withdrawal is proposed was the principal offender and the purpose will be equally achieved if the case against some other accused who took lesser part in the offence is allowed to be withdrawn. But no hard and fast rule can possibly be laid down for the guidance of the Court as regards a matter which is essentially a matter of discretion. If the Court finds that the object of withdrawing from the prosecution is to avail of the evidence of the particular accused and the circumstances of the case are such that it would further the ends of justice to have his evidence and that Sec. 337 (Now see Section 306 of 1973 Code) is applicable, the Court will not be wrong in giving its consent.⁴

4. *Harihar Sinha v. Emperor*, 163 I.C. 9; 1934 Cal. 334 (7 B.); 40 C.W.N.

(t) *Admissibility of evidence of accused illegally pardoned.* If the conditional pardon is illegal, three different views are held as to the evidence of the accused pardoned, viz. :

(1) That such evidence is inadmissible, because of the combined effect of Secs. 342 and 343.⁵ This view is not correct.

(2) That such evidence is admissible, the test being whether or not the particular accused at the time when he was deposing was an accused in fact.⁶

(3) Even if the evidence is admissible, it is worthless, in view of the circumstances under which the accomplice accused deposes.⁷

As observed in *Akhoy Kumar Mookerjee v. R.*,³ the rulings are not reconcilable. Possibly too, traces may be found in them of some confusion between the competency of a person as a witness and the admissibility of any evidence such person may have to give.

The question of admissibility of an accomplice witness and the contentions on either side in regard to such admissibility have been fully gone into in *Govinda Sambhuji Mau v. R.*⁹ which is quoted *in extenso* in concluding the discussion on this subject.

In this case a C. I. D. Inspector discovered a large number of cases of forgery committed by a gang. One of such forgeries was committed in respect of a bond and a suit being instituted thereon before a Munsif, the Inspector of Police applied before the Munsif for prosecuting five persons concerned in the forgery including one Sakharām. Under orders of the Superintendent of Police, the Inspector promised a pardon to Sakharām. Sakharām was never arrested nor brought to trial in the Criminal Court and no steps were taken to give him a conditional pardon under Sec. 337 (Now Section 306 of 1973 Code), Cr. P. C. The Munsif sanctioned the prosecution and in the trial Sakharām was examined as a witness. The question was whether the evidence of Sakharām was admissible in evidence. It was argued on behalf of the accused that having regard to the imperative provision of Sec. 170 (Now Section 170 of 1973 Code), Cr. P. C., and Sec. 204 (Now Section 204 of 1973 Code), Cr. P. C., Sakharām was an accused person in the eye of the law irrespective of the illegal action of the Police and the Magistrate and as such could not be sworn having regard to Sec. 342 (4) (Now Section 313 of 1973 Code), Cr. P. C. It was further argued that though Sec. 337 (Now Section 306 of 1973 Code) or Sec. 338 (Now Section 307 of 1973 Code) does not use the word 'accused', Sec. 343 (Now Section 316 of 1973 Code) expressly refers to, and therefore incorporates the provisions of Secs. 337 (Now Section 306 of 1973 Code) and 338 (Now Section 307 of 1973 Code) and debars the use of any influence or promise or threat to an accused person and the word 'accused' in Sec. 343 (Now Sec. 316) includes persons who are referred to in Secs. 337 (Now Sec. 306 of 1973 Code) and 338 (Now Sec. 307

5. *R. v. Hanmanta*, (1887) I.L.R. 1 Bom. 610 at p. 619. The corresponding section in the Code of 1973, are respectively, sections 313 and 316.

6. *R. v. Mona Puna*, (1892) I.L.R. 16 Bom. 661; *R. v. Durant*, (1898)

I.L.R. 23 Bom. 213.

7. *Banu Singh v. R.*, (1906) 10 C.W.N. 972.

8. (1919) I. L. R. 45 Cal. 720 : 45 I.C. 999 : A.I.R. 1919 C. 1021.

9. (1919) 21 Cr. L.J. 769 : 58 I.C. 449 : A.I.R. 1920 Nag. 255.

of 1973 Code) as well as those who are fully "accused". According to the appellant's contention, the promise of pardon to Sakham, not being in accordance with Sec. 337 (Now Section 306 of 1973 Code), was illegal, and as it contravened the provisions of Sec. 343 (Now Section 316 of 1973 Code) it should be rejected. A further contention was that the statement of Sakham was irrelevant under Sec. 24 of the Evidence Act.

Mitra, A. J. C., said: "It is now settled law that a person, not on his trial, is not an accused person within the meaning of Sec. 342. It is only to such a person that no oath can be administered." The test laid down in *Mal Singh v. R.*,¹⁰ viz. does the person offered as a witness answer to the description of the accused in the enquiry or the trial, as the case may be, in which he is presented as a witness, was applied by the learned Judge and following *R. v. Mona Puna*,¹¹ *Banu Singh v. R.*¹² and *Akhoy Kumar Mukerjee v. R.*,¹³ the learned Judge held that unless Sakham was to be regarded as a co-accused with the applicants in the eye of the law the objection in Sec. 342 (Now Section 313 of 1973 Code) was untenable. Was he then an accused person in the eye of the law by the operation of Sec. 170 (Now Section 170 of 1973 Code), Cr. P. C. and Sec. 204 (Now Section 204 of 1973 Code), Cr. P. C.? The learned Judge said: "The short answer to this is that as he could, in view of Sec. 239 (Now Section 223 of 1973 Code), Cr. P. C., be tried jointly or separately, the fact that he was not tried separately does not make him a co-accused with the applicants. Accordingly his competency as a witness cannot be questioned, as he does not answer to the description of an accused person in this trial."

(u) "Accused" in Sec. 342 (Now Section 313 of 1973 Code) and "any person supposed to be concerned in the offence in Sec. 337 (Now Section 306 of 1973 Code)". Regarding the objection based on Sec. 343 (Now Section 316 of 1973 Code), the learned Judge held that the word 'accused' as used in the chapters dealing with inquiries and trials, means "a person over whom the Magistrate or other Court is exercising jurisdiction"¹⁴ and proceeded thus: "Section 343 (Now Section 316 of 1973 Code) occurs in Chapter XXIV entitled 'General Provisions as to Inquiries and Trials'. Although the section must be read with Sec. 337 (Now Section 306 of 1973 Code) to which it refers, I am not prepared to accept the contention that the word 'accused' in Sec. 343 (Now Section 316 of 1973 Code) includes any person supposed to have been directly concerned in or privy to the offence under inquiry, unless there is an inquiry or trial in respect of that person, including a Magisterial inquiry under the Code in relation to an offence, before its cognizance has been taken. Such an inquiry takes place if a person is placed before the Magistrate for the tender of a pardon under Sec. 337 (Now Section 306 of 1973 Code), he becomes then an accused person, though he may not have been arrested or challaned.¹⁵ He is a person over whom the Magistrate is exercising jurisdiction under Sec. 337 (Now Section 306 of 1973 Code). If he accepts the offer, he becomes conditionally pardoned accused. If he rejects the offer, he ceases to be such an accused, unless he is already an accused. Whilst he is an ac-

10. 38 P.R. 1887.

11. (1892) I.L.R. 16 Bom. 661.

12. (1926) 10 C.W.N. 972.

13. (1919) I.L.R. 45 Cal. 720 : 45

I.C. 999 : A.I.R. 1919 C. 1021.

14. Following *R. v. Mona Puna*, (1892)

I.L.R. 16 Bom. 661; *Jhoja Singh v. Queen-Empress* I.L.R. 23 Cal. 493 and *Sheikh Chand v. Mahomed Hanif*, 8 Cr. L.J. 20.

15. *Bhalla Singh v. R.*, 3 P.R. 1897 (Cr.).

cused person in respect of the proceeding under Sec. 337 (Now Section 306 of 1973 Code), no influence other than that authorised by law can be used against him to induce a disclosure [Sec. 163 (Now Section 163 of 1973 Code)], Cr. P. C. After process has been issued against a person under an accusation, he becomes technically an accused person and necessarily comes under Sec. 343 (Now Section 316 of 1973 Code). But the issue of process does not seem to be essential to constitute a person an accused within the meaning of this section. It does not seem necessary to give the word 'accused' in Sec. 343 (Now Section 316 of 1973 Code) occurring as it does in the chapter relating to inquiries and trials, a wider meaning in order to include a person against whom there has been an accusation, especially as there is no penalty attached to that section.

"If a conditional pardon is tendered in violation of Sec. 343 (Now Section 316 of 1973 Code), the pardon would be an illegal pardon, and, if the accused was being jointly tried, he would not cease to be an accused person within the meaning of Sec. 342(4) (Now Section 313 of 1973 Code). The question would then arise whether the person so pardoned was a competent witness. Another effect is that an answer given by an accused when examined by the Court under Sec. 342 (Now Section 313 of 1973 Code), if induced by means prohibited by Sec. 334 (No corresponding section in 1973 Code), must be ruled out both in that trial as well as in a subsequent trial of the same accused, whether the answer so induced is also irrelevant under Sec. 24 of the Evidence Act or not. But it has not the effect of ruling out the evidence of Sakharan. There is a distinction between a confession or mere disclosure as such, and the testimony of a competent witness. A witness does not become incompetent, merely because he has been bribed or threatened, the fact that he has been bribed or threatened, no doubt, affects the value of his testimony. If we assume that the word 'accused' in Sec. 343 (Now Section 316 of 1973 Code) is to be taken in its widest sense, the disclosure by Sakharan was improperly obtained within the meaning of that section. But the prosecution does not seek to tender the evidence of that confession or disclosure. They rely solely on the evidence given at the trial duly cross-examined.

"To adopt the construction of the word 'accused' as suggested would be to rule out not merely the disclosure as such but also the testimony given in Court and would be to frustrate the object of Sec. 337 (Now Section 306 of 1973 Code). Even if Sakharan was illegally converted into a witness, he is none the less a competent witness and this view which is in accordance with the plain reading of Sec. 342(4) (Now Section 313 of 1973 Code) is supported by the authorities and is based on reasons of convenience. It would be highly inconvenient to enter into a preliminary enquiry in the midst of a trial as to what relevant evidence the police had against a person tendered as a witness. The fact that he is not presented as an accused ought to be sufficient to determine his competency. When, however, the testimony or the confession or disclosure of Sakharan is tendered as evidence in a future trial against him, it would have to be rejected both under Sec. 24 of the Evidence Act and in view of Sec. 163 (Now Section 163 of 1973 Code), if not also of Sec. 343 (Now Section 316 of 1973 Code). It is futile to argue that Sakharan's testimony is to be excluded from consideration as against the applicants on the ground of Sec. 24 of the Evidence Act."

"Although the argument that there has been an evasion of Secs. 170 (Now Section 170 of 1973 Code) and 204 (Now Section 204 of 1973 Code), Cr. P. C., did not support the contention that the evidence of Sakharan should

be rejected as inadmissible, it leads, however, to the conclusion, that, by disregarding the Statute law Sakham's evidence was made available to the prosecution without Magisterial approval and had prejudiced the accused." The trial was on this ground held bad and the conviction was set aside, leaving the Crown to take such steps as it may be advised to take.

(v) *Incriminating questions in examination.* In *R. v. Bradlaugh*,¹⁶ Coleridge, C. J., said that he would not allow questions to be asked or answered which might have the effect of incriminating such a witness. "But that course is not open to the Indian Court, for by Sec. 132 of the Evidence Act, a witness is not excused from answering any question as to any matter relevant to the matter in issue in any civil or criminal proceeding upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate, such witness. When an accused person is making a statement under Sec. 342 (Now Section 313 of 1973 Code) of the Code of Criminal Procedure, he can refuse to answer any question. As a witness he is not excused from answering any question as to any matter relevant to the matter in issue. There is, however, an important proviso to Sec. 132 of the Evidence Act, viz. that no such answer which a witness shall be compelled to give shall be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. As then the Jury trying the accused, and hearing his witnesses examined and cross-examined, will not be the Jury which will have to decide as to the guilt or innocence of such of those witnesses as may be subsequently put on their trial, and as the answer which those witnesses may be now compelled to give cannot be proved against them in the subsequent trial, it was ruled that the witnesses now called by the accused on his behalf could be duly examined and cross-examined on oath."¹⁷

These principles are embodied in the following decisions of the Supreme Court: *Rameshwar Kalyan Singh v. The State of Rajasthan*,¹⁸ *Kashmira Singh v. State of M. P.*,¹⁹ *Swamirathnam v. State of Madras*,²⁰ *Sarwan Singh Ratan v. State of Punjab*,²¹ and *Jnanendranath Ghosh v. State of West Bengal*.²²

2. Principle. The testimony of accomplices, who are usually interested, and nearly always infamous witnesses, is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice.²³ But the practice is to regard the statements of such persons as tainted because, from the position occupied by them, their statements are not entitled to the same weight as the evidence of independent witnesses.²⁴ Accomplice evidence is held untrustworthy for three reasons: (a) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (b) because an accomplice, as a participator in crime and consequently an immoral person, is likely to disregard the sanction of an oath; and (c) because he gives his evidence under promise of a pardon, or in the expecta-

16. 15 Cox. 217.

17. *R. v. Durant*, (1898) 1 L.R. 23 Bom. 213; see also *Moher Shetkh v. R.*, (1893) 1 L.R. 21 Cal. 392 [Chaudhuri: Evidence of Accomplices, (1958 Edn.), Law Book Company, Allahabad].

18. A.I.R. 1952 S.C. 54: 1952 Cr. L.J. 547.

19. A.I.R. 1952 S.C. 159 : 1952 Cr.

L.J. 839.

20. A.I.R. 1957 S.C. 340: 1957 Cr. L.J. 422.

21. A.I.R. 1957 S.C. 637 : 1957 Cr. L.J. 1014.

22. A.I.R. 1959 S.C. 1199 : 1959 Cr. L.J. 1492.

23. Taylor, Ev., p. 967.

24. *R. v. Bepin Biswas*, (1884) 10 C. 970, 975.

tion of an implied pardon, if he discloses all he knows against those with whom he acted criminally; and this hope would lead him to favour the prosecution.²⁵ Therefore, as a general rule, confirmation of the evidence of an accomplice is required,¹ yet, as it is allowed that he is a competent witness, the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness.² The provisions of this section, or indeed the law embodied in it are not applicable to cases arising under the Sea Customs Act, 1878. Where, therefore, certain persons were innocent purchasers of gold, who had no knowledge at all that it had been contraband, they could not be regarded as persons accused of an offence, although the gold seized from them was confiscated. The rule that the evidence of an accomplice must be corroborated in material particulars, cannot be relied upon against such a person.³

3. Scope. Section 118 laid down the class of persons who are competent to be witnesses, and this section provides that an accomplice shall be a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. No doubt, there is a presumption that an accomplice is unworthy of credit, unless his evidence is corroborated in material particulars;⁴ but it is incorrect to say that his evidence is inadmissible.⁵ An accomplice is a person who is "a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly indicted with the defendant (principal)."⁶ But the fact that he is equally guilty with the accused and has already been convicted of the offence does not in any way detract from his competency.⁷ The fact, that the Local Government issued a Notification that persons, though accomplices, will not be prosecuted by the Government if they gave evidence in the case will not make them incompetent witnesses.⁸ *An accused person actually under trial at the time cannot be sworn as witness, and no accused, jointly tried, is a competent witness for or against the co-accused; but when accused persons are tried separately, each one, though implicated in the same offence, is a competent witness at the trial of the other. So, an accused person, when not being tried jointly with a co-accused, is a competent witness for, or against, him.*⁹ There is nothing improper in tender-

25. Per Scott. J., in *R. v. Magan Lall*, (1889) 14 B. 115, 119; see remarks of Peacock. C.J.; in *R. v. Elahi Bux*, (1866) 5 W.R. (Cr.) 80.

1. v. post.

2. *R. v. Jones*, 2 Camp. 131; *R. v. Elahi Bux*, (1866) B.L.R. Sup. Vol., pp. 459, 462 (F.B.) ; see *Wigmore, Ev.*, s. 2056; *Emperor v. Anant Kumar Banerji*, 32 C.L.J. 204; 60 I.C. 417; A.I.R. 1920 C. 663 (2). As to whether absence of corroboration is fatal, see *Alla-uddin v. Emperor*, 1919 All. 327; 20 Cr.L.J. 561; 52 I.C. 49 and see *Shahra v. Emperor*, 1919 Lah. 168 ; 49 I.C. 607; 20 Cr.L.J. 191; 20 P.R. 1919 (Cr.); *Pingang v. Emperor*, 1517 L.B. 5 (2) ; 42 I.C. 1002 ; 19 Cr. L.J. 42.

3. *M/s. Valli Muhomed v. C.T.A. Pillai*, A.I.R. 1961 Bom. 48;

4. s. 114 illus. (b).

5. *Rama Shanker Shukla v. Rekhav Kumar Jain*, 1952 All. 428; 53 Cr. L.J. 747 ; 1951 A.W.R. 640.

6. *Ramaswami Gounden v. Emperor*, (1903) 27 Mad. 271; 14 M.L.J. 226; 2 Weir 803; *Govinda Balaji Sonar v. Emperor*, 1936 Nag. 245; *State v. Murli*, 1957 All. 53 ; 1956 Cr.L.J. 52.

7. *Vaikuntham Jaganadham v. State of Orissa*, 1952 Orissa 164 ; 53 Cr. L.J. 918.

8. *Emperor v. Har Prasad Bhargava*, 1923 All. 91 ; I.L.R. 45 All. 226; 77 I.C. 961; 25 Cr. L.J. 497; 21 A.L.J. 42.

9. *Akhoy Kumar Mukerjee v. Emperor*, 1919 Cal. 1021; I.L.R. 45 Cal. 720; 45 I.C. 999; *A.V. Joseph v. King-Emperor*, 1925 Rang. 122; I.L.R. 3 Rang. 11 ; 85 I.C. 236; 26 Cr. L.J. 492.

ing an accomplice as a witness apart from any question of pardon. Such a person is a competent witness and there is no irregularity in not sending up for trial every person against whom any suspicion appears to exist. It may, on occasions, be desirable to include the evidence of an accomplice for what it is worth without tendering him a pardon.¹⁰ Being a co-accused, the accomplice may have already been convicted,¹¹ or tendered a pardon under Sec. 337¹² of the Criminal Procedure Code,¹³ or he may have been discharged under Sec. 494,¹⁴ Criminal Procedure Code.¹⁵ There can be no objection to an oath being administered to an accomplice. Section 342,¹⁶ Criminal Procedure Code, gives power to the Court to examine the accused upon his trial for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Sub-section (4) of that section provides that no oath shall be administered to the accused. Obviously this means that for the purposes of Sec. 342¹⁶ no oath shall be administered and equally obviously it is restricted to an accused who is on trial in the proceeding to which the section is being applied. The very terms of the section show that it has no application to a person who may be accused in some other proceeding.¹⁷

The retracted confession of a co-accused is not the testimony of an accomplice within the meaning of this section.¹⁸ When a person against whom there was sufficient evidence to justify his production for enquiry and trial before a Magistrate under Sec. 170,¹⁹ is not prosecuted by police, such person is not an accused person within the meaning of Sec. 342.¹⁶ There is nothing which precludes the Court from administering oath to such a person. Hence he can be a competent witness even though he was not pardoned under Sec. 337.¹² But this evidence must ordinarily be of less value than that of a person who has been granted a valid pardon and is no longer under fear of a prosecution.²⁰

4. Accomplice who is: An accomplice is one concerned with another or others in the commission of a crime,²¹ or one who knowingly and

10. *Nga Thein Pe v. The King*, 1939 Rang. 361 : 184 I.C. 545 : 41 Cr. L.J. 44.
11. *Veekuntham Jaganadham v. State of Orissa*, 1952 Orissa 164 : 53 Cr. L.J. 918.
12. Now see section 306 of the Code of 1973.
13. *Haji Ayub Mandal v. Emperor*, 1927 Cal. 680; I.L.R. 54 Cal. 539; 103 I.C. 545; 20 Cr. L.J. 689; *Khairatiram. In re*, 1931 Lah. 476 : I.L.R. 12 Lah. 635; 132 I.C. 519; *Kundan Lal v. Emperor*, 1931 Lah. 353; I.L.R. 12 Lah. 604; 131 I.C. 625 : 32 Cr. L.J. 785; 32 P.L.R. 423.
14. Now see section 321 of the Code of 1973.
15. *G. V. Raman v. Emperor*, 1929 Cal. 819; I.L.R. 56 Cal. 1023; 33 C.W.N. 468; see also *Sudam Chandra Bag v. Emperor*, 1933 Cal. 148; 144 I.C. 74 : 34 Cr. L.J. 675 (a co-accused against whom the charge has been unconditionally with-

- drawn is a more reliable witness than an accomplice who is examined under conditional pardon); *Queen-Empress v. Hussain Haji*, (1900) I.L.R. 25 Bom. 422.
16. Now see section 313 of the Code of 1973.
17. *Mohammad Yusuf v. Emperor*, 1931 Cal. 341; I.L.R. 58 Cal. 1214 : 131 I.C. 142.
18. *Moyez Sardar v. Emperor*, 1925 Cal. 406 : 26 Cr.L.J. 360 : 84 I.C. 712 : 40 C.L.J. 551.
19. Now see section 170 of the Code of 1973.
20. *Amdumiyar Guljar Patel v. Emperor* A.I.R. 1937 Nag. 17; I.L.R. 1937 Nag. 315; 166 I.C. 582-587; 38 Cr. L.J. 237, 251 (F.B.).
21. *Wharton's Law Lexicon*, 5th Edn. The co-operation in the crime must be real and not merely apparent. *Wharton, Cr. Ev.*, s. 440. See *Surya Kanta v. R.*, 24 C.W.N. 119; 88 I.C. 674; A.I.R. 1920 C. 980.

voluntarily co-operates with, and helps others in the commission of crime.²² In *K. K. Dalmia v. Delhi Administration*,²³ it was said that an accomplice is a person who participates in the commission of the actual crime charged against an accused. He is to be a *particeps criminis*. There are two cases, however, in which a person has been held to be an accomplice, even if he is not a *particeps criminis*. Receivers of stolen property are taken to be accomplices of the thieves from whom they receive goods on a trial for theft. Accomplices in previous similar offences committed by the accused on trial are deemed to be accomplices and the offence for which the accused is on trial, when evidence of the accused having committed crimes of identical type on other occasions be admissible to prove the system and intent of the accused in committing the offence charged.²⁴ The term "accomplices" may include all *particeps criminis*.²⁵ An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he can be jointly indicated with the defendant (principal).¹ "An accomplice witness is one who is either being jointly tried for the same offence and makes admissions which may be taken as evidence against a co-prisoner and which make the confessing accused *pro hac vice* a sort of witness, or one who has received a conditional pardon on the understanding that he is to tell all he knows, and who may at any time be relegated to the dock if he fails in his undertaking."² A witness is none the less an accomplice, because, at the time of his giving evidence, he has already been convicted on his own confession.³ An accomplice means a guilty associate or partner in crime, or who, in some way or other, is connected with the offence in question or who makes admissions of facts showing that he had a conscious hand in the offence.⁴

The word 'accomplice' is interchangeable with an associate in crime who is consciously so connected with the criminal act done by his confederate, that

22. *Kunhaman v. State of Kerala*, 1974 Ker. L.T. 328 ; I.L.R. (1971) 21 Raj. 209.
23. A.I.R. 1962 S.C. 1821.
24. See *State of Assam v. V. N. Rajkhowa*, 1975 Cri. L.J. 354.
25. *Foster's Crown Cases* 341 ; thus in English law it includes both principals in the first and second degrees and accessories before and after the fact. But in India it was held that an accessory after the fact (under the law prior to the Penal Code) stood on a very different footing from an accomplice. *R. v. Chutterdharee Singh*, (1866) 5 W.R. Cr. 59; see also Mayne's Penal Code, note to S. 167 and Ss. 190, 196, 167, 212, 216 ; Gour's Penal Law of India, 6th Ed., Vol I. pp. 442, 443.
1. Per Sir S. Subramania Ayyar. Offg. C.J. in *Ramaswami Gounden v. R.*, (1903) 27 M. 271; 14 M.L.J. 226; relied on in *Govinda Balaji Sonar v. Emperor*, 1936 Nag. 245; *State v. Murli*, 1957 All. 53; 1956 Cr. L.J. 32 ; *Ghudo v. Emperor*, 1945 Nag. 143; I.L.R. 1945 Nag. 315;

- 22 I.C. 507; *Nirmal Kumar Singhji v. State*, 1954 Sau. 55: 55 Cr. L.J. 678 ; *Chetumal Rekumal v. Emperor*, 1934 Sind 185 ; *Kailash v. Emperor*, 1931 Pat. 105: 129 I.C. 534: 12 Cr. L.J. 383; *State of Assam v. V. N. Rajkhowa*, 1975 Cr. L.J. 354.
2. Per Glover, J., in *R. v. Ramsodoy Chuckerbutty*, (1873) 20 W.R. (Cr.) 19; as to giving evidence under pardon, see remarks of Peacock, C.J. in *R. v. Elahi Bux*, 1866 B.L.R. (Sup.) Vol. 459 at p. 468; see *R. v. Boyes* 1 B and S 311, 322; *R. v. O'Hara*, (1890) 17 C. 642.
3. *R. v. Ramsodoy Chuckerbutty*, *supra*; *Vaikuntham Jagannadham v. State of Orissa*, 1952 Orissa 164: 53 Cr. L.J. 918: 17 C.L.T. 154.
4. *Jagannath v. Emperor*, 1942 Oudh 221: I.L.R. 17 Luck. 516: 198 I.C. 714: 43 Cr. L.J. 416; see also *Yacoob v. Emperor*, 1933 Rang. 199: 146 I.C. 240 : 34 Cr. L.J. 1255; *Chatru v. State*, 1953 Bilas. 3; *The Crown v. Ghulam Rasool*, 1950 Lah. 129 : 51 Cr. L.J. 1123; 1950 Pak. Cas. (Lah.) 416: 1950 Pak. L.R. 183.

he on account of the presence of the necessary *mens rea* and his participation in the crime in some way or the other, can be tried along with that confederate actually perpetrating the crime.⁵ But it is not every participation in a crime which makes a party an accomplice in it, so as to require his testimony to be confirmed; much depends on the nature of the offence and the extent of the complicity of the witness in it.⁶

An accomplice is a competent witness and conviction can rest on his testimony if the court is satisfied in regard to its truthfulness. It is not necessary to seek corroboration in regard to every minor detail appearing in the statement of the approver.⁷ It is impossible, indeed it would be dangerous, to formulate the kind of evidence which should or would be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged.⁸ But, it is clear that—

- (1) there need not be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice should in itself be sufficient to sustain conviction; all that is required is, that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it;
- (2) the independent evidence must not only make it safe to believe that the crime was committed, but must, in some way, reasonably connect, or tend to connect, the accused with it by confirming, in some material particular, the testimony of the accomplice or complainant that the accused committed the crime;
- (3) the corroboration must come from independent sources; ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another;
- (4) the corroboration need not be made by direct evidence that the accused committed the crime, which is sufficient, if it is merely circumstantial, establishing his connection with the crime.⁹

It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. But, in considering, whether this general maxim does or does not apply to a particular case, it is to be remembered that all persons, coming technically within the category of accomplices, cannot be treated as on precisely the same footing; the nature of the offence and the circumstances under which the accomplices make their statements must always be considered. No general rule on the subject can be laid down.¹⁰ It has been held that where a witness admits that he was cognizant

5. *State v. Bishambher Daval*, 1953 Pepsu 83.

6. *R. v. Chutterdharce Singh*, (1866) 5 W.R. Cr. 59; Best. Ev. s. 171; *R. v. Hargrave*, 5 C. & P. 170; *R. v. Jarvis*, 2 Moo. & R. 40; *R. v. Toves*, 1 B. & S. 311, 322; see first supplementary illustration to Illust. (b), S. 114.

7. *Nizam-ud-din v. State*, A.I.R. 1963 J & K. 34.

8. *Rameshwar v. State of Rajasthan*, A.I.R. 1952 S.C. 54.

9. *Ibid.*

10. *R. v. Malhar*, (1901) 26 B. 193; s.c. 3 Bom. L.R. 694; *R. v. Hanmant*, (1901) 6 Bom. L.R. 443, 450; *Narain Chandra Biswas v. Emperor*, 1936 Cal. 101; 161 L.C. 289; 37 Cr. L.J. 445; 63 C.L.J. 191.

of the crime as to which he testifies, and took no means to prevent or disclose it, his evidence must be considered as no better than that of an accomplice.¹¹ But there is nothing in law to justify the broad proposition that the evidence of witnesses, who admit that they were cognizant of a crime, that they made no attempt to prevent it, and that they did not disclose its commission, should only be relied on to the same extent as that of accomplices.¹² A person who has helped the accused to conceal the corpse of a person murdered, or has omitted to give information of the murder, is not an accomplice, although he may be guilty of an offence either under Sec. 201 or Sec. 202 of the Indian Penal Code.¹³ The trend of decisions in the various High Courts has been to regard an active participant in the commission of the crime, one who is a *particeps criminis* alone, as an accomplice. The fact that a person is passively helping another to commit a crime, or, having been present when the crime was committed, does not inform the police, or, for the matter of that, where a person helps the criminal in disposing of the murdered body or concealing it, would not make him an accomplice.¹⁴ 'Accomplice' means a person who knowingly or voluntarily co-operates with or aids and assists another in the commission of a crime. The expression obviously includes principals in the first and second degree.¹⁵ But, in a Lahore case, it has been held that witnesses who admittedly had witnessed the crime, who have assisted in concealing the evidence of that crime, or at least connived at such being done and who have not attempted to give any information either to the police or to any other person to enable the offenders to be brought to justice, are in a very little better position than that of accomplices, and it would be unsafe to accept their testimony, unless corroborated by some independent circumstances.¹⁶ Where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime. The fact that he did not make a report to the police soon after the occurrence or the following morning by itself does not make him an accomplice.¹⁷ It has been held that a wife who knew all about the proposal to murder her husband and was a consenting party to the commission of the

11. *R. v. Chando Chandalinee*, (1875) 24 W.R. Cr. 55; see *Ishan Chandra v. R.* (1873) 21 C. 328; *Jagannath v. Emperor*, 1942 Oudh 221: I.L.R. 17 Luck. 516: 198 I.C. 714: 43 Cr. L.J. 416; *Md. Usuf Khan v. Emperor* 1929 Nag. 215: 114 I.C. 457: 30 Cr. L.J. 311; *Kunhaman v. State of Kerala*, 1974 Ker. L.T. 328 (was not only cognizant but assisted in concealing the evidence).
12. *R. v. Smither*. (1902) 26 M.I. 12.
13. *Ramaswami Gounden v. Emperor*, (1903) 27 M. 27: 14 M.L.J. 226. per Sir S. Subramania Ayyar, Offg. C.J. and Sir Bhashyam Aiyangar, J.; *Jehana v. The Crown*, 1923 Lah. 343: 73 I.C. 506: 24 Cr. L.J. 618.
14. *Abdul Munim Khan v. State of Hyderabad*, 1953 Hyd. 145: I.L.R. 1951 Hyd. 895: 54 Cr. L.J. 785; see also *Ramaswami Gounden v. Emperor*, (1903) 27 Mad. 271: 14 M.L.J. 226; *Nurul Amin v. Emperor*, 1939 Cal. 335: I.L.R. 1939 Cal. 511: 182 I.C. 386: 40 Cr. L.J. 667; *Phullu v. Emperor*, 1936 Lah. 731: 164 I.C. 700: 37 Cr. L.J. 978; *Jagannath v. Emperor*, 1942 Oudh 221.
15. *Ismail v. Emperor*, 1947 Lah. 220: 231 I.C. 150: 48 Cr. L.J. 708: 48 P.L.R. 410; see also *Jagannath v. Emperor*, 1942 Oudh 221: I.L.R. 17 Luck. 516: 198 I.C. 714: 43 Cr. L.J. 416.
16. *Hayatu v. Emperor*, 1929 Lah. 540: 120 I.C. 190: 31 Cr. L.J. 50. But see *Suryanarayana*, In re. 1958 Andh. L.T. 356 (not accomplice). But see *Kunhaman v. State of Kerala*, 1974 Ker. L.T. 328 in which view taken by Lahore High Court has been followed.
17. *Jagannath v. Emperor*, 1942 Oudh 221, *supra*; *Satyannarayana Rao v. State of Mysore*, (1972) Mad. L.J. (Cit.) 321; (Information was given late and that too only when examined by the Police).

crime is an accomplice,¹⁸ but, in a subsequent Madras case, it has been held that the fact that she made no attempt to prevent the commission of the crime was not sufficient and that in the absence of evidence that she shared with the accused any intention that the deceased should be killed, she could not be held to be an accomplice.¹⁹

A person who assists the criminals to the extent of keeping a lookout to see whether the police were approaching is, strictly speaking, an accomplice.²⁰ A person, who knowingly aids in the disposal of stolen property, is an accomplice.²¹ A thief, who sells stolen property to a receiver, would be an accomplice in the offence of receiving stolen property.²² But, a receiver of stolen property is not necessarily an accomplice of the thief.²³ Persons who have helped the complainant in disposing of the stolen property cannot be said to be accomplices of the accused who are being prosecuted for committing the offence of extortion against the complainant.²⁴ A coolie carrying a bundle without knowing that it contained stolen articles cannot be said to be an accomplice.²⁵ Where a driver of a lorry, intentionally transports foodgrains from a village in Orissa to a village in Madras in contravention of the Orissa Foodgrains Control Order, 1947, under instructions of the petitioner, he is equally guilty of the offence and in accomplice.¹ An ekka-driver, who knew of the intentions of the accused to commit a crime and aided them by taking them to the spot and by helping them in making good their escape, is an accomplice.² But, a person who in charge of a cart and states that the cart contains a dead body cannot be assumed to be an accomplice in the absence of the proof that he was aware that the death was the result of a crime.³ Where the accused administers poison to another through an innocent girl, the girl cannot be said to be an accomplice.⁴

The burden of proving that a witness is an accomplice ordinarily is upon the body alleging it, namely, the accused, though it is the duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court.⁵ Where a woman, although cognizant of the fact that her paramour intended to kill her husband, did not disclose the fact to her husband, it was held that her testimony was no better than that of an accomplice.⁶ A

18. *Shabira v. Emperor*, 1919 Lah. 168; 49 I.C. 607 : 20 Cr. L.J. 191; see also *Ali Mohammad v. Emperor*, 1934 Lah. 171.

19. *In re Addanki Venkadu*, 1939 Mad. 266; 181 I.C. 933; 40 Cr. L.J. 606. See also *Balbir Singh Balwant Singh v. State*, A.I.R. 1959 Punj. 332.

20. *Dhanpati De v. Emperor*, 1946 Cal. 156; I.L.R. (1944) 2 Cal. 312 : 225 I.C. 153 : 47 Cr. L.J. 695.

21. *Mavuthalayan v. Emperor*, 1934 Mad. 721; I.L.R. 58 Mad. 86; 67 M.L.J. 693 : 40 L.W. 873 : 1934 M.W.N. 1140.

22. *Chetumal Rekumal v. Emperor*, 1934 Sind 185.

23. *Kundan v. Emperor*, 1948 Sind 65; 49 Cr. L.J. 207.

24. *State v. Bassappa Chalappa Bekwad*,

1956 Bom. 341 : 1956 Cr. L. J. 605.

25. *King-Emperor v. Sheo Shanker Singh*, 1954 Pat. 109.

1. *Vaikuntham Jaganadham v. State of Orissa*, 1952 Orissa 164.

2. *State v. Ram Autar Chaudhry*, 1955 All. 138.

3. *Hadu v. State of Orissa*, 1951 Orissa 53; I.L.R. 1950 Cut. 509.

4. *Public Prosecutor v. Ramanathan Pillai*, 1941 Mad. 832 (1) : 1941 M.W.N. 790.

5. *Jagannath v. Emperor*, 1942 Oudh 221; I.L.R. 17 Luck. 516; 198 I.C. 714; *Kamini Kumar v. State*, 1971 Cr. L.J. 786 : A.I.R. 1971 Tripura 26.

6. *Phullu v. Emperor*, 1936 Lah 731; 164 I.C. 700 : 37 Cr. L.J. 978 : 38 P.L.R. 226.

person who is present at the commission of the crime and who is interested is not disclosing the commission of the crime is a person who is in the position of an accomplice.⁷ Persons who had dug pits at the instance of an accused without the knowledge that dead bodies would be concealed there are not accomplices.⁸ When a person purchases property at its real value, it is not possible to attribute to him the knowledge that it is stolen property and he is not an accomplice.⁹ Eye-witness of murder who did not disclose it due to the threat held out by the accused is not accomplice.¹⁰ A Government servant who on superficial examination certified in good faith the goods to be of superior quality without knowledge about the inferior quality is not accomplice of the supplier of goods.¹¹ Persons who are forced to give bribe are not accomplices.¹² Repairing of a private house by a Government clerk on the orders of the accused overseer and deputy engineer with the help of municipal labour and material was not held to make him an accomplice and his evidence was believed because he had no enmity with the accused.¹³

In every case, the Judge has to decide as a preliminary issue whether a given witness is or is not an accomplice.¹⁴ A girl, who is a victim of an outrageous act, is, generally speaking, not an accomplice, though the rule of prudence requires that the evidence of a prosecutrix should be corroborated before a conviction can be based upon it.¹⁵ However in the undernoted case the evidence of the victim of rape was treated like accomplice evidence.¹⁶ Omission by a printer to send a copy of declaration and the printed offending leaflet to District Magistrate as required by Section 127-A (2) of the Representation of People Act, 1951 would not make him an accomplice of the author of the leaflet.¹⁷

Punter. A punter is not in the same position as that of an accomplice. He is entitled to greater credit and his evidence is entitled to greater value.¹⁸ The evidence of a punter who is interested in securing a conviction is unworthy of credit and the principles applicable to the testimony of an accomplice who is unworthy of credit are not inapplicable to the evidence of a punter who is unworthy of credit for different reasons but as to the extent of corroboration, it is not necessary that there should be independent corroboration in all material particulars.¹⁹

5. Accessories before and after the fact. In order to be an accomplice, a person must participate in the commission of the same crime,²⁰ and

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| <p>7. Behari Mandal v. State, 1957 Orissa 260; 1 L.R. 1957 Cut. 347 : 1957 Cr. L.J. 1300 (2); 23 Cut. L.T. 311 ; see also cases cited therein.</p> <p>8. State of Assam v. V. N. Rajkhowa, 1975 Cr. L.J. 354.</p> <p>9. Dakshina Moorthy In re, 1972 Mad. L.W. (Cr.) 223.</p> <p>10. I.L.R. 1973 Cut. 967.</p> <p>11. (1972) 1 Cut. L.R. (Cr.) 450.</p> <p>12. Kamini Kumar v. State, 1971 Cr. L.J. 786 : A.I.R. 1971 Tripura 26.</p> <p>13. Viswa Nath v. State of Maharashtra, 1978 Cr. L.J. 431 (Bom.).</p> <p>14. In re Ambujam Annmal, 1954 Mad. 326; 55 Cr. L.J. 417 : 1953 M.W.N. 424 : 1953 M.W.N. (Cr.) 156.</p> | <p>15. Sidheswar Ganguly v. State of West Bengal, 1958 S.C. 143; Rameshwar v. State of Rajasthan, 1952 S.C. 54; Bhudanlal Sharma v. State, (1961) 1 Cr. L.J. 689 (Orissa).</p> <p>16. Mohammad v. State of Karnataka, (1977) 2 Kar. L.J. 308.</p> <p>17. Virendra Singh v. Vimal Kumar, (1977) 1 S.C.C. 718 : 1977) 1 S.C.R. 525; A.I.R. 1976 S.C. 2169.</p> <p>18. Miyabhai Pirbhai v. State, A.I.R. 1963 Guj. 188 : 1963 Guj. L.R. 253.</p> <p>19. Ibid.</p> <p>20. Underhill, Cr. Ev., v. 69; Foster's Crown Cases, 341.</p> |
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this he may do in various ways. In English law, the modes of complicity with crime are treated under the heads of principals in the first degree or second degree and accessories before or after the fact. A principal of the first degree is one who actually commits the crime; a principal of the second degree is a person who is present and assists in the perpetration of the crime; an accessory before the fact is one who counsels, incites, connives at, encourages, or procures the commission of a crime; and, everyone is an accessory after the fact to a felony who, knowing a felony to have been committed by another, receives, comforts or assists him in order to enable him to escape from punishment; or rescues him from arrest for the felony; or having him in custody for the felony, intentionally and voluntarily suffers him to escape; or opposes his apprehension: Provided that a married woman who receives, comforts, or relieves her husband knowing him to have committed a felony, does not thereby become an accessory after the fact.

In English law, the term 'accomplice', in its fullness, includes in its meaning all the above four classes of persons, who have been concerned in the commission of the crime; all *particeps criminis*, whether they are concerned in the strict legal propriety as principals in the first or second degree or merely as accessories before or after the fact.

In India, all assessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices.²¹ So far as accessories after the fact are concerned it is obvious that the expression "accomplice" includes principals both in the first and second degree.²² It has been held in some cases, that in this country there is no such thing as an accessory after the fact.²³ But, in some cases, accessories after the fact have been held to be no better than accomplices.²⁴ A person who knowingly aids in the disposal of stolen property falls under the third definition of abettor in Sec. 107, Indian Penal Code, and is an accomplice.²⁵ In the Oudh case first cited above, a woman's paramour was murdered in the presence and within the sight of the woman. But she did not give information of the fact to the nearest Magistrate or Police Officer as required by Sec. 44,¹ Criminal Procedure Code. She did not do so even when her husband, who was accused of the murder, had gone away about ten days after the murder. It was held that her conduct in not divulging the crime was intended to assist the accused,

21. Narain Chandra Biswas v. Emperor, 1936 Cal. 101; 161 I.C. 289; 37 C.L.J. 445; 63 C.L.J. 191; Jagannath v. Emperor, 1942 Oudh 221; I.L.R. 17 Luck. 516; 198 I.C. 714; 43 Cr. L.J. 416; 1941 A.W.R. (C.C.) 402.
22. Ismail v. Emperor, 1947 Lah. 220; 231 I.C. 150; 48 Cr. L.J. 701; 48 P.L.R. 419.
23. Nga Pauk v. The King, 1937 Rang. 513; R. v. Chutterdharee Singh, 5 W.R. Cr. 59.
24. Emperor v. Kallu, 1937 Oudh 259; 166 I.C. 667; 38 Cr. L.J. 286; Shyam Kumar Singh v. Emperor,

- 1941 Oudh 130; 191 I.C. 466; 42 Cr. L.J. 165; 1941 A.W.R. (C.C.) 59; see also Mahadeo v. The King, 1936 P.C. 242; 163 I.C. 681; 37 Cr. L.J. 914; 1936 A.L.J. 869 (a case from Fiji); Mahlikiji v. The King, 1943 P.C. 4; 203 I.C. 453; 44 Cr. L.J. 1; 1942 A.L.J. 714 (a case from Swaziland); Ashutosh Roy v. State, A.I.R. 1959 Orissa 159; 25 Cut. L.T. 269.
 25. Mavuthalayan v. Emperor, 1934 Mad. 721; I.L.R. 58 M. 86.
- 1 Now see section 39 of the Code of 1973.

and as an accessory after the fact she was an accomplice.² But, even under English law a married woman who receives, comforts, or receives her husband knowing him to have committed a felony, does not thereby become an accessory after the fact.³ In an earlier case, the same Court held that though it could not be said that the evidence of a person who stated that he had seen a murder committed but did not give any information thereof was little better than that of an accomplice, yet such evidence was not free from suspicion.⁴ In a Madras case, where the deceased met his death at the hands of the accused in the presence of his wife who was probably in love with the latter, and she made no attempt to prevent the commission of the crime, it was held, that, in the absence of evidence to show that she shared with the accused the intention to kill the deceased, she could not be held to be an accomplice whose evidence required corroboration.⁵

Three conditions must unite to render one an accessory after the fact : (1) the felony must be complete ; (2) the accessory must have knowledge that the principal committed the felony ; and (3) the accessory must harbour or assist the principal felon. Mere acts of charity which relieve or comfort a felon, but do not hinder his apprehension and conviction nor aid his escape, do not render one an accessory after the fact.⁶ He must be proved to have done some act to assist the felon personally.⁷ The mere fact that one had knowledge that a crime had been committed, and that he concealed or failed to disclose such knowledge, does not render him an accomplice. If for example, the concealment is due to the witness's anxiety for his own safety rather than to any desire to shield the criminal, he would not be an accomplice. Nor would a person, who remain passively silent after obtaining knowledge of the commission of the crime, be an accessory or an accomplice within the rule as to the testimony of accomplices. To render a person an accomplice, his participation in the crime must be criminally corrupt.⁸ Statement by an approver to a near relation of his disclosing the crime committed by him, as early as could be reasonably expected in the circumstances, would, however, be admissible under Sec. 157, as corroborative evidence. But the evidence of the relation cannot be deemed to be a statement of an accessory after the fact and therefore of an accomplice.⁹

6. Bribe-givers and bribe-takers. A person who offers a bribe to a public officer is an accomplice in the offence of taking an illegal gratification.¹⁰ Persons who actually pay bribes or co-operate in such payments, or

2. *Emperor v. Kallu*, 1937 Oudh 259; 166 I.C. 667 : 38 Cr. L.J. 286.

3. *Stephen's Digest of Criminal Law*, 50.

4. *Sunder Lal v. Emperor*, 1934 Oudh 315 : 148 I.C. 1045 : 35 Cr. L.J. 836; see also *Turab v. Emperor*, 1935 Oudh 1 : I.L.R. 10 Luck. 281 : 152 I.C. 473; *Ashutosh Roy v. State*, A.I.R. 1959 Orissa 159 : 25 Cut. L.T. 269.

5. *In re Addanki Venkadu*, 1939 Mad. 266 : 131 I.C. 933 : 49 L.W. 175; 1938 M.W.N. 1272. See however *Balbir Singh v. Balwant Singh*, A. I.R. 1959 Punj. 332 : 61 Punj. L.R. 632 (wife allowing the

murderer to escape, held not an accomplice).

6. *Blackstone's Commentaries*, p. 38.

7. (1823—41) 9 C.P. 355.

8. *Ismail v. Emperor*, 1947 Lah 220.

9. *State of Bihar v. Srilal*, A.I.R. 1960 Pat 459; 1960 B.L.J.R. 565.

10. *R. v. Chagan Dayaram*, (1890) 14 B. 331; *R. v. Magan Lal*, (1889) 14 B. 115; *R. v. Malhar*, (1901) 26 B. 193 : 3 Bom. L.R. 694; see also *R. v. Obhoy Churn*, (1865) 3 W.R. Cr. 19; *R. v. Samiappa*, (1891) 15 M. 63; see also *K. H. Bhattacharjee v. Emperor*, 1941 Cal 374 : 215 I.C. 298; 48 C.W.N. 632;

are instrumental in the negotiations for the purpose, are also accomplices of the person bribed.¹¹ In bribery cases, the person paying the bribe is treated as an accomplice.¹² A person who, with knowledge that the bribe has to be paid, advances money, is clearly an abettor and as such an accomplice.¹³ Persons merely present when money is given to a bribe-taker are not accomplices; but the case is different if they have co-operated in the payment of the bribe or taken some part in the negotiations for its payment. In the latter case they cannot be regarded as independent witnesses and their evidence is tainted.¹⁴ Where certain persons accompanied another who was entrusted with and carried the money intended to be given as a bribe to the head constable in the knowledge that it was to be so paid and in order to witness and assist in such payment they were held to be accomplices.¹⁵ While it is usually unsafe to convict a public servant of receiving bribes on the uncorroborated evidence of persons who say they have given him, the question as to the amount of corroboration depends on the circumstances of each case.¹⁶ When the person giving the bribe and the accused are the only two persons in the knowledge of the matter, one cannot expect corroboration. Indeed corroboration in every particular is not essential. What the prosecution has to prove to bring home the offence is that the accused by corrupt or illegal means, or by otherwise abusing his position, obtained for himself any valuable thing or pecuniary advantage.¹⁷ A distinction must be drawn between a person who is threatened and becomes an accomplice and a person who voluntarily takes part in the crime. In the former case, corroboration necessary to establish the credit of such a person would be very much less than in the latter case. In bribery cases, this factor becomes of great importance by the very nature of the crime itself. When a person gives a bribe to a public servant with a view to induce him to abstain from doing his duty and to the detriment of a third party, as in the case of bribing an Income-tax Officer with a view to evade payment of proper income-tax the bribe-giver is equally guilty with the bribe-taker as their common intention is to defraud a third party, and bearing in mind the reasons why an accomplice's evidence is unworthy of credit, viz. that he is an immoral person and has little sanctity for the oath, his evidence would certainly require a greater amount of corroboration than in the case of a person who is compelled by force of circumstances to give bribe to a public

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- In re Jesudas Appadurai Pillai, 1945 Mad. 358; I.L.R. 1945 Mad. 321; 221 I.C. 193; (1945) 1 M.L.J. 197; 58 L.W. 111; Mehara Singh v. State, 1955 Pepsu 156; 59 Cr. L.J. 1387; Ram Swarup v. Crown, 1949 Ajmer 12; 1949 A.M.L.J. 121; Balakrishna Murlidhar v. Emperor, 1948 Nag. 245; 1947 M.L.J. 310; Biswabhusan v. State, 1952 Orissa 289; I.L.R. 1952 Cut. 107 (bribe-giving under threats); Bhajahari Mandal v. State, 1959 Cal. 385; Pyarey Mohan v. State, 1956 All. 358; but see Emperor v. C.A. Mathews, 1929 Cal. 822; M.M. Gandhi v. State of Mysore, A.I.R. 1960 Mys. 111; 1960 Cr. L.J. 934.
11. E. v. Magan Lal, 14 Bom. 115; Empress v. Deodar Singh, 27 Cal. 144.
12. In re K. V. Ayyaswamy, A.I.R. 1965 A.P. 105; (1965) 1 Andh. W.R. 9.
13. Md. Usuf Khan v. Emperor, 1925 Nag. 215; 114 I.C. 457; 30 Cr. L.J. 311.
14. Khadam Ali v. Emperor, 1919 Lah. 284; 50 I.C. 18; 20 Cr. L.J. 258; see also Jagdish Narain v. Emperor, 1942 Oudh 163; 197 I.C. 277; 43 Cr. L.J. 159.
15. Rajoni Kant v. Asan Mullick, (1895) 2 C.W.N. 672.
16. R. v. Malhar, (1901) 26 B. 193; 3 Bom. L.R. 694; Manohar v. State of Maharashtra, 1973 Mah. L.J. 921; I.L.R. 1973 Bom. 1234; Raghubar Singh v. State of Haryana, 1974 Cri. L.J. 1062; A.I.R. 1974 S.C. 1516.
17. R. v. Malhar, (*supra*).

servant to induce him to do just his plain duty which he refused to do otherwise. In the latter case, although there is the element of wrong-doing, the degree of immorality involved is considerably less on the part of the bribe-giver and his credibility would stand on a higher footing than that of a bribe-giver in the former case.¹⁸ In *Srinivas Mall v. Emperor*,¹⁹ a their Lordships of the Privy Council observed: "No doubt, the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must, however, vary according to the extent and nature of the complicity; sometimes, as was said by Sir John Beaumont, C. J., in *Kamal Khan v. Emperor*,¹⁰ the accomplice is "not a willing participant in the offence but a victim of it." It is not possible to lay down any hard and fast rule as to the degree of compulsion necessary to render a witness an unwilling accomplice to bring his case within the exception to the ordinary rule that an accomplice's evidence should be supported in material particulars, and if at all any corroboration is necessary a very much slighter amount of evidence would be sufficient.²⁰ A bribe-giver is an accomplice only when he gives it with the intention of gaining some undue official favour, but no one who gives it in order to aid the detection of a crime. He has not the necessary *mens rea*.²¹ Uncorroborated testimony of a person who has taken bribe for giving vote should not be relied upon.²²

The mere presence of a person on the occasion of the giving of a bribe and omission to promptly inform the authorities do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.²³

7. Corrupt practices. In corrupt practices, affecting elections, circumstantial evidence has the same place and relevancy as in civil or criminal proceedings. Breaches of law and corrupt practices must be strictly proved to justify interference with results of elections. But the circumstantial evidence must not only be full and cogent but also of a conclusive nature so as to exclude to a moral certainty any other hypothesis on which it could be explained.²⁴ As laid down by the Supreme Court in *Hannanant Govind v. State of M. P.*,²⁵ a case, where the evidence is of a circumstantial nature. The circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts established should be consistent only with the hypothesis of the guilt of the accused. The cir-

18. *State v. Keshav Lal Oza*, 1951 Sau. 25: 52 Cr. L.J. 471; 3 Sau. L.R. 108.

18-a. 1947 P.C. 135 at 139: I.L.R. 26 Pat. 460; 1947 A.L.J. 496.

19. 1935 Bom. 230: I.L.R. 59 Bom. 486; 36 Cr. L.J. 968; 156 I.C. 615.

20. *State v. Keshav Lal Oza*, 1951 Sau. 25: A.I.R. 1951 Sau. 26; K.H. Bhattacharjee v. Emperor, 1944 Cal. 374; see also *Pandita Ganga Ram v. Crown*, 1950 Nag. 1: I.L.R. 1950 Nag. 229; 1950 N.L.J. 435; P. K. Subbiah v. State, 1952 Tri. 1: 53 Cr. L.J. 1201.

21. *The King v. S.N. Singh Rai*, 1951

Orissa 297: I.L.R. (1949) 1 Cut. 585.

22. *V. Ram Chandra Rao v. M. Chenna Reddy*, (1968) 37 E.L.R. 269 (A.P.).

23. *R. v. Doodhar Singh*, (1899) 27 C. 144 and in *Akhoy Kumar v. Jagat Chunder*, 27 C. 925:4 C.W.N. 753. (It was held that a person lending money in ordinary course of business to pay an amount extorted was not an accomplice).

24. *Subba Rao v. Brahmananda Reddy*, A.I.R. 1967 A.P. 155: (1966) 2 Andh. W.R. 401.

25. A.I.R. 1952 S.C. 343.

cumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to lead any reasonable ground for a conclusion consistent with the innocence of the accused, and it must be such as to show that within all human probability that act must have been done by the accused. In *Jagdev Singh v. Pratap Singh*,¹ their Lordships laid down that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside, on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, who must prove both the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his consent for its practice, not by mere preponderance of probability but by cogent and reliable evidence beyond any reasonable doubt.

8. Trap witness. Adverting to bribery, there are various types of bribe-givers. There is at one end the unblushing giver, who pays the bribe and gets an advantage, and subsequently gives evidence of some ulterior purpose. He is an accomplice of the darkest hue. At the other extreme is the person who, from the very beginning, has no intention of giving a bribe, but makes a show of doing it, so as to bring the dishonest public servant to book; such a man far from being an accomplice is a good citizen, to be respected and encouraged.² Between the two there are many gradations of accomplice-hood, and consequent legal infamy and need for more or less corroboration. There is the giver, who goes half-way with the intention of paying, but for some reasons beyond his control thinks it wise or safe to report to the authorities and becomes a witness. He is only a less infamous accomplice than the extreme type. Another, who changes his mind without external pressure, is still technically an accomplice, but not as unreliable as the two other types. Then there is the decoy or the spy, who, with no intention to pay the bribe, makes himself the instrument of the authorities in tracking the dishonest public servant. The professional spy, or decoy, doing this for pecuniary or other advantages, though not an accomplice, is suspect all the same, and requires corroboration. If, on the other hand, the decoy is not acting for gain but, being himself the victim of the demand, helps the authorities spontaneously from a sense of citizen's duty, he is a reliable and respectable witness.³ The mere offer of money or illegal gratification to a public servant would not amount to an offence of abetment of bribery, unless that offer is made as a reward for showing that person some favour in exercise of the official functions of the public servant.⁴ The evidence of witnesses, not a willing party to the giving of the bribe but only actuated with the motive of trapping the accused, cannot be treated as the evidence of accomplices. It is nevertheless the evidence of partisan witnesses out to trap the accused and cannot be taken at its face value.⁵ A trap witness, who habitually

1. 1964 S.C.R. 750; A.I.R. 1965 S.C. 183.

2. *Narayananaswami v. Kerala State*, I.L.R. 1957 Ker. 559; A.I.R. 1957 Ker. 154.

3. *State of Vindhya Pradesh v. Shiva Bahadur Singh*, 1951 V.P. 17; 52 Cr.L.J. 561; *Ram Chet Shukla v. State*, 1957 All. W.R. (H.C.) 167; but see *B. R. Chari v. State*, A.

I.R. 1959 All 149 (Bribe-giver must be corroborated).

4. *Narayananaswami v. Kerala State*, A.I.R. 1957 Ker. 154; I.L.R. 1957 Ker. 559.

5. *Shiva Bahadur Singh v. State of Vindhya Pradesh*, 1954 S.C. 322; 1954 S.C.A. 1316; 1954 S.C.J. 362; 1964 S.C.R. 1098; *Ambalal Motibhai v. State*, A.I.R. 1961 Guj. 1.

gives bribe to station masters, because he cannot secure the booking of his goods otherwise, is to that extent an unwilling accomplice. But he is a habitual bribe-giver for which offence he expects not to be prosecuted, by shifting the blame on the station masters. He is also interested in the success of the trap, and, for these reasons, he would be biased in favour of the prosecution. Therefore the least that can be said is that he is a partisan witness and that his evidence does require corroboration.⁶ A distinction has to be made in the various kinds of trap for payments of bribe. There may be a case in which a bribe is going to be paid in the normal course of business and, on information being received by the police, a trap is arranged for watching this normal course of transaction. No legitimate objection for laying such a trap can be made. But, there may be another case in which it is not the intention of the bribe-giver to pay any bribe, and it is only the police which wants that a bribe should be paid in order that an offence may be staged and detected. It is the kind of trap which has been disapproved in the pronouncements of the various High Courts as also by the Supreme Court.⁷ In *Brannan v. Peek*,⁸ Lord Justice Goddard has observed that, unless authorised by an Act of Parliament, no trap can be laid by the police or the magistracy to find out whether a man will commit an offence, and that persons trapping him like that would be accomplices liable for punishment themselves. The learned Chief Justice further observed that "the Court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasised that...it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected." With respect to this the Supreme Court observed in *Kamalabai v. State of Maharashtra*⁹: "We have only to substitute the words 'aid an act of prostitution' for 'to commit an offence' and the analogy is complete. In this case, two youngmen were given money to go to the house of the appellant and also to use that money in rather an improper manner. Manmohan Anandji Mehta seems to be a person of rather doubtful character and the employment of this class of persons for detection of offences is hardly a credit to anyone....after saying this we have still to see what is the consequence of the testimony of these witnesses..." "There are two kinds of traps—a 'legitimate trap', where the offence has already been born and is in its course, and, 'an illegitimate trap', where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man and the man goes out offering to bring the money but goes to the police and the Magistrate and brings them to witness the payment, it will be a 'legitimate trap', wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man. But, where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes and he is tempted with a bribe, just to see whether he would accept it or not and to trap him, if he accepts it, it will be 'an illegitimate trap' and, unless authorised by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap

6. In re Venkataraman Iyer, 1957 Andh. Pra. 441; 1956 Andh. L.T. 256; 1956 Andh. W.R. 288; Pandurang v. State, 1.L.R. 1959 Bom. 213; 1959 Cr. L.J. 34; A.I.R. 1959 B. 30.
7. State v. Har Prasad Sharma, 1959

All. 334; 1958 Cr. L.J. 586; 1957 A.L.J. 934; 1957 A.W.R. (H.C.) 874.
8. (1947) 2 All E.R. 572
9. A.I.R. 1962 S.C. 1189,

who will all be 'accomplices' whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent, as the case may be, before a conviction can be had under a rule of Court which has ripened almost into a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, and the witnesses to the trap, would in no sense be 'accomplices', and their evidence will not require, under the law, to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinised carefully and accepted as true before a conviction can be had."¹⁰ Reviewing all the authorities, Ramaswami, J. of the Madras High Court observed in a case: "The authorities indicate that if a man makes himself an agent for the prosecution before associating with the wrong-doer or before the offence is committed, or if with a view to protect his own interest, or that of others, pretends to associate with such persons with the object of preventing the commission of an offence by giving timely information to the authorities, he is not an accomplice. But however good the motive may be, if such a person or a spy or an informer in the exuberance of his enthusiasm actually instigates another to commit a crime, even if it be for detection of offence or to get the credit of having him arrested, he is an abettor under the penal law and his position cannot be anything other than that of an accomplice".¹¹ A trap witness is not an approver but he is certainly an interested witness in the sense that he is interested in seeing that the trap laid by him has succeeded. He could hence be at least equated with a partisan witness, and it would therefore be not advisable to rely upon his evidence without corroboration. Though the Court might reject the evidence of the witness in regard to some events, either because that part of the evidence is inconsistent with the other parts of his evidence, or with the evidence of some disinterested witnesses, still it can accept the evidence given by the witness in regard to the events when the version is corroborated in all material particulars by the evidence of the other disinterested witnesses. Corroboration must be by independent testimony, confirming, in some material particulars, not only that the crime was committed but also that the accused had committed it; it is, however, not necessary that all the circumstances of the case or every detail of the crime must be corroborated. It is enough, if it relates to the material circumstances of the case and of the identity of the accused.¹² There is no rigid rule that he should be corroborated, because he is not regarded as an accomplice. But the weight to be attached to his testimony depends on the character of each individual trap. It is however better that he is corroborated in some measure, although it would be true to say that a great deal depends on the nature of the crime, the character of the trap witness's testimony and the general requirements necessary to sustain a conviction.¹³ Where the charge is for gambling, it has been held that the solitary testimony of a punter would not be enough, as he is a tainted witness.¹⁴ In *Kesho Pershad v. State*,¹⁵ I. D. Dua, J., observed: "Granting that decoy or trap witnesses may to an extent be considered to be interested inasmuch as they may be inclined

10. In re M. S. Mohiddin, 1952 Mad. 561 at 562: 53 Cr. L.J. 1245: (1952) 2 M.L.J. 11: 1952 M.W.N. 220: 1952 M.W.N. (Cr.) 45.
11. In re M. Rangarajulu, 1958 Mad. 368 at p. 374: 1958 Cr. L.J. 906.
12. E.G. Barsay v. State of Bombay, A.I.R. 1961 S.C. 1762; see also Ambalal Motibhai v. State, A.I.R.

- 1961 Guj. 1: 1961 (1) Cr. L.J. 50.
13. Public Prosecutor v. A. Thomas, A.I.R. 1959 Mad. 166: 1959 Cr. L.J. 484.
14. Ramchander v. State, (1960) 10 Raj. 842.
15. A.I.R. 1967 Delhi 51: 69 P.L.R. (D) 25.

to see that their trap succeeds, in the final analysis, however, the necessity of corroboration of evidence from its very nature depends on the facts and circumstances of each case, including, *inter alia*, the status and calibre of the witnesses and the quality of their testimony. It is, indeed, a rule of caution devised to seek assurance and dispel doubts in regard to the credibility of the evidence and is dictated by judicial experience of the common course of human conduct. No hard and fast rule demanding rigid adherence need or can be formulated to be followed in all cases without considering the background, the totality of circumstances and the intrinsic quality of testimony in each case."

In some cases a distinction has been made between tainted evidence of accomplice and interested testimony of a partisan witness and it has been said that the degree of corroboration necessary is higher in respect of tainted evidence than for partisan evidence.¹⁶ But such distinctions are somewhat artificial, and, in the matter of assessment of the value of evidence and the degree of corroboration necessary to inspire confidence no rigid formula can or should be laid down.¹⁷ There is no inflexible rule that the evidence of the witnesses of the raiding party must be discarded in the absence of any independent corroboration. The correct rule is this: if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the Court may even look for independent corroboration before convicting the accused person. If a Magistrate puts himself in the position of a partisan or interested witness, he cannot claim any higher status and must be treated as any other interested witness.¹⁸ When bribe money was not given by police and when the Magistrate did his duty by intercepting the offenders who took bribe, the evidence of the Magistrate cannot be discarded.¹⁹ The general principle could however be stated thus: An accomplice has to be corroborated because of his having his own axe to grind, namely, to rope in his confederate and himself escape scot-free; he is interested in getting away with a pardon. But a partisan-witness is not interested in the same way as an accomplice. Nevertheless some caution is usually required before accepting his testimony wholesale, although corroboration for his testimony may not be just of the type which is required in the case of an accomplice.²⁰ Where two persons are tried for bribery and one of them makes an exculpatory statement under Sec. 342, Cr. P. C.,²¹ it is not to be used as evidence against the other.²² A Panch witness who is summoned during a

16. *Ram Chand Tolaram v. State*, 1956 Bom. 287; I.L.R. 1956 Bom. 343; 1956 Cr. L.J. 585 : 58 Bom. L.R. 90; *Narayanawami v. State of Kerala*, A.I.R. 1957 Ker. 134 : I. L.R. 1957 Ker. 559.

17. *State of Bihar v. Basawan Singh*, 1958 S.C. 500 : 1958 Cr. L.J. 976.

18. *State of Bihar v. Basawan Singh*, 1958 S.C. 500 : 1958 Cr. L.J. 976.

19. *Raghubir Singh v. State of Haryana*, 1974 Cr. L.R. (S.C.) 430 : 1974

Cr. L.J. 1062 : 1974 S.C. Cr. R. 250 : (1974) 4 S.C.C. 560 : 1974 Punj. L.J. (Cr.) 183; 1974 S.C.C. (Cr.) 596; 1974 Serv. L.C. 511; 1975 All. Cr. C. 79 : (1974) 3 S.C.R. 799 : 1975 Mad. L.W. (Cr.) 192 : A.I.R. 1974 S.C. 1516.

20. *Kishan Dayal v. State*, 1958 Raj. L.W. 516.

21. Now Sec. 313 of the 1973 Code.

22. *State of M.P. v. Ranjeet Singh*, 1961 M.P.C. 778.

raid, is not an interested witness, unless he had himself been instrumental in conducting it.²³ An executive Magistrate performs no judicial functions, and hence could function as a trap witness.²⁴ The legal position of trap-witnesses (spy, detective, decoy, paid-informer) has been fully set out in two Madras cases in *Ambujam Ammal v. The State*,²⁵ and *Rangarajulu v. State*.¹

A police officer laying an illegal trap is an accomplice.²

It has to be seen, whether a trap witness is an accomplice and secondly, whether the evidence of that accomplice requires corroboration and to what extent. The term 'accomplice' is not defined in the statute. The Evidence Act itself is silent on the meaning of the word. The Penal Code does not even refer to it. The Criminal Procedure Code does not pretend to define it; it merely refers to the term 'accomplice', in the marginal note to Sec. 337, which reads thus: 'Tender of pardon to accomplice'.

Therefore one has to look to the case-law on the subject for the definition of the term 'accomplice'. An accomplice is a person who has concurred in the commission of an offence.³ The New Oxford Dictionary says that 'accomplice may be spelt as 'a complice' meaning a partner in crime, an associate in guilt. The term 'a complice' signifies a guilty associate in crime, or when the witness sustains such a relation to the criminal act that he could be jointly indicted with the accused, he is an accomplice.⁴ This definition is based upon *U. S. v. Neversen*⁵ and *White v. Com.*⁶ The Patna case of *Kailash Misir v. Emperor*,⁷ the Oudh case of *Jagannath v. Emperor*⁸ and the Sind case of *Chetumal v. Emperor*⁹ have adopted this definition of accomplice. The word 'accomplice' means a guilty associate or partner in crime, or who in some way or other is connected with the offence in question, or who makes admissions of facts showing that he had a conscious hand in the offence.¹⁰ He is a person who participates in the commission of the actual crime charged against an accused.¹¹

The word 'accomplice' has been held also so wide enough as to include persons who are known to English law as accessories after the fact.¹² But every participation in a crime does not make a person an accomplice and it depends upon the nature of the offence and the extent of the complicity of the witness in it. There is one class of witnesses who go by the various names of informants, spies, detectives, decoys, agent *provocateurs* and trap-witnesses who by general consensus of decisions now do not fall under the category of accomplices.

23. *Ambalal Motibhai v. State*, A.I.R. 1961 Guj. 1 : (1961) 1 Cr. L.J. 507.

24. *M. M. Gandhi v. State*, A.I.R. 1960 Mys. 111 : 1960 Cr. L.J. 934.

25. 1953 M.W.N. (Cr.) 156 : A.I.R. 1954 M. 326.

1. 1958 M.W.N. (Cr.) 4.

2. *Karim Kunju v. State*, 1972 Mad. L.J. (Cri.) 23 : 1972 Cri. L.J. 292 (Ker).

3. Per Maule, J., in *R. v. Mullins*, 3 Cox. Cr. 526.

4. Per Subramania Iyer J., in *Ramawami Gounden v. Emperor*, (1903) 27 Mad. 271.

5. 14 Century Digest, Col. 1279.

6. 14 Century Digest Col. 1280.

7. A.I.R. 1931 Pat. 105 : 129 I.C. 535.

8. A.I.R. 1942 Oudh 221 : I.L.R. 17 Luck. 516 : 198 I.C. 714.

9. A.I.R. 1934 Sind 185.

10. *Jagannath v. Emperor*, I.L.R. 17 Luck. 516 : A.I.R. 1942 Oudh. 221 : 198 I.C. 714; *R. v. Burn*, (1909) 11 Bom. L.R. 1153.

11. *R. K. Dalmia v. Delhi Administration*, A.I.R. 1962 S. C. 1821.

12. *Ismail v. Emperor*, A.I.R. 1947 Allah. 220.

This position has been arrived at in a long series of decisions. The leading cases are those of the Privy Council.¹³ The principles which are deducible from these Indian cases are that the principals as defined in Secs. 34 to 38 and 149 of the Indian Penal Code and abettors as defined in Secs. 107 and 108 of the Indian Penal Code are the only classes of accomplices contemplated under the Indian law, and there can be no direct or indirect concern in or privity to an offence outside the said provisions. An accessory after the fact, pure and simple, who is not in any way concerned in the original offence cannot be classified as an accomplice under the Indian law, whatever be the position under the English law. There can be valid exceptions to the rule however, as in the case of a subsequent possessor of a stolen property who may be an accomplice witness against the thief, even if he is an accessory after the fact within the meaning of the expression, for illustration (a) to Sec. 114 of the Evidence Act permits presumption of theft from subsequent possession. The rule that an accomplice must sustain such a relation to the criminal act that he could be jointly indicted with the accused is subject to various modifications. It is not necessary that the accomplice (as a witness) should so unreservedly confess to his complicity in the crime charged that in strict legal propriety he brings himself within the grip of the law, and, if he is tried for it, he could be convicted of it out of his own mouth. It is sufficient if, by his admissions of fact or conduct or both in the light of the surrounding circumstances, he lays himself open to grave suspicion that he had a conscious hand in the offence or was at least a consenting party to it though the same may not be sufficient for his conviction if jointly tried along with the accused. Nor is it necessary that the accomplice should be capable at law of committing the offence, and, if so capable, should be punishable at law for his or her complicity. Capability at law of committing an offence and liability at law for punishment for an offence are considerations developed by the authors of the Penal Code mostly on grounds of public policy and not as necessarily negating *mens rea* in respect of acts covered by such considerations. A reasonable suspicion of *mens rea* in respect of an alleged

13. Bhuboni Sahu v. The King, 1949 M.W.N. 444; A.I.R. 1949 P.C. 257 and Mahadeo v. King, 1936 M.W.N. 889; 163 I.C. 681; A.I.R. 1936 P.C. 242 and the Madras cases of Ramaswami Gounden v. Emperor, (1903) 27 Mad. 271; Saitar Khan v. Emperor, 1938 M.W.N. 962; 181 I.C. 364; A.I.R. 1939 M. 283; Venkadu v. Emperor, (1938) M.W.N. 1272; 181 I.C. 933; A.I.R. 1939 M. 266; Venkatiah v. Emperor (1937) Mad. Cr. Cases 27; M.K. Thiagaraja Bhagavathar v. Emperor, 1946 M.W.N. 49; 225 I.C. 593; A.I.R. 1946 M. 271; In re Vyasa Rao, (1911) 1 M.W.N. 527; Muthukumaraswami v. Emperor, 1912 M.W.N. 549; Emperor v. Nilakanta (1912) M.W.N. 207; Rajagopal v. Emperor, 1943 M.W.N. 793; 211 I.C. 367; A.I.R. 1944 M. 117; Mahadeo v. King, 1936 P.C. 212; Paramban Mammudu

v. The King, 1949 M.W.N. 634; (1949) 2 M.L.J. 544; The Calcutta cases of Hafizuddi v. Emperor, A.I.R. 1934 Cal. 678; 151 I.C. 486; Narain Chandra v. Emperor, A.I.R. 1936 Cal. 101; 161 I.C. 289; Nurul Amin v. Emperor, A.I.R. 1939 Cal. 335; I.I.R. (1939) 1 C. 511; 182 I.C. 386; Alimuddin v. Queen-Empress, (1895) 23 Cal. 361 and Dhanapati De v. Emperor, A.I.R. 1946 Cal. 156; 225 I.C. 153 and the Bombay case of Papa Kamalkhan v. Emperor, A.I.R. 1935 Bom. 230 and the Nagpur case of Chudo v. Emperor, A.I.R. 1945 Nag. 143 and the Oudh case of Jagannath v. Emperor, A.I.R. 1942 Oudh 221 and the Lahore case of Ismail v. Emperor, A.I.R. 1947 Lah. 220 and the Patna case of Kailash Misir v. Emperor, A.I.R. 1931 Pat. 105; 129 I.C. 535.

crime is the test of complicity of the accomplice in it and the measure of the untrustworthiness of a witness shown to be an accomplice is not in the least affected by considerations of the capability at law of committing the offence or the liability at law for punishment thereof, so that a course of relevant conduct prior to the crime alleged may well constitute a witness an accomplice especially in sexual offences. There may be valid exceptions to the part of the rule, requiring in effect a finding of suspected complicity, before a witness could be treated as an accomplice, such as in the case of rape, where consent is a valid plea and, therefore, in the absence of anything independent tending to negative consent, the issue on the accomplice character of the prosecutrix begs the very issue on the guilt of the prisoner. Paradoxical though it may sound, there may be an accomplice to an act which may ultimately be found to be no offence at law. The reasonable and desirable course in such a case would be to proceed on the tentative footing that the prosecutrix was an accomplice. There may also be valid exceptions to the part of the rule requiring in effect the accomplice to be indictable jointly with the accused for the crime with which the latter is charged, such as in a case of theft, or receipt of stolen property, with knowledge, where the law creates such a relation between the original and the subsequent crimes that both the offenders are jointly triable for their separate offences, or for both in the alternative. Where the alleged receiver and the thief are not jointly tried, each may be an accomplice witness against the other. The fact that a person is motivated by a lofty object is no reason when he suggests or instigates the commission of an offence to remove him from the category of accomplice, though it is so in the case of mere informants, spies or detectives, who pretend to concur in the commission of the crime, without suggesting or initiating the commission of the crime. Then, where participation of an individual in a crime is not voluntary but is the result of pressure and the element of *mens rea* is entirely absent, he cannot be classified as an accomplice, for he would then be a guilty participant in the crime and this also saves the trap witness from being classified as accomplice. Finally, the law of accomplice's evidence does not recognise "practical accomplice" or "more or less accomplice" and "that all persons coming within the category of accomplices cannot be treated as being on the same footing" and which expressions are all due to confusion of thought. In every case, the Judge has got to decide as a preliminary issue whether a given witness is or is not an accomplice, and if he is an accomplice it is well established that there is no justification to record a conviction on the uncorroborated testimony of an accomplice in the absence of special or exceptional facts of the nature of the two further illustrations in illustration (b) to Sec. 114, Indian Evidence Act. The extent of the corroboration should be as laid down in *R. v. Baskerville*.¹⁴ Even if the given witness is not an accomplice, the Judge, bearing in mind that these trap-witnesses are not unoften dangerous and unreliable witnesses, should scrutinise their evidence with great care and their testimony must succeed or fail on their own inherent strengths or inherent infirmities.

The well-settled law, now based upon a long line of decisions, is, that the evidence of spy, detective, decoy or agent *provocateur* who sets a trap cannot be clubbed as that of an accomplice requiring corroboration. This position has not been arrived at without judicial protests now and then. The earliest decision is *Queen-Empress v. Javecharam*.¹⁵ It was held there.

14. (1916) 2 K. B. 656.

15. (1895) 19 Bom. 363.

that the act of a detective in supplying marked money for detection of a crime cannot be treated as that of an accomplice; but the action of a spy and informer in suggesting and initiating a criminal offence is itself an offence, the act not being excused or justified by any exception in the I. P. C. This decision was considered and sharply differed from in *Emperor v. Chaturbhuj Sahu*.¹⁶ In that case, an Excise Deputy Collector deputed B to purchase cocaine from the accused and B purchased it with money supplied by the Excise Sub-Inspector and handed the same over to the Excise Deputy Collector. The accused was tried for illicit sale of cocaine. B, in his evidence deposed to the purchase of cocaine from the accused under instructions from the Excise Deputy Collector, who stated that he gave such instructions and received the cocaine from him. The accused was convicted upon the uncorroborated testimony of B. Held that B was not an accomplice and the conviction was good. The learned Judges Holmwood and Dass, reviewed the following English decisions. In *Rex v. Despard*¹⁷ where the accused was tried for high treason, Lord Ellenborough in his summing up to the jury said :

"But there is another class of persons which cannot properly be considered as coming within the description of or as partaking of the criminal contamination of an accomplice. I mean persons entering into communication with the conspirators with an original purpose of discovering their secret designs and disclosing them for the benefit of the public. The existence of such original purpose on their part is best evidence by a conduct which precludes them from ever wavering in or swerving from the discharge of their duty, if they might otherwise be disposed so to do."

In *Reg. v. Dowling*¹⁸ in which the accused was tried on a charge of treasonable conspiracy, the Central Criminal Court held that a person who enters into a conspiracy for the sole purpose of detecting and betraying it does not require confirmation as an accomplice, although his evidence should be received by the jury with caution. In his summing up to the jury Erle, J., advertng to the particular witness, said that : "Although he had been designated as spy or a traitor and an accomplice if his object in entering into the confederacy was not to deceive or entrap anyone, but to serve his country, he was entitled to praise instead of censure. If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice, for he did not enter the conspiracy with the mind of a conspirator. but with the intention of betraying to the police, with whom he was in communication."

In *Reg. v. Mullins*¹⁹ the Central Criminal Court held that a person employed by Government to mix with conspirators and pretend to aid their designs for the purpose of betraying them does not require corroboration as an accomplice. Maule, J. in his direction to the jury, distinguished between two classes of witnesses. As to one class he said, "they were persons who understanding, as they say, that there were dangerous designs entertained by certain chartist societies, joined the meetings, and pretended to sympathise

16. (1910) 98 Cal. 96.

17. (1803) 28 St. Tr. 346

18. 3 Cox. C.C. 509

19. 1848 (3) Cox. (3) Cr. Cases 726.

with the views of the conspirators, in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies." As to the other class he said, "on the other hand, they were really chartists concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates, and gave information against them. These persons may be truly called accomplices. Now as to spies, I know of no rule of law which declares their evidence requires confirmation, nor any rule of practice which says that the juries ought not to believe them."

Later on, the learned Judge thus stated the reason for this distinction:

"An accomplice confesses himself a criminal and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man, but may think that the course he pursues is absolutely essential for the protection of his own interests and those of the society; and if he does so, he believes that there is no other method of counteracting the dangerous designs of wicked men. I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies and I do not see that a person so employed deserves to be blamed if he instigates offence, no further than by pretending to concur with the perpetrators."

This case was followed by the Court of Criminal Appeal (Lord Alverstone, L. C. J. and Bigham and Walton, JJ.) in *Rex v. Bickley*,²⁰ when the prisoner was convicted under Secs. 22 and 25 Vict., c. 100, s. 59, of having unlawfully supplied a noxious thing to a woman with intent to procure her miscarriage. The woman, who was not pregnant, acted under police instructions in order to trap the prisoner. It was contended on appeal that there was misdirection as no warning had been given to the jury that they should regard the evidence of the woman to whom the drugs had been supplied as that of an accomplice. The Court held that "the fact that the woman was a police spy in no way invalidated her evidence nor must her evidence be regarded as that of an accomplice" And proceeded to affirm that "as the law stands at present, it seems established that a police spy does not need corroboration".

The learned Judges also referred to a series of American decisions holding that one who as a spy or detective associates with criminals solely for the purpose of discovering and making known their crimes and who acts throughout with this purpose and without any criminal intent is not an accomplice and that it is immaterial that he encourages or aids the commission of the crime. The rule laid down in *Rex v. Despard*²¹ has been followed in a long and uniform current of decisions in America where it has been held that one who as a spy or a detective associates with criminals solely for the purposes of discovering and making known their crimes, and who acts throughout with this purpose, and without any criminal intent, is not an accomplice, and it is immaterial that he encourages or aids in the commission of the crime.²²

20. (1909) 2 Cr. App. Rep. 53: 73 J. P. 239.

21. (1803) 28 St. Tr. 346.

22. See *State v. McMean*, 38 Iowa 343: 14 Am. Rep. 530; *State v. Brownles*, 84 Iowa 473: 51 N.W. 25;

Wright v. State, 7 Tex. Ct. App. 574: 42 Am. Rep. 599; *People v. Bolanger*, 71 Cal. 17: 11 Pac. 799; *People v. Farrel*, 30 Cal. 316; *Commonwealth v. Downing*, (1855) 4 Gray 29; *Commonwealth v. Baker*

The learned Judges laid down the following two ratios in regard to the assessment of evidence in such cases :

"Though the testimony of a spy does not stand in need of corroboration, in order to be acted upon, it is entirely for the Judge of fact to decide in each particular case what weight he will attach to this kind of evidence, the question depending upon the character of each individual witness. It may sometimes be difficult to draw the line of discrimination between an accomplice and a pretended confederate, such as a detective, spy or decoy but we think that the line may be drawn in this way :

"If the witness has made himself an agent for the prosecution before associating with the wrong-doers or before the perpetration of the offence, he is not an accomplice; but he may be an accomplice if he extends no aid in the prosecution until after the offence had been committed."

In *Koganti Appayya v. Emperor*,²³ it was held that "the motive of the person who instigates the commission of a crime is not the only determining factor to conclude whether an instigator is an accomplice or not. In other words, even if the object of the person who instigates another to commit a crime is to catch him in the act of committing the crime, instigation by him nevertheless amounts to abetment of the offence, and the abettor must be regarded as an accomplice when the object of the instigation is to make the offender commit the offence, and the person who was instigated actually commits the offence. Even though such a person may not be regarded as an accomplice in the strict legal sense of the word, nevertheless the evidence of such person or persons should be viewed with caution. Where, therefore, the substantial charge against the accused is conspiracy to sell counterfeiting materials (to persons employed by the C. I. D. for detection of offences) the witnesses set on detection come under the category of accomplices and their evidence cannot therefore be accepted or acted upon in the absence of material corroboration.

The Nagpur cases of *Mohanlal Moolchand v. Emperor*²⁴ and *Govinda Balaji v. Emperor*²⁵ are on the same lines as *Emperor v. Chaturbhuj Sahu*.¹ Similarly are the Oudh case of *Bhuneshwari Pershad v. Emperor*² and the Lahore case of *Mangal Rai v. Emperor*.³ Even in Madras Panchapagesa Ayyar, J. has struck the same note in *In re M. S. Mohiddin*⁴ wherein he has held that where traps are set not to initiate crimes, e.g., to tempt a man to take a bribe when he never solicited directly or indirectly but to expose crimes and criminals, a trap is wholly laudable and admirable and adopted by every country without the least criticism of any honest man and that the officers taking part in the trap and the witnesses to the trap would, in no sense, be accomplices. The Mysore High Court has followed these decisions

155 Mass. 589; 29 N.E. 512; State v. Baden, 37 Min. 312; 34 N.W. 24; People v. Noelke, 94 N.Y. 137; Campbell v. Commonwealth, 84 Penn. 187; O'Grady v. People, 42 Cal. 312; 97 Pac. 306 and *Grimm v. United States*, 156 U.S. 605.
23 1938 M.W.N. 825 18 M.L.W. 322; 178 I.C. 616; A.I.R. 1938 M. 893.

24. A.I.R. 1947 Nag. 109; I.L.R. 1946 N. 982; 226 I.C. 276.

25. A.I.R. 1936 Nag. 245.

1. (1910) 38 Cal. 96.

2. 132 I.C. 231; A.I.R. 1931 Oudh 172.

3. A.I.R. 1928 Lah. 647.

4. 1952 M.W.N. 220; (1952) 2 M.L.J. 11; A.I.R. 1952 M. 561.

in *T. A. Basheeruddin Ahmed v. Govt. of Mysore*⁵ citing with approval passages from Russell on Crimes and Misdemeanours, Vol. 2, p. 222 and Taylor on Evidence, Vol. I, 1920 Edn., p. 920, fully supporting this viewpoint of trap-witnesses not being accomplices. When a trap-witness is a man of high position, his evidence would be credible.⁶ It is wrong to disbelieve the evidence of police officers who are trap-witnesses merely for the reason that they are police officers. Instead of disbelieving the evidence of persons who have in the past given evidence for police, the better course is to weigh such evidence in the light of probabilities.⁷ But the Supreme Court has laid down that corroboration is required from independent source of the evidence of trap witnesses for two reasons. Firstly a criminal case is to be proved beyond reasonable doubt. Secondly evidence of witnesses interested in the fruits of investigative efforts becomes devalued.⁸

The Orissa decision of *King v. S. Singh Rai*⁹ points out that the evidence of a spy does not stand in need of corroboration either as a principle of law or as a fundamental rule of practice necessary for safe administration of justice. It is always for the Judge to decide whether it is safe to rely and act upon a decoy witness. Each case depends upon its own merits. His partiality for the prosecution is a factor which can hardly be ignored. The character, position in life, and the social standing of the witness would go a great way in helping the Judge to appreciate his evidence.

In such cases it has also to be borne in mind that for instance, to frame a false charge of gambling or soliciting is very easy. So, as pointed out in *Emperor v. Harilal Gordhan*¹⁰ in a great many such cases the police agents are as a rule unreliable witnesses. It is always in their interest to secure a conviction in the hope of getting a reward. Therefore such evidence ought to be received with great caution and should be closely scrutinised. But to hold that such evidence ought not to be admitted in courts of law would be to deprive the authorities of their weapon in securing the observation of enactments like the Excise or Suppression of Immoral Traffic Act, etc. Therefore, the evidence of such witnesses should not be disbelieved only because of the nature of their calling but should be tested and should succeed or fail by reason of their own inherent strength or weakness.¹¹

In this connection owing to the increasing uses of these decoy witnesses the multiplicity of special enactments, which are coming into force connected with controls and rationing, Magistrates and Judges are becoming more restive and tend to brush aside such evidence as *ipso facto* worthless. In fact, in a decision, *Brannon v. Peek*,¹² Lord Goddard, C. J. made severe observa-

5. 1952 Mys. 42; 1 L.R. 1951 Mys. 466; 1952 Cr. L.J. 919.

6. Kewal Krishna v. State of Jammu and Kashmir, 1975 Cr. L.J. 1963.

7. Gian Singh v. State of Punjab, (1974) 1 S.C.W.R. 493; 1974 Punj. L.J. (Cri.) 53; 1974 Cri. App. R. 231 (S.C.); 1974 U.J. (S.C.) 754; 1974 S.C.C. (Cri.) 406; 1974 Cri. L.J. 789; 1974 Cri. L.R. (S.C.) 376; (1974) 4 S.C.C. 305; A.I.R. 1974 S.C. 1021.

8. Som Prakash v. State of Delhi, 1974 1 S.C.W.R. 396; 1974 S.C.C. (Cri.)

215; 1974 S.C.D. 249; 1974 Cr. L.R. (S.C.) 216; 1974 Cri. L.J. 784; (1974) 4 S.C.C. 84; 1974 S.C. Cri. R. 204; (1974) 3 S.C.R. 200; A.I.R. 1974 S.C. 989.

9. I.L.R. (1949) 1 Cut. 585; A.I.R. 1951 Orissa 297.

10. 39 B.L.R. 613.

11. In re Ramprasad, A.I.R. 1937 Nag. 251; 169 I.C. 42. See also In re Ambujam Annal, 1954 Mad. 326; 1953 M.W.N. 424; 1953 M.W.N. (Cr.) 156.

12. (1948) 1 K.B. 68.

tions disapproving the practice of police officers themselves committing offences in order to obtain evidence of offences by other persons. The learned C. J. remarked :

"If the Police authorities have reason to believe that offences are being committed in a public house, that is to say, taking bets, it is right that they should cause watch to be kept by detective officers, but it is not right that they should instruct, allow or permit a detective officer or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence." Similar observations have been made in *Kamalahai v. State of Maharashtra*¹³ and the Supreme Court condemned a student being used as a trap witness in detecting an offence under the Suppression of Immoral Traffic Act. But unfortunately as pointed out above owing to the increasing nature of the special enactments and the impossibility of procuring evidence in any other way and the paramount necessity of putting down offences of this kind, the use of trap-witnesses has become widespread and indispensable and courts have got to do their duty by not brushing that evidence aside as *ipso facto* tainted and worthless but submit it to close scrutiny, separate the truth from the falsehood and base its conviction upon reliable testimony.

So far as this country is concerned the employment of spies, agent *provocateurs* and trap-witnesses is in accordance with the best tradition of Hindu and Muslim statecraft.

The Indian law is summarised in two decisions in *In re Ambujam Ammal*¹⁴ and *Sundaravadivelu Chetty v. State*.¹⁵ The Supreme Court decisions bearing upon this subject are : *Ramakrishnan and Gian Chand v. State of Delhi*¹⁶ and *Ramjanam Singh v. State of Bihar*.¹⁷

An informer or a detective is not an accomplice and does not require corroboration even if he be an agent *provocateur*.¹⁸

Though, as has been pointed out by the Supreme Court, it may sometimes be necessary to employ spies or decoys for detection of offences which cannot be detected in any other way, the practice is not looked upon with much favour, because, in their enthusiasm, these men soon degenerate into agent *provocateur* instigating or provoking the commission of crimes. Therefore, the authorities indicate that if a man makes himself an agent for the prosecution before associating with the wrong-doer or before the offence is committed, or, if with a view to protect his own interest or that of others, pretends to associate with such persons with the object of preventing the commission of an offence by giving timely information to the authorities, he

13. A.I.R. 1962 S.C. 1189; 61 Bom. L.R. 517.

14. 1953 M.W.N. 424; Cr. 156.

15. 1955 M.W.N. 126; Cr. 14; A.I.R. 1956 S. C. 476.

16. 1956 M.W.N. 480; Cr. 128.

17. A.I.R. 1956 S.C. 643.

18. See Chief Justice Monir's Principles and Digest of the Law of Evidence (Third Edition), p. 1085; V. B. Raju, I.C.S., Evidence Act (1955), p. 1186, S. 133, Note 2 (c);

Sarkar on Evidence, 9th Edition, page 1079 (S. 133); Chitale and Appu Rao, The Indian Evidence Act (A.I.R. Commentaries), Vol. 7, S. 133, Note 19. For later case-law bringing it up to 1956 see p. 1062 *et seq* S. 133, Indian Evidence Act, Note (c) of N. T. Raghunathan All-India Digest (1951-55) (M.W.N.); Yearly Digest (M.L.J. and A.I.R.) for 1956 and 1957.

is not an accomplice. But however good the motive may be, if such a person or a spy or an informer in the exuberance of his enthusiasm actually instigates another to commit a crime, even if it be for detection of offence or to get the credit of having him arrested, he is an abettor under the penal law and his position cannot be anything other than that of an accomplice. In *Brannan v. Peek*,¹⁹ Lord Goddard, C. J., observed :

“The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. . . . I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone; if they do commit offences, they ought also to be convicted and punished for the order of their superior would afford no defence.”

This distinction between legitimate and illegitimate trap is brought out in (a) the decision of the Supreme Court in *Ramjanam Singh v. State of Bihar*²⁰ and (b) the American case in the following extract from *Sundaravadi-velu Chetty v. State*²¹ :

(a) Their Lordships of the Supreme Court observed :

“Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing agent *provocateurs* may be (and this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally decided shall not be done. The very best of men have moments of weakness and temptation, and even the worst have times when they repent of an evil thought and are given an inner strength to set Satan behind them; and if they do, whether it is because of caution, or because of their better instincts, or because some other have shown them either the futility or the wickedness of wrong-doing, it behoves society and the State to protect them and help them in their good resolve; not to place further temptation in their way and start afresh a train of criminal thought which had been finally set aside.”

They held, that this was not a case of laying a trap in the usual way, for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerable emphasis and decision.

(b) The evidence of a trap-witness which normally cannot be treated as the evidence of an accomplice becomes so when the trap-witness is actually the instigator of the offence and this is well brought out in the following American decisions. The fact that an obscene paper was sent in response

19. (1947) 2 All E.R. 572.
20. A.I.R. 1956 S.C. 643.

21. 1955 M.W.N. 26; Cr. 14; A.I.R. 1956 S.C. 476.

a decoy letter is no defence to an indictment for mailing such publication.²² is no defence sending a letter giving notice where obscene pictures may be obtained in violation of U.S. Rev. Stat. [s. 3893 U. S. C. title 18—s. 7] that the letter was an answer to enquiry under an assumed name from detective or Government official.²³ The fact that a letter was a decoy is no defence to an indictment of a railway postal clerk for embezzling and stealing when it contained money.²⁴ The fact that officers or employees of the Government merely afford opportunities or facilities for the commission of an offence does not defeat a prosecution therefor.²⁵ A conviction for possession and selling intoxicating liquor in violation of the National Prohibition Act is improper where the acts alleged to constitute the offence were committed solely upon the instigation of a prohibition agent.¹ Entrapment is the conception and planning of an offence by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. This was the separate opinion of Roberts, Handies, Stone, JJ. in *Sorrells v. United States*.² It is not the duty of a Government official to incite to and create crime for the purpose of prosecuting and punishing it.³

The principles have been embodied in two decisions of the Supreme Court, *Rao Shri Bahadur Singh v. The State of Vindhya Pradesh*⁴ and *Ramashen v. The State of Delhi*.⁵

For a discussion of trap-cases and value of evidence of trap-witnesses, see Kapur and Pandit, *The Prevention of Corruption Act*, p. 195 and foll. and Arupal Varshni, *The Law Relating to Bribery and Corruption*, p. 99.

9. Informers, spies and decoys. Though a great degree of disfavour may attach to a person for the part he has played as an informer, yet his case is not treated as that of an accomplice.⁶ The action of a spy and an informer in suggesting and initiating a criminal offence is itself an offence, the act not being excused or justified by any exception in the Indian Penal Code, but by the doctrine which distinguishes the spy from the accomplice. But the act of a detective in supplying marked money for the detection of a crime can-

22. *Rosen v. United States*, 40 L. Ed. 606; *Andrews v. United States*, 40 L. Ed. 1027; *Price v. United States*, 41 L. Ed. 727.

23. *Grimm v. United States*, 39 L. Ed. 550.

24. *Montgomery v. United States*, 40 L. Ed. 1020.

25. *Sorrells v. United States*, 77 L. Ed. 413.

1. *Ibid.*

2. *Ibid.*

3. *Bulls v. United States*, 18 A.L.R. 43.

4. (1954) 17 S.C.J. 362.

5. 1956 M.W.N. 480 : Cr. 128.

6. *Taylor, Ev.*, S. 971; *Wharton, Cr. Ev.*, s. 440; *Stewart Rapalji op. cit.*, s. 228; *R. v. Despard*, (1803) 28 St. Tr. 346; *R. v. Mullins*, 3 Cox. C.C. 526, referred to and followed in *R. v. Jivecharan*, (1894) 19

B. 363 in which the distinction between a spy and an accomplice is pointed out; see also *R. v. Mona Puna*, 16 B. 661; *R. v. Shankar*, Cr. R. 91 (Bom.) 21 December, 1886 cited in (1894) 19 B., *supra* at p. 368; *Bhuneswari Pershad v. Emperor*, 1931 Oudh 172; 132 I.C. 234; 32 Cr. L.J. 860; 8 O.W.N. 503; *Mahabir Parshad v. The State*, 1951 Punj. 424 : 52 Cr. L.J. 944; 1951 A.W.R. (Sup.) 87; *T.A. Basheeruddin Ahmed v. Government of Mysore*, 1952 Mys. 42; I.L.R. 1951 Mys. 464; 1952 Cr. L.J. 919; 32 Mys. L.J. 1; *In re Ambujam Ammal*, 1954 Mad. 326; 55 Cr. L.J. 417; 1953 M. W.N. 424; *State Government of Madhya Pradesh v. Hiralal Tejpal*, 1952 Nag. 58; I.L.R. 1951 Nag. 930; 53 Cr. L.J. 325; 1952 N.L.J. 129.

not be treated as that of an accomplice.⁷ Where an informer was upon his own statement cognisant of the commission of an offence and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice; but held that his testimony was not such as to justify a conviction except where it was corroborated.⁸ "When the Judges speak of the danger of acting upon the uncorroborated evidence of accomplices, they refer to the evidence of accomplices who are admitted as evidence for the Crown in the hope or expectation of a pardon".⁹

"The case of a pretended confederate, who as detective, spy or decoy, associates with the wrong-doers in order to obtain evidence, is distinct from that of an accomplice, although the distinction may sometimes be difficult of application."¹⁰ A person who, either before associating with wrong-doers or before the perpetration of an offence, makes himself an agent for the prosecution with the purpose of disclosing such offence, is a police spy or decoy and not an accomplice, and therefore his evidence (though its value would depend on his character) would not require corroboration. But a person who associates with wrong-doers with a criminal design and does not help the prosecution, till after the perpetration of the offence, is an accomplice.¹¹ A mere detective or decoy or paid informer is therefore not an accomplice, nor an original confederate who betrays before the crime's committal, yet an accessory after the fact would be, if he had before betrayal rendered himself liable as such.¹² If, at the time when a person joined conspiracy, he had no intention of bringing his associates to book, but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice and his position is not modified simply because later on he turns round and carries information to the police.¹³ Even if the object of the person who instigated another to commit a crime is to catch him in the act of committing the crime, instigation by him nevertheless amounts to abetment of the offence, and the abettor must be regarded as an accomplice, when the object of the instigation is to make the offender commit the offence, and the person who was instigated actually commits the offence.¹⁴ The fact that a person is engaged to witness a crime does not make him an accomplice unless he is proved to have participated in the commission of the crime. If he has participated in the crime, the mere fact that he was engaged by the police will not entitle him to claim immunity from being charged as an accomplice. Whether he is a spy or an accomplice will depend upon the view taken by the judge of fact having regard to all the circumstances of the case.¹⁵

7. *R. v. Jivecharam*, (1891) 19 B. 363.
8. *Ishām Chandra v. R.*, (1893) 21 C. 328; *R. v. Chando Chandalinee*, (1875) 24 W.R. Cr. 55.
9. *Per Peacock, C. J.*, in *R. v. Elahi Bux*, 1886 B.L.R. (Sup.) Vol. p. 459 at p. 469; 5 W.R. (Cr.) 80.
10. *Wigmore, Ev.*, s. 2060.
11. *R. v. Chatrabhuj Sahu*, (1910) 38 C. 96; 8 I.C. 119; 15 C.W.N. 171; *Mohan Lal Moolchand v. Emperor*, 1947 Nag. 109; I.L.R. 1946 Nag. 982; 226 I.C. 276; 47 Cr. L.J. 873; 1946 N.I.J. 586; *State v. Bishamber Daval*, 1953 Pepsu 82; I.L.R. 1952 Pepsu 512; 54 Cr. L.J. 986; *Mahadeo Damappa Gunaki v. State*, 1952 Bom. 435; 11 R. 52 Bom. 900; 53 Cr. L.J. 1572; 54 Bom. I.R. 153; for English rule to same effect, see *Archbold's Criminal Pleading*, 26th Ed., p. 411, and *R. v. Bickley*, (1909) 2 Cr. App. Rep. 53; *R. v. Wig*, (1848) 3 Cox C.C. 526; see also *Dowling More, Ev.* s. 2060.
12. *Wigmore, Ev.*, s. 2060.
13. *Karim Baksh v. Emperor*, 1928 Lah. 193; I.L.R. 9 Lah. 550; 109 I.C. 593; 29 Cr. L.J. 577.
14. *In re Koganti Appayya*, 1938 Mad. 893; 178 I.C. 616; 40 Cr. L.J. 108; 48 I.W. 322; 1938 M.W.N. 825.
15. *The State of Orissa v. Minaketan Patnaik*, 1953 Orissa 160; I.L.R. 1952 Cut. 678; 54 Cr. L.J. 1084.

It has been held, in some cases, that the evidence of a spy or agent *pro-vocateur* should be looked upon with suspicion and should be seldom relied upon in support of a conviction,¹⁶ unless corroborated.¹⁷ But the evidence of a spy does not stand in need of corroboration, either as a principle of law or as a fundamental rule of practice necessary for safe administration of justice. It is always for the Judge to decide whether it is safe to rely and act upon a decoy witness. His partiality for the prosecution is a factor which can hardly be ignored. The character, position in life, and the social standing of the witness would go a great way in helping the Judge to appreciate his evidence.¹⁸ In a great many cases, the police agents are as a rule unreliable witnesses. It is always in their interest to secure a conviction in the hope of getting a reward. Therefore, such evidence ought to be received with great caution and should be closely scrutinised. But to hold that such evidence ought not to be admitted in courts of law would be to deprive the authorities of their weapon in securing observation of enactments like the Excise Act, the Suppression of Immoral Traffic Act, etc. Therefore, the evidence of such witnesses should not be disbelieved only because of their role, but should be tested and should succeed or fail by reason of their own inherent strength or weakness.¹⁹ The question, whether a witness who is engaged by the police to act as a spy is to be believed, must be decided by the Judge who tries the case and his reliability should be determined by the circumstances of the particular case. There can be laid down no rule of general application.²⁰ Deprecating the practice of police authorities, supplying decoy witness with Government money for bringing about the taking of a bribe, their Lordships of the Supreme Court observed: "It may be that the detection of corruption may sometimes call for the laying of traps, but there is no justification for the police authorities to bring about the taking of a bribe by supplying the bribe money to the giver, where he has neither got it nor has the capacity to find it for himself. It is the duty of the police authorities to prevent crimes being committed. It is no part of their business to provide the instruments of the offence."²¹ The independence and impartiality of the judiciary requires that Magistrates whose normal function is judicial should not be relegated to the position of partisan witnesses and "required to depose to matters transacted by them in their official capacity unregulated

16. Hazura Singh v. Emperor, 1929 Lah. 436; 118 I.C. 544; 30 Cr. L.J. 941.
17. Nitvanand Prem Lal v. State, 1954 Punj. 89; 55 Cr. L.J. 545; P. Venkatarao v. The King, 1951 Orissa 281; 52 Cr. L.J. 832; Surat Bahadur v. King-Emperor, 1925 Oudh 158; 81 I.C. 986; 25 Cr. L.J. 1162; 11 O.L.J. 640; Emperor v. Anwar Ali, 1948 Lah. 27; 49 P.L.R. 253; Hari Lal Gordhan v. Emperor, 1937 Bom. 385; 1 I.L.B. 1937 Bom. 670; 171 I.C. 284; 39 Bom. L.R. 613; T.A. Basheeruddin v. Government of Mysore, 1952 Mys. 42; Harakchand Radha Kishen v. State, 1954 M.B. 145; 1954 M. B. L. J. 574; Hormazdyar Ardeshir Hirani v. Emperor, 1948 Bom. 430; 38 Bom. L.R. 163;

- Tarsem Lal v. The State, A.I.R. 1960 Punj. 72; 61 Punj. L.R. 499.
18. King v. S.N. Singh Rai, 1951 Orissa 297.
19. In re Ambujam Ammal, 1954 Mad. 326; 1953 M.W.N. 424; see also In re Ram Prasad, 1937 Nag. 251; 169 I.C. 42.
20. The State of Orissa v. Minaketan Patnaik, 1953 Orissa 160; 1 I.L.R. 1952 Cut 678; 54 Cr. L.J. 1084.
21. Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1954 S.C. 322 at 324 following State v. Ful Chand, 1956 M. B. 50; 1956 Cr. L.J. 226; see also Ram Janam Singh v. State of Bihar, 1956 S.C. 643; 1956 Cr. L.J. 1254.

by any statutory rules of procedure or conduct whatever.”²² But the principle on which the employment of Magistrates as witnesses of police traps has been condemned have hardly any application where the Magistrates concerned are executive Magistrates who perform no judicial functions or where the officer concerned are officers of the Anti-Corruption Department whose duty it is to detect offences of corruption.²³ The mere fact that a person acts as a decoy is not sufficient to reject his testimony, when it is supported in every particular by the other witnesses.²⁴ Where a party presenting a document for registration is asked by the peon to pay money to the Sub-Registrar, to get back the document forthwith and pays accordingly to that officer, who accepts it, the party could not be termed an accomplice but an interested witness. Nevertheless some corroboration is necessary.²⁵ *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*¹ did not lay down any inflexible rule that the evidence of the witnesses of the raiding party must be discarded in the absence of any independent corroboration. The correct rule is this: *if any of the witnesses are accomplices who are particeps criminis in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the Court may even look for independent corroboration before convicting the accused person. If a Magistrate puts himself in the position of a partisan or interested witness, he cannot claim any higher status and must be treated as any other interested witness.*²

10. The rule in this section and Sec. 114, Illustration (b). This section is the only absolute rule of law as regards the evidence of accomplices. But there is a rule of guidance which the Court should also regard; and it is to be found in Illus. (b) to Sec. 114. The latter section enacts a rule of presumption, and, read with Sec. 4, it indicates that this is not a presumption incapable of rebuttal. The right to raise this presumption is sanctioned by the Act; and it would be an error of law to disregard it. What effect is to be given to it must be determined by the circumstances of each case. The evidence of an accomplice requires to be accepted with great caution because, among other things, he is likely to swear falsely in order to shift the guilt from himself. The corroboration of such evidence, when required, should be such corroboration in material particulars as would induce a prudent man to believe, on consideration of all the circumstances, that the evidence is true, so far as it affects each person implicated.³ The rules in this section and

22. *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, 1954 S.C. 322; see also *Nazir Ahmad v. King-Emperor*, 1936 P.C. 253 (2); 63 I.A. 372; I.L.R. 17 Lah. 629; 163 I.C. 881; 37 Cr. L.J. 897; 1936 A.L.J. 586.

23. *The State of Bihar v. Basawan Singh*, A.I.R. 1958 S.C. 500.

24. *Laurie E. Jacobs v. Union of India*, 1958 All. 481; 1958 Cr. L.J. 827.

25. *G. Moogappa v. State*, A.I.R. 1961 Mys. 44.

1. A.I.R. 1954 S.C. 322.

2. *The State of Bihar v. Basawan Singh*.

1958 Cr. L.J. 976; A.I.R. 1958 S.C. 500; 1958 S.C.J. 856; 1958 M. C.J. (Cr.) 641; (1958) 2 M.L.J. (S.C.) 136; (1958) 2 Andh. W.R. (S.C.) 136; *Khemu Ram v. State*, 1972 Cr. L.J. 381 (H.P.); *State of Mysore v. Ram Chandran & others*, 1972 Mad. L.J. (Cr.) 821; (1972) 1 Cut. L.R. (Cr.) 48 (Orissa); *M.P. Agarwal v. State of Bihar*, 1973 Cr. L.J. 1582 (1584) (Pat.); *Om Prakash Mathur v. The State*, 1974 W. L.N. 324.

3. *R. v. Shrinivas Krishna and R. v. Naro Bhaskar*, 7 Bom. L.R. 969.

in Sec. 114, Illust. (b), are part of one subject, and neither section is to be grafted in the exercise of judicial discretion,⁴ and they coincide with the rule formerly observed in England,⁵ and laid down in India prior to the passing of this Act.⁶ There may appear some seeming inconsistency between the proposition that an accomplice is unworthy of credit unless corroborated and the proposition laid down in Sec. 133, but, if the object and scope of each of the above rules are looked into, they would not be found to be really inconsistent. Section 133 merely says what it is not illegal to do. It says nothing about the propriety of the conviction. It looks, as if the section was intended to settle legislatively a question which at the time of its enactment was thought to be disputed. The negative form of the section on the face of it indicates as if the contrary was or was supposed to be the rule. At any rate, the section does not go to the length of saying that, though it is not illegal to convict an accused person on the uncorroborated testimony of an accomplice, a conviction based on it is proper. It does not bar a rule of caution, if any, in treating such evidence. The section only says that if, in spite of such rule for appreciating the evidence, the Court relies on the evidence in a particular case, the conviction under such circumstances would be legal. Thus the rule expresses the bare existence of a principle to meet the requirements of very exceptional cases, e.g., where there are special circumstances to destroy or diminish the reasons for which an accomplice's evidence is held unreliable, or, in other words, where the taint is removed.

So far as Sec. 114(b) is concerned, it will be observed that, if the Legislature had intended to treat an accomplice's evidence in the same way as any other evidence, there would not have been any necessity for laying down Sec. 114(b) at all, particularly after repealing Act II of 1855. But the credit of an accomplice's evidence was too important a matter to be left without notice. Accordingly, Sec. 114(b) is one of the very few provisions in the Act in which something is specially said about the weight of evidence, which ordinarily ought to be a matter for the Court to decide in each case. The Court is given discretion to take into account certain facts, such as are given in the two illustrations, for considering, whether the rule, that the accomplice, if not corroborated, is unworthy of credit, does or does not apply to the case. There appears to be some vagueness as to whether such facts should be taken into account before or after the presumption is drawn. In the former case, the presumption would not invariably be raised. In the other case, the presumption will be drawn according to the discretion of the Court but it will stand rebutted by such facts as are mentioned in the illustration. All that the explanation, however, requires is the consideration of such facts as are given in the illustrations to see if the rule applies in the case. It is true that the illustrations are not exhaustive but there is nothing about the raising of the presumption, nor is there anything to show that the discretion of the Court

4. *R. v. Chagan Dayaram*, (1890) 14 B. 331, 334; *R. v. Mohiuddin Sahib*, (1901) 25 M. 143, 147 [the section must be read with Illust. (b) to S. 114]; *Babu Singh v. Emperor*, 1936 Oudh 156; 159 I.C. 375; 37 Cr. L.J. 163; 1936 O.W.N. 64; *Nitai Chandra v. Emperor*, 1937 Cal. 433; 170 I.C. 201; 28 Cr. L.J. 852 (S.B.).

5. *R. v. Ramaswami Padayachi*, (1878)

1 M. 394; *R. v. Ram Saran*, (1885) 8 A. 396; *R. v. Magan Lal*, (1889) 14 B. 115; *Lale v. Emperor*, 1929 Oudh 321 (2); 118 I.C. 425; 30 Cr. L.J. 922.

6. See the Full Bench case of *R. v. Elahi Bux*, 1866 B.L.R. (Sup.) Vol. p. 459 (F.B.); s.c. 5 W.R. Cr. 80 in which the law which is the subject of these sections was fully discussed.

to raise the presumption is affected by the illustrations.⁷ It has been held, that the circumstances given in the illustrations, if they exist, may lessen the degree of corroboration and do not make the rule of caution inapplicable and that in each case the question is what is just and proper.⁸ In the Full Bench case of the *King v. Nga Myo*,⁹ it has been held, that the two illustrations in the explanation to Sec. 114(b) show circumstances in which the presumption normally to be drawn is capable of being displaced (or rebutted) and that they are given by way of guidance only and in order that the Court may test the facts of the particular case to see whether anything has emerged to show that the evidence of the accomplice need not be corroborated in material particulars. The illustrations show that all persons, coming technically within the category of accomplices, cannot be treated as on precisely the same footing. The nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down. The Legislature has not done so; and the Courts, whose function it is to interpret the law, cannot do so. The decisions, however, show the principles on which Judges have acted in particular cases, and it is the duty of their successors to consider those principles and determine to what extent they are applicable in the circumstances of other cases.¹⁰ The rule in Section 114(b) is a rule of practice, not a rule of law, for to make a hard and fast rule would be to fetter the Court when a competent witness is before it. The rule of law says he is competent to give evidence, and the rule of practice says it is almost unsafe to convict upon his testimony alone. But the rule of law to this extent triumphs over the rule of practice that, if special circumstances exist which render it safe, in an exceptional case, to act upon the uncorroborated testimony of an accomplice and upon that alone, the Court will not merely for the reason that the conviction proceeds upon such uncorroborated testimony say that the conviction is illegal. This is the plain meaning of Sec. 133. It has been said in English cases that the rule of practice is virtually a rule of law; all that this means is, that the practice laid down must be followed with the same precision as if it were a rule of law; not that the rule of law has been obliterated by the rule of practice, but that both must be observed with equal care. The rule of practice must not be subordinated to the rule of law, but both must be considered together, as though the rule of law comprised the rule of practice. How necessary it is that the rule of law should exist is shown by the illustrations given under clause (b) of Sec. 114.¹¹ An approver's evidence is admissible under the Evidence Act and, if accepted, is sufficient to support a conviction, but whether it should be accepted without corroboration is quite a different matter. It may be taken, that, unless the case is a very exceptional one, an accomplice's evidence should not be accepted as being sufficient.¹² "On the whole, the result" of these sections "appears to be that the Legislature had laid it down, as a maxim or rule of evidence resting on human experience, that an accomplice is unworthy of credit against an accused person, i.e., so far as his testimony implicates an accused person, unless he is corroborated in material

7. See *The Evidence of Accomplices* by Rai Prasanna Narain Chaudhuri Bahadur, 6th Ed., pp. 377-379.

8. *Bimal Krishna Biswas v. Emperor*, I.L.R. 62 Cal. 819:39 C.W.N. 761.

9. 1938 Rang. 177: 175 I.C. 465: 39 Cr. L.J. 581 (F.B.).

10. *King-Emperor v. Malhar Martand*

Kulkarni, I.L.R. 26 Bom. 193: 3 Bom. L.R. 694.

11. *Nga Aung Pe v. Emperor*, 1937 Rang. 209:169 I.C. 705:38 Cr. L.J. 785.

12. *In re B.K. Rajagopal*, 1944 Mad. 117: I.L.R. 1944 Mad. 308: 211 I.C. 367:45 Cr. L.J. 373 (F.B.).

particulars in respect to that person; that it is the duty of the Court, which in any particular case has to deal with an accomplice's testimony, to consider whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly, in exceptional cases, notwithstanding the maxim, and in absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration."¹³ It is not illegal to base a conviction on the evidence of an accomplice alone, nor is a Court required to set aside a verdict merely on the ground that it is based upon the uncorroborated testimony of an accomplice, unless it is clear that by the omission to require corroboration, a failure of justice has, in fact, occurred.¹⁴ Since under Sec. 133 an accomplice is a competent witness, conviction of accused on his sole testimony cannot be said to be illegal.¹⁵ The rule, that an accomplice must be corroborated in a material particular, is a mere rule of general and usual practice, the application of which is in the discretion of the Judge by whom the case is tried. Thus, the rule has no application in the case of an accomplice who is merely a youthful tool in the hands of one who stood to him in *loco parentis*,¹⁶ nor where the offence is merely technical.¹⁷ In a case in the Madras High Court it was said that this section is the substantive enactment declaring the law on this point, while Sec. 114 only assists the Court in drawing inferences of fact, and that therefore the Court may be warranted in refusing to accept the presumption in Sec. 114, Illust. (b), and may consider the evidence of an accomplice in the light of all the circumstances and value it accordingly, though always bearing in mind that it is tainted.¹⁸ And this case has been reviewed in another in which it was held that this section read with Sec. 114, Illust. (b), lays down the rule that a conviction on the uncorroborated evidence of an accomplice is not illegal where the presumption of untrustworthiness is rebutted by special circumstances.¹⁹ It was said, in this case, that nothing in Sec. 114 overrides this section or forbids the Court to act on such uncorroborated evidence²⁰ when it believes it to be true, and that while Sec. 114 raises certain presumptions, the use of 'may' instead of 'shall' indicates that the Court is not compelled to raise them but need only consider whether they should be raised.²¹ An accused person can legally be convicted upon the uncorroborated evidence of an approver; whether an accused person should or should not be convicted upon such evidence is left to the prudence and

13. Per Pheasant, J., in *R. v. Sadhu Mandal*, (1874) 21 W.R. Cr. 69, 70; see remarks in *Abdul Karim v. R.*, (1904) 1 All. L.J. 110, where the Court was unable to regard a witness as an accomplice of such an exceptional kind as would justify the Court in dispensing with confirmatory evidence. Corroboration is required unless the Court can unhesitatingly believe it. See *Alauddin v. Emperor*, 1919 All. 327; 52 I.C. 49; 20 Cr. L.J. 561.
14. *State v. Anil Ranjan*, 1952 Cal. 534; 53 Cr. L.J. 1154.
15. *Rajani Kanta Mehta v. State of Orissa*, (1976) 42 Cut. L.T. 292.
16. *Ramaswami Gounden v. R.*, (1905)

- 27 M. 271; 14 M.L.J. 226, per Sir S. Subramania Ayyer, Offg. C.J.
17. *Muhammad Usuf Khan v. Emperor*, 1929 Nag. 215; 114 I.C. 457.
18. *R. v. Nilakanta*, (1911) 35 M. 247; 14 I.C. 849 and *R. v. Tate*, (1908) 2 K.B. 680; *Meunier, In re*, (1894) 2 Q.B. 415.
19. *Muthukumaraswami Pillai v. R.*, (1912) 35 M. 397; 14 I.C. 896; see *Alauddin v. Emperor*, 1919 All 327.
20. *Muthukumaraswami Pillai v. R.*, *supra*, per Benson, C.J.
21. *Muthukumaraswami Pillai v. R.*, (1912) 35 M. 397; 14 I.C. 896, per Wallis, J.

good sense of the tribunal after considering all the circumstances of the case. *Prima facie*, the evidence of an approver, being tainted evidence, is unworthy of credit, unless it is corroborated in some material particulars tending to show that the accused committed the offence with which he is charged.²² As Thomas, C. J. observed in *Debi Dayal v. Emperor*²³: "Section 133, Evidence Act, contains the rule of law regarding the testimony of an accomplice and Sec. 114, Illust. (b) is merely a guide to assist the Courts. There is, therefore, no bar to the conviction of an accused person, even on the uncorroborated testimony of an approver, if the Court is fully satisfied about its truth. If any corroboration is required, its extent will, however, vary with the circumstances of each case. If the approver's evidence appears on the whole to be reliable, and he has no motive for implicating an accused person falsely, I fail to see why he cannot be convicted on the statement of the approver. If a Judge, after making due allowance for all considerations and the probabilities of the story, comes to the conclusion that the evidence of an accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict." An accomplice is a suspect witness, whose evidence must be received with great caution and should be materially corroborated before it is accepted. All that is true, but it is not the whole truth. The scales must be held even; for, while it is essential that accused persons should be protected from conviction on the mere evidence of an untrustworthy accomplice, it is also important that the requirements of the Legislature in this respect should not be exaggerated by the Courts as to offer a practical guarantee of immunity to persons guilty of grave offences which are in their very nature difficult of detection. If, after all cautions have been observed, the Judge or Magistrate is convinced that the accomplice's evidence is true, it is his duty to say so and to give effect to his mental conviction.²⁴ It is significant to note that it was not laid down as a rule of law that, without independent corroboration, the evidence of partisan witnesses can, under no circumstances, be relied on as sufficient to sustain a conviction of the accused. After all, the rule regarding independent corroboration is only a rule of prudence. If, in any particular case, the evidence of partisan witnesses is seen to be thoroughly reliable and trustworthy, there will be nothing wrong in the Court in acting upon such evidence and entering a conviction against the accused. Even in the cases of witnesses standing in the position of accomplices their evidence is not totally discarded.²⁵ In a Bombay case, Beaumont, C. J. expressed the opinion that the rule of the Court which requires corroboration of the evidence of an accomplice as against each accused, if it applies at all, applies with very little force to a case in which the accused is charged with extorting a bribe from other persons. The objections which usually arise to the evidence of an

22. *Aung Hla v. Emperor*, 1931 Rang. 235; I.L.R. 9 Rang. 404; 135 I.C. 849; *Emperor v. Nirmal Jiban Ghose*, 1935 Cal. 513; I.L.R. 62 Cal. 238; 157 I.C. 387; 36 Cr. L. J. 1115; 39 C.W.N. 744 (S.B.); *Purnanand Das Gupta v. Emperor*, 1939 Cal. 65; I.L.R. (1939) 1 Cal. 1; 179 I.C. 506; 40 Cr. L.J. 199; *Debi Dayal v. Emperor*, 1942 Oudh 435; 201 I.C. 411; 43 Cr. L.J. 661; see also *In re B.K. Rajagopal*, 1944 Mad. 117; I.L.R. 1944 Mad. 308;

211 I.C. 367; 45 Cr. L.J. 373; (1943) 2 M.L.J. 634 (F.B.).

23. 1942 Oudh 435 at 438.

24. Per Batchelor, J., in *Govind Balwant Laghate v. Emperor*, 1916 Bom. 229 at 233; 34 I.C. 976; 17 Cr. L.J. 256; 18 Bom. L.R. 266.

25. *Narayanswami v. The State*, 1957 Ker. 134; I.L.R. 1957 Ker. 559; 1957 Cr. L. J. 1127; (1957) 1 M. L.J. (Cr.) 443.

accomplice do not really apply where the alleged accomplice, that is, the person who pays the bribe, is not a willing participant in the offence, but is really a victim of that offence.¹ No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must, however, vary according to the extent and nature of the complicity.² Where the nature and extent of the complicity of a witness is small, bordering almost on nullity, it will be open to a Court to act merely on his evidence alone without any further corroboration.³ The rule of prudence, which is now recognised as a rule of law, that evidence of accomplices before it is utilised for convicting an accused person must be corroborated in material particulars, in so far as it involves the accused, can have no application, where the evidence is led only for the purpose of proving that the complainant was in possession of some property which is alleged to be stolen.⁴

(a) *Law in England.* In England there is now an increasing tendency to insist that the evidence of an accomplice must be corroborated. In Archbold's "Criminal Pleading" it is said that "it is now fully recognized to be an established practice, virtually equivalent to a rule of law, to require corroboration of the evidence of an accomplice by independent evidence on some material particulars going to the offence itself and implicating the accused."⁵ The fullest and the most authoritative exposition of the English law is to be found in *R. v. Baskerville*,⁶ where all the leading authorities were reviewed and the principles applicable were stated in clear terms by the Court of Appeal (Reading, L. C. J., Scrutton, Avory, Rowlatt and Atkin, J.J.). There Lord Reading, the Lord Chief Justice, stated the law as follows: "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. . . . But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and in the discretion of the Judge to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. . . . The rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal came into operation this Court has held, that, in the absence of such a warning by the Judge, the conviction must be quashed. . . . If, after the proper caution by the Judge, the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated."

(b) *Law in India.* This is exactly the law in India so far as accomplices are concerned, and it is certainly not any higher in the case of sexual offences.⁷

1. *Papa, Kamalkhan v. Emperor*, 1935 Bom. 230 at 232; I.L.R. 59 Bom. 486; 156 I.C. 615; 36 Cr. L.J. 968; see also *State of Kerala v. Samuel*, I.L.R. 1960 Ker. 783 (F.B.).
2. *Srinivas Mall v. Emperor*, 1947 P. C. 135, 139; I.L.R. 26 Pat. 460.
3. *In re Amir Sultan*, 1957 Mad. 796; 1957 Cr. L.J. 1424; (1957) 1 M. L.J. (Cr.) 209.
4. *State v. Bassappa*, 1956 Bom. 341;

1956 Cr. L.J. 605.

5. Archbold's *Criminal Pleading, etc.*, 25th Ed., 441 and Taylor on *Evidence* (10th Edition), 967.
6. (1916) 2 K.B. 658; 86 L.J. K.B. 28; 115 L.T. 453.
7. *Rameshwar v. State of Rajasthan*, 1952 S.C. 54; 1954 S.C.A. 40; 1952 S.C.J. 46; 1952 S.C.R. 377; *State of Bihar v. Basawan Singh*, 1959 S.C. 500; 1958 S.C.J. 856.

This section in unmistakable terms lays it down that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, and to hold that the corroboration is necessary is to refuse to give effect to this provision.⁸ And so, a jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement.⁹ And there may be cases of an exceptional character in which the accomplice's evidence alone convinces a Judge of the facts required to be proved, and Sec. 133 would support him, if he acted on that conviction without the corroboration usually insisted on.¹⁰ "Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict."¹¹ Before acting on the presumption mentioned in Sec. 114, the Court or jury is required by the section and the sequel to the illustrations to take into consideration certain facts with the view to ascertain the probability of the story told.¹² It is not wise or feasible to construct a fixed rule of law for all cases, though constant attempts have been and are still made to turn what was in its origin and is under the Act a cautionary practice into a rule of law.¹³

The law regarding accomplice evidence has been considered in numerous cases¹⁴ and has been restated as follows :

"The Evidence Act nowhere requires that in class of cases commonly referred to as sexual cases, there should be corroboration of the testimony of an accomplice. Although it says in Sec. 114 (b) that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, it makes it clear in Sec. 133 that an accomplice shall be a competent witness against the accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. There is no doubt, therefore, that the uncorroborated evidence of an accomplice is admissible in evidence.

8. *R. v. Ramaswami Padayachi*, (1878) 1 M. 394; *R. v. Gobardhan*, (1887) 9 A. 528, 533; *R. v. Koa*, (1875) 19 W.R. (Cr.) 48; *R. v. Ram Saran*, 1885 A.W.N. 311; *R. v. Magan Lal*, 14 Bom. 115; *R. v. Chagan Dayaram*, (1890) 14 B. 331; *Balchand v. King-Emperor*, 1927 All. 90; I.L.R. 49 All. 181; 98 I.C. 489.

9. *R. v. Godai Raout*, (1866) 5 W. R. (Cr.) 11; *R. v. Ramaswami Padayachi*, *Supra*; *R. v. O'Hara*, (1890) 17 C. 642, 665; *R. v. Mahima Chandra*, (1871) 16 B.L.R. App. 198, 111; *R. v. Nidheeram*,

(1872) 18 W.R. (Cr.) 45.

10. Per Scott, J., in *R. v. Magan Lal*, (1889) 14 B. 115, 119; *R. v. Ramaswami Padayachi*, (1878) 1 M. 394.

11. *R. v. Gobardhan*, 9 A. 528, 554, per Edge, C.J.; see also *Debi Daval v. Emperor*, 1942 Oudh 435; 201 I.C. 411.

12. *R. v. Ramaswami Padayachi*, (1878) 1 M. 394, as to the character of an accomplice, see sequel to Illust. (b), S. 114; and remarks of Peacock, C.J., in *R. v. Elahi Bux*, 1886 B. L.R. (Supp.) Vol. p. 468.

13. See Wigmore, Ev., S. 205.

14. Too numerous to be cited.

"But it has long been a rule of practice at common law, which has become virtually equivalent to a rule of law, and which is exactly the law in India, so far as accomplices are concerned, and it is certainly not any higher in the case of sexual offences, that the Judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and it lies in the discretion of the Judge, to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon unconfirmed evidence. If after this proper caution by the Judge, the jury nevertheless convict the prisoner, his conviction will not be quashed, merely upon the ground that the accomplice's testimony was uncorroborated.

"The only clarification necessary in India is where this class of offence is sometimes tried by a Judge without the aid of a jury. The rule in every case of this type is that the rule about the advisability of corroboration should be present to the mind of the Judge. In such cases, it is necessary that the Judge should give some indication in his judgment that he had this rule of caution in mind, and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. It is wrong for a Judge to think that he could not, as a matter of law, convict without corroboration.

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained."¹⁵

As pointed out in *U. R. Bhatt v. Union of India*¹⁶ an inquiring officer, in a departmental inquiry against a public servant, is not bound by the strict rules of the law of evidence. Hence Illustration (b) to Section 114 of the Evidence Act cannot be literally applied and it is open to such inquiring officer to hold a public servant guilty even on the basis of evidence of an accomplice.¹⁷

11. Accomplice unworthy of credit. On the other hand, accomplices are not like ordinary witnesses in respect of credibility, but their evidence is tainted and should be carefully scrutinized before being accepted,¹⁸ and therefore, the presumption that an accomplice is unworthy of credit unless corroborated in material particulars, has become a rule of practice of almost universal application.¹⁹ "Neither Sec. 114, Illust. (b), nor this is to be ignored

15. *Shamsher Bahadur Saxena v. State of Bihar*, 1956 Pat. 404 at 412; I. L.R. 34 Pat. 781; see also *Rameshwar v. State of Rajasthan*, 1952 S.C. 54; *State of Bihar v. Basawan Singh*, 1958 S.C. 500.

16. A.I.R. 1962 S.C. 1344.

17. *Anil Behari Saran v. State of Bihar*, (1967) 2 Lab. L.J. 540; A.I.R. 1967 Pat. 43 (49); *Made Gowda v. State of Mysore*, (1966) 12 Fac. L.

R. 183; (1965) 2 Mys. L.J. 490; A. I.R. 1966 Mys. 220 (224).

18. *Rajoni Kanta v. Asan Mullick*, (1895) 2 C.W.N. 672.

19. *R. v. Magan Lal*, 14 Bom. 115; *Best Ev.*, S. 171; it is not a rule of law but of practice only; *R. v. Amir Khan*, (1871) 9 B.L.R. 36, 57; *R. v. Stubbs*, 25 L.J.M.C. 18 but it is a practice which deserves all the reverence of the law; *R. v.*

in the exercise of judicial discretion. The Illust. (b) is, however, the rule, and, when it is departed from, the Court should show, or it should appear that the circumstances justify, the exceptional treatment of the case. It is not enough for a Court to state the rule *pro forma* and merely as a reason to evade it; the Courts must act up to it. So long established a rule of practice as that which makes it prudent, as a general rule, to require corroboration of accomplices, cannot without great danger to society be ignored, simply because Sec. 133 declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."²⁰ It is no doubt the law, that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. *But the Court has not merely to record a conviction that is not illegal. It has to be satisfied that the conviction is properly based.*²¹ The general result, therefore, is that in almost all cases the presumption mentioned in Sec. 114, Illust. (b), should be raised and corroboration in material particulars required. The bare existence of a principle is acknowledged in order to meet the requirements of very exceptional cases, but from the very fact of the exceptional character of these cases, this principle is in practice constantly disapproved of and frequently violated.²² Later cases leave the law where it was, viz., that the evidence of an accomplice, if believed, is in law sufficient, but that in practice the Courts will generally insist on corroboration of it in material particulars.²³ As observed in *Emperor v. Srinivas Krishna*,²⁴ the right to raise a presumption was sanctioned by the Act, and it would accordingly be an error of law to disregard it. The presumption of untrustworthiness may be rebutted by special circumstances.²⁵ But though, under Sec. 133 of the Evidence Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of

- Farlar, 8 C. & P. 107, per Lord Abinger; In the matter of Jogendra v. Sanga. (1897) 2 C.W.N. 55; Kamala v. Sital, (1901) 28 C. 339, 343; 3 C.W.N. 517; Hulas v. R., 1927 Cal. 63:99 I.C. 34:44 C.L.J. 216; State v. Yusuf Dhar, 1973 Cr. L.J. 955.
20. Per Jardine, J., in *R. v. Chagan*, (1890) 14 B. 331, 344; see also *R. v. Imam*, (1867) 3 Bom. H.C.R. 57; *R. v. Mohan*, (1874) 22 W.R. (Cr.) 38 (whether evidence of approver alone, uncorroborated was sufficient to justify the Court in calling upon the prisoner for his defence); *R. v. Luchmee*, (1873) 19 W.R. (Cr.) 43; *Kailash Missir v. Emperor*, 1931 Pat. 105: 129 I.C. 535:11 P.L.T. 545.
21. *Ambica Charan v. Emperor*, 1931 Cal. 697:134 I.C. 1121; 35 C.W.N. 1270 (S.B.).
22. See remarks in *Roscoe*, Cr. Ev., 16th Ed., 138—145.
23. *R. v. Jamaldi*, 1924 Cal. 701: I.L.R. 51 Cal. 160: 81 I.C. 712:28 C.W.N. 536; *Manna v. R.*, 1925 Oudh 1: 75 I.C. 753; *Maung v. R.*, 1924 Rang. 173: I.L.R. i Rang. 602:77 I.C.

- 429; *Emperor v. Darya*, 1923 Lah. 666: 77 I.C. 984; *Khushi v. R.*, 1924 I. 481:81 I.C. 627; *Mahant Narain v. R.*, 1922 Lah. 1: I.L.R. 3 Lah. 144:68 I.C. 113; *Lala v. R.*, 1921 Lah. 215; 65 I.C. 622; *Kisan v. R.*, 67 I.C. 343; 6 N.L.J. 52: 1922 Nag. 172; *Ahmad v. R.*, 1923 Lah. 76: 68 I.C. 821; *Gobinda v. R.*, (1920) 21 Cr. L.J. 769; *Tota v. R.*, (1922) 23 Cr.L.J. 734; *Madan v. R.*, 24 Cr. L.J. 723; *Faizullah v. King-Emperor* 1925 Sind 105:81 I.C. 881; *Hazara v. R.*, 1924 Lah. 727:82 I.C. 707:6 I.L.J. 370; In the matter of *Satish Chandra*, 1927 Cal. 536: I.L.R. 54 Cal. 721:31 C.W.N. 554; *Kailash Missir v. Emperor*, 1931 Pat. 105:129 I.C. 535:11 P.L.T. 545; In re *K. Muttiga*, 1950 A.P. 255: (1957) 2 Andh. W.R. 182; In re *Boddu Sanyasi Patrudu*, 1957 A.P. 482:1957 Cr. L.J. 939.
24. (1905) 7 Bom. I.R. 969: 3 Cr. L.J. 33.
25. *Muthukumaraswami v. Emperor*, I. L.R. 35 Mad. 397:14 I.C. 596:3 Cr. L.J. 352 (F.B.); *Ramaswami Goundan v. Emperor* 27 Mad. 271.

witnesses. Illust. (b) to Sec. 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person, on his own showing, he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances, it is absolutely necessary that what he has deposed must be corroborated in material particulars.¹ Whilst it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of an accomplice cannot be used to corroborate the evidence of another accomplice.² According to the provisions of Sec. 133, indeed the evidence of an accomplice carries much weight and even if it is uncorroborated, a conviction based thereon is not illegal. But this rule of law must always be read with Illust. (b) to Sec. 114 of the Evidence Act, which is a rule of prudence.³ Courts should seek corroboration of the testimony of accomplice as a rule of prudence. The corroborating evidence must connect the accused with the offence charged.⁴ This rule has hardened into a rule of law.⁵ "There is no rule of law or practice that the self-incriminating portion of the evidence of an accomplice is unworthy of belief unless corroborated. The credibility of a witness who says that he and another joined in committing an offence stands *per se*, so far as his self-accusation is concerned, on the same footing as that of a witness who says that he alone committed an offence, though in the latter instance there would be a narrow basis for cross-examination to test his own self-accusation. If a witness is an accomplice, he is an accomplice and must own to be an accomplice, if he tells the truth. It is, therefore, merely arguing in a circle to say that the self-incriminating statement of an accomplice requires corroboration because he is an accomplice. What must first be decided is whether the witness in question is in truth an accomplice or is merely posing as an accomplice. When it is once established that he is an accomplice, then the next practical question arises who are the other accomplices, and it is at that stage, when his evidence implicating others has to be weighed, that there comes into application the maxim, that it is unsafe to convict upon the evidence of an accomplice, unless he is corroborated in material particulars, both as to the circumstances of the offence and the identity of the persons whom he implicates."⁶ It has been held that the testimony of a person who may not be an accomplice in a strict sense of the term but a person who in any way helped in the commission of the offence for which the accused are tried, or was cognisant of it, and omitted to disclose it for a time, is not a person whose testimony could

1. Subramania Goundan v. The State of Madras. 1958 S.C. 66:1958 S.C.R. 428:1958 S.C.J. 321.
2. Bhuboni Sahu v. The King, 1949 P.C. 257:76 I.A. 147:50 Cr. L.J. 872; see also Mahadeo v. The King, 1936 A.W.R. 741 : 38 Bom. L.R. 1101: 40 C.W.N. 1164: 163 I.C. 681: A.I.R. 1936 P.C. 242.
3. In re K. Muttiga, 1958 A.P. 255, 257; see also In re Boddu Sanyasi Patrudu, 1957 A.P. 482: 1957 Cr. L.J. 939.
4. Ram Narayan v. State of Rajasthan,

- 1973 W.L.N. 98; (1973) 3 S.C. 805: (1973) 3 S.C.R. 463: 1973 Cr. App. R. 161 (S.C.): (1973) S.C.D. 288: 1973 S.C. Cr. R. 308: 1973 U.J. (S.C.) 598: 1973 S.C.C. (Cr.) 545: 1973 Cr. L.R. (S.C.) 228: (1973) Cr. L.J. 914: A.I.R. 1973 S.C. 1188.
5. In re Basi Reddy, A.I.R. 1972 Mad L.J. (Cr.) 118: 1972 Cr. L.J. 1141 (Mys.).
6. R. v. Hanmant, (1904) 6 Bom. L.R. 413, 450, per Aston, J.

justify a conviction, except where there is corroboration.⁷ But "so far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question, in such a case, is the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case. It may not be possible to place much reliance on the evidence coming from persons falling within the description given above, but they are not accomplices, and it leads to confusion of thought to treat them as practically accomplices and then apply the rule as to their credibility, instead of judging their credibility by a careful consideration of all the particular facts of the case affecting the evidence."⁸

The English rule is that the evidence of a husband or wife that there has been no access by the husband to the wife is inadmissible because it is evidence which tends to bastardize the issue. But there is nothing in the Indian Evidence Act which renders such evidence inadmissible in India.⁹ But, if the evidence of an approver is discarded, it must be discarded as a whole, and the defence cannot base arguments on it any more than the prosecution.¹⁰

12. Hints on approvers by Mr. J. D. Mayne. It will often happen that a prisoner will get frightened, and offer to reveal the whole crime, if he is admitted as an approver. The prudent course, under such circumstances, will be to listen quietly and attentively to everything he says, without either accepting or rejecting his offer. It is very probable that he may, unintentionally, let fall such hints as will enable the Police to get upon the right track without his evidence. It will also be wise absolutely to refuse to give any pledge that he shall be admitted to a conditional pardon, until he shall have made such disclosures as will prove that he really is able to earn it, and that his information is trustworthy, and likely to lead to a conviction. Of course, no disclosures which he makes under such circumstances can ever be used as evidence against himself, but if they appear to be so full of lies, or so uncorroborated that they cannot be safely relied on, the proper course will be to refuse to recommend him for a pardon, and to have nothing more to do with him, as a witness, unless he produces evidence which is more to the purpose. If his statements appear trustworthy, and likely to be of service, he may then be admitted to the conditional pardon.

Sometimes, however, no such overtures proceed from any of the prisoners. The police, of course, will never solicit a party to become an approver unless they have failed in every other mode. When, however, they consider it necessary to resort to this measure and have obtained the necessary authority, they will, of course, be at liberty to address themselves directly to such of the prisoners, as they think most proper, and to urge them, by every argument

7. *Ishan Chandra v. Queen-Empress*, I.L.R. 21 Cal. 328.

8. *Hafijuddi v. Emperor*, 1934 Cal. 678; 151 I.C. 486; 35 Cr. L.J. 1357; 38 C.W.N. 777 (S.B.). See also the observations of Davies, J., in *Emperor v. Edward William Smither*, I.L.R. 26 Mad. 1.

9. *Ernest Lionel Doutre v. Anne Ruth*

Doutre, 1939 All. 522 : I.L.R. 1939 All. 573; 184 I.C. 110; *Bachinta v. Emperor*, 1916 Lah. 380; 32 I.C. 836; 17 Cr.L.J. 97; *Asar Ali v. State*, 1954 Assam 27; I.L.R. 1953 Assam 136; 55 Cr. L.J. 40.

10. *Sheo Barhi v. Emperor*, 1930 Pat. 164; 127 I.C. 566; 32 Cr. L.J. 5.

and by the fullest promises of pardon, to make a free disclosure. A good deal of tact, however, will be necessary in selecting the prisoners whom it is desired to admit as approvers. It will not do to embarrass the course of justice by pardoning more criminals than can be helped. On the other hand, it is necessary to choose one who is thoroughly acquainted with every circumstance and every accomplice, and who is at the same time willing to tell the entire truth. Where the crime is an isolated transaction, it will be best, if possible, to fix upon one who has borne the least guilty part in the matter, for instance, in a gang robbery attended with murder, to select one who was led into the crime, or who took a minor part, rather than one of the ringleaders and actual murderers. Such a person will have less to conceal, which tells against himself, and will, therefore, be more truthful. He is also likely to be less intimately connected with the other accomplices, and therefore more ready to inform against them. On the other hand, where the crime is a matter of wide organization, as for instance an extensive system of gang robbery, it will be advisable to select an old offender, as his information, if true, will be much more valuable. It should then be distinctly explained to him that his pardon is only conditional, and that the condition is, that he should make a full and true disclosure of everything he knows, and of every person connected with the matter.

Assuming now that he has been admitted as an approver, and has received his conditional pardon, and has made a full discovery, or at least as full as can be got from him at once, the Police must not suppose that their labours are at an end; they are only beginning. They must now sift his evidence, and compare it with the other facts of the case, in order to see, in the first place, how far it is true, and how far it is untrue, and, in the next place, how far it can be corroborated, so as to be legally sufficient upon the trial. They must remember that there is a strong probability against the statement being wholly true. From various reasons, even a pardoned criminal will always try to make his own share in the transaction as slight as possible, and to rest all serious blame upon others. He will also try to exculpate those of his accomplices towards whom he entertains feelings of particular friendship, and to throw the entire blame upon those who are less guilty, or even upon the wholly innocent. He will often have some grudge to satisfy, and his position, as trusted accuser, in a case which no one but himself can reveal, of course, gives him great opportunities. It is also to be remembered that he has the power of mixing up truth with falsehood in a way which gives peculiar plausibility to the latter. From his being connected with the crime itself, he, of course, knows all the details minutely, and is, therefore, able to make statements which bear considerable testing. If he wishes to accuse a false person, he has only to describe the acts which were really done by himself or others, and attribute them to the man whom he maliciously accuses. Here every investigation as to the facts tends to corroborate him, and it is only when the investigation is conducted with special reference to the person accused, that there is any chance of detecting the lie. And, of course, in the same way, if he wishes to suppress the name of any accomplice, it will be most difficult to discover the concealment, unless, by independent evidence, the complicity of such person can be shown, or unless other facts spoken to by the approver lead to his detection. Hence, the evidence of approvers is always looked upon with such suspicion, that it has become a recognized principle of law, that no conviction ought to be considered satisfactory, which rests solely upon the uncorroborated evidence of one or more accomplices. Such a conviction would not be absolutely illegal, for a jury may lawfully, if

they believe the accomplice, find a prisoner guilty merely upon his evidence, but it is always the practice for a Judge to tell a jury that it is not safe to convict upon such evidence, and in the *Mofussil*, where there need be no jury, a Judge ought always to act upon the same rules, which it would be his duty to lay down for the guidance of a jury. The rule which "requires corroborative evidence in support of the testimony of an accomplice" is also expressly recognized in the Indian Evidence Act, I of 1872, Sec. 114 (b).

A question still remains, however, as to the degree and species of corroboration necessary, that is, as to the sort of circumstances which the Police should look for in order to make their case complete. Formerly, it was considered sufficient, if the independent evidence confirmed the accomplice as to the facts of the crime. But it was soon perceived that, although such confirmation went to establish that the approver had really been a guilty party—which there is seldom any reason to doubt—it did not, in the least, tend to show that the person he accused had also been guilty. As Baron Alderson remarked in *R. v. Wilkes*¹¹:

"The confirmation of the accomplice as to the commission of the felony is really no confirmation at all; because it would be a confirmation as much, if the accusation were against you or me, as it could be against the prisoners who are now on their trial. The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged." And so, in another case, Lord Abinger said to the Jury: "It is a practice which deserves all the reverence of law that Judges have uniformly told Juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the person accused. A man, who has been guilty of a crime himself, will always be able to relate the facts of the case and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man was to break open a house and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the person accused participated in it. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others."¹² Finally, as the rule was once pithily put by Mr. Justice Patterson¹³:

"The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which go to prove or disprove the offence charged against the prisoner."

Hence, it will be no corroboration whatever, if the additional facts relate to circumstances which are not connected at all with the accused. As for instance, where, on a charge of robbery, the approver said that the prisoners took a ladder from another house, and it was proved that the ladder had been so taken away. So, where, on a charge of sheep stealing, the accomplice stated that he was with the prisoner, and assisted him in stealing the

11. 7 C. & P. 272.

12. Reg. v. Farler, 8 C. & P. 106.

13. R. v. Addis, 5 C. & P. 389.

lamb, but the only evidence to confirm his statement was that of a witness who found the skin of the lamb in the field where the lamb had been kept. Nor is it any corroboration, where the facts which go to prove the connection of the prisoner with the accused are of such a trifling or immaterial nature, that they are just as consistent with his innocence as with his guilt. For instance, in one of the cases cited above,¹⁴ the circumstance relied on as corroboration was merely, that the prisoner and the accomplice had been drinking together in a public house on the evening in question, and had left it at the same time. Lord Abinger said: "If they were seen together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there; and he left when they were shutting up the house. Therefore, it is perfectly natural that he should have been there, and left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once a week, and there the case ends against him. All the rest depends on the evidence of an accomplice. I would suggest to you that the circumstances are too slight to justify you in acting upon this evidence."

Where, however, the corroboration is as to a fact which in itself would be evidence of guilt; as for instance, if part of the stolen property is found in the prisoner's house, if a knife identified as his is discovered near the scene of the murder, or marks of blood are found upon his clothes, or wounds upon his person, or if he is shown to have been near the place where the crime took place, under circumstances which make it very improbable that he should have been there for an indifferent purpose, as for instance in a remote and unfrequented spot, or at the dead of night—all these facts are such as afford legitimate corroboration.

When an accomplice speaks to several of the prisoners, he must be corroborated as to each, and the testimony of one accomplice is no corroboration of the evidence of another.¹⁵

These remarks will at once suggest the proper course to be adopted by the police, both for the purpose of testing the approver's evidence, and of supporting it in such a way as may enable it to stand the test of a trial in open Court. All witnesses in this country, but especially approvers, are fond of speaking with the vaguest generality. "The robbers came, they beat Ramasamy, they plundered the clothes then they ran away." This is by no means an uncommon form of deposition, when the substance is extracted from what is purely irrelevant. This sort of statement should never be tolerated from an approver. The moment he consents to be an approver, he stands in a different position from an ordinary prisoner making a confession. The latter is free to say as much or as little as he chooses, but the approver has bound himself by a solemn contract to tell the truth and the whole truth, and nothing else should be accepted from him. The greatest particularity of detail should be required, and all the collateral circumstances should be obtained from him and carefully noted down. He should be tested at every point with "when? where? why? in whose presence?" When everything has been taken down, his statement should be weighed, and every dis-

14. *R. v. Farler*, 8 C. & P. 106.

15. *R. v. Moores*, 7 C. & P. 270; *R. v. Noakes*, 5 C. & P. 326.

crepancy should be enquired into, and strictly accounted for. If, as will generally be the case, parts of his statement are inconsistent with facts already or subsequently ascertained, he should be plainly told so, and informed that he will be thrown back into his old position unless he tells the truth. Of course, great care must be taken to be sure that the facts supposed to be previously ascertained really are true. Nothing is more common than to fall into some error, or to adopt a false theory on the first blush of a case, and if those who have the conduct of it insist on trying to make all later evidence square with this mistaken view, they of course, go hopelessly wrong. A good detective should always be ready to alter his theory on each new aspect of facts instead of obstinately trying to accommodate the facts to his theory, and rejecting as false all that are inconsistent with it. We will assume, however, that after patient enquiry the approver's story is reduced into a statement which is neither grossly inconsistent with itself, nor flagrantly at variance with undoubted facts.

The next step is to test separately every fact which he has spoken to, and particularly to visit and question every individual whom he has named. In all probability, however, you will find reason to believe that he is substantially correct as to the general facts of the case, which he has clearly no motive for misrepresenting but that his statement requires support as to those whom he names as accomplices. For this purpose, the detective should put himself in the place of the criminals and try to represent to himself the state of facts pointed to by the approver, and should then consider what evidence ought to exist, if it is true. For instance, a gang robbery is committed at a particular village at 10 p.m. The approver names as his accomplices three men belonging to a village 10 miles off. Enquiry should be made as to whether that pretext was a true one; their persons and clothes should be at once examined and their houses, wells, etc., searched for portions of the property. The moment any of the property is found in the possession of any, it should be traced back, till someone is reached who can give no satisfactory account of how he came by it. Motives for committing any crime should be examined into, but this species of evidence should be weighed with great caution. In this country, where religions, caste and family feuds are so common, the mere existence of what people call "enmity" should not be considered by itself as of the slightest weight, and is much more likely to be the source of the accusation than a reliable proof of the crime. When a witness states any important fact, try to ascertain whether he has ever mentioned the circumstance, before, and to whom, and in what way. Try to find out, whether he is corroborated in his statement by those who, if it were true, must have known of it as well as himself. In this way, a great number of facts will be elicited which can never be adduced as evidence, but which may lead to the discovery of real evidence, and, what is equally important, to the rejection of false evidence. It is, of course, utterly impossible to attempt to give directions for conducting such enquiry. Every crime will demand a peculiar mode of treatment, but the general principles are the same in all. The skill of the most skilful detective always resolves itself into this, that he is alive to the smallest fact which has real bearing upon the case, sagacious in perceiving what facts he ought to look for in connection with those he has discovered, indefatigable in pursuing every enquiry by which the truth may be revealed, and honest in discarding all evidence which he has good reason to doubt.

This last caution that all doubtful evidence should be resolutely cast aside, is, it is feared, not sufficiently attended to. Those who are engaged

in the detection of crime are apt to be too easily satisfied with the evidence they have obtained. Vanity and indolence are both gratified when they have got up a case which may secure them the credit of a conviction, without the labour of further investigation. Of course, nothing can be more unprincipled and more in violation of public duty than to put forward a case against one who, there is reason to believe, is innocent. So far as the police act as public prosecutors, they act in the public interest, and nothing can be a greater public injury and violation of public duty than not to put forward a case against one when there is the strongest reason to believe that they have got hold of the real offender, the caution is no less important. Every piece of false evidence which has crept into a case is doubly injurious, first, because it tends to obscure and shut out the real facts of the case, and secondly, because, if it is detected on the trial, it will throw suspicion even upon that testimony which is unimpeachable. Suppose, for instance that part of the case consists in the fact that a portion of the stolen property had been found in the prisoner's house, and that there is strong reason to suspect that it was placed there without his knowledge after the event. So long as this fact is admitted as evidence, it shuts out all enquiry as to the person who really had guilty possession of those particular articles, and diverts attention from him. Moreover, if it comes out on the trial that there has been a trick played upon the prisoner as regards these articles, it may utterly discredit all the other evidence against him, even though that evidence may be amply sufficient without the possession of the property. No conscientious Police Officer ought to produce as evidence that which he feels he would reject as a Judge.

A few words may be added upon the course to be pursued towards an approver who persists in giving a false or a wilfully imperfect statement of the facts which he is admitted to prove. It is hardly necessary to say that the strictest honour should be observed in reference to approvers. But it is also to be remembered, that from the fact of their being approvers, they confess their guilt, and ask for a pardon, which is conditional upon their performing the terms upon which it is granted. If they do not substantially perform those terms the contract is broken, and justice as well as law demands that they should be in no better position than any other criminal. Where the approver has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter, and the statement made by him may be given in evidence against him when the pardon has been withdrawn on the above grounds. The case of *R. v. Rudd*¹⁶ is an instance of this. Margaret Rudd was indicted for forgery of three bonds, in one of which certain people named Perreaus were implicated. The Justices before whom the case was brought admitted her as a witness against the Perreaus, and told her that if she would speak the truth and the whole truth, not only in respect of the bond in question, but also of all other forgeries, she should be safe; if not, she should be prosecuted. In short, they gave her such a conditional pardon as the Judges and Magistrates are authorised to give under the Criminal Procedure Code. As to one bond, she said that she was compelled by fear of being killed to forge

16. (1775) Cowper, 331. 1 Lea C.C. 115.

it, and denied all knowledge of the others. She afterwards gave a contradictory confession as to the first bond. She was indicted for all three forgeries, and the question was whether she was saved by this conditional pardon. The Judges decided that she was not. They said that, as to the first bond, if her own evidence were true, she was not an accomplice at all but an innocent party, as a forgery committed under fear of death was no crime. As to the other bonds, she said she had nothing to do with them. The indictments, therefore, went upon the ground that her former evidence was false. If that evidence was false, the conditional pardon, from its very terms, was no protection. If it were true, she could not be convicted on the indictments.

These observations are as profoundly truthful and practical today as when they were made several decades ago.

12-A. Approver, when to be examined. An approver should be examined first and not after all the witnesses who were supposed to corroborate his evidence, were examined.¹⁷

13. Corroboration, necessity of. In *Vadivelu Thevar v. State of Madras*,¹⁸ their Lordships of the Supreme Court, with regard to the oral testimony, which was neither wholly reliable nor wholly unreliable held, that a Court should be circumspect and look for corroboration in material particulars by reliable testimony, direct or circumstantial, before accepting the testimony of a partially unreliable witness. The Court should sift, from the evidence before it, parts which are wholly reliable and parts which are wholly unreliable and those which are partly reliable and partly unreliable. Even a partly unreliable part of evidence may form the basis of a conviction, where it is corroborated in material particulars by some reliable evidence. It is always a question of fact, whether a particular piece of evidence is sufficiently reliable to be used, or even if it appears unreliable, whether it ought not to be accepted in view of some other independent and reliable corroborative evidence. Their Lordships pointed out that a question appertaining to sifting or weighing of individual items of evidence, about which no fixed and rigid rules can possibly be laid down, must be distinguished from the general rule that a piece of evidence which is found to be partly unreliable, after such a sifting and weighing, needs to be corroborated by reliable evidence before it is acted upon. And in *R. R. Chari v. State of U. P.*,¹⁹ it was laid down that, if the essential part of the prosecution story in respect of a charge really rests on the evidence of the accomplice uncorroborated by any other evidence, it should be held as not proved; and in *Saravanabhavan v. State of Madras*,²⁰ the Supreme Court held that, ordinarily, a Court seeks for corroboration of the evidence of an approver before convicting an accused on that evidence. Generally speaking, this corroboration is of two kinds, namely—

- (1) the Court has to satisfy itself that the statement of the approver is credible in itself, and there is evidence other than the statement of the approver that the approver himself had taken part in the crime; and

17. *JThangbul v. Government of Manipur*, 1968 Cr. L.J. 514; A.I.R. 1968 Manipur 34 (38); *Ali Mohammad v. Emperor*, 36 Cr. L.J. 491; A.I.R. 1934 Lah. 171.
18. A.I.R. 1957 S.C. 614; 1957 S.C.J. 527; 1957 S.C.A. 793; 1957 A.L.J. 898; (1957) 2 Andh. W.R. (S.C.) 69; 1957 A.W.R. (H.C.) 640; 1957

Cr. L.J. 1000; 1957 M.P.C. 711; (1957) 2 M.L.J. (S.C.) 69; (1957) 1 M.L.J. (Cr.) 775.
19. A.I.R. 1962 S.C. 1273.
20. (1966) 1 S.C.A. 730; A.I.R. 1966 S.C. 1273; (1966) 1 S.C. W.R. 840; *Data Ram v. State of Rajasthan*, 1976 Raj. L.W. 484; 1977 Cr. L.J. 1428.

- (2) after the Court is satisfied that the approver's statement is credible and that his part in the crime is corroborated by other evidence, the Court seeks for corroboration of the approver's evidence with respect to the part of other accused persons in the crime, and this evidence has to be of such a nature as to connect the other accused with the crime.

However, it must never be forgotten that before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether, even as an accomplice, the approver is a reliable witness. If the answer to this question is against the approver, then there is an end of the matter, and no question, as to whether his evidence is corroborated or not, falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test, namely, that—

- (1) his evidence must show that he is a reliable witness, and
- (2) the approver's evidence must receive sufficient corroboration.²¹

Their Lordships made it clear that the evidence of an approver has not to be dealt with in two water-tight compartments. It must be considered as a whole along with other evidence. Even so, the Court has to consider whether the approver's evidence is credible in itself; and, in doing so, it may refer to such corroborative pieces of evidence as may be available.²² If the evidence of the approver is so thoroughly discrepant, and so inherently incredible, that the Court considers him wholly unreliable, the Court has to discard his evidence.²³ A conviction, therefore, ought not to be based on the testimony of the approver, unless it is corroborated in material details not only with regard to the general story narrated by him, but also with regard to the *corpus delicti* and the identity of the accused. It is so, even though his testimony does not suffer from inherent defects or improbabilities.²⁴ Approver's testimony can be accepted if he involves him in the crime and gives a natural account of the events implicating the accused in clear manner. Ordinarily his testimony would require corroboration.²⁵ The evidence of an accomplice must always be received with the greatest possible caution, and if there is any fear in the witness's mind that failure to establish the case for the prosecution will result in his own prosecution, it is not likely to lead to truthful evidence being given by such a witness.¹ It is subject to suspicion; and though, in certain cases, it is of great value as evidence, it cannot form the basis of a conviction, unless supported by reliable evidence of another kind to corroborate it.²

21. Sarwan Singh v. State of Punjab, 1957 S.C.R. 953 : A.I.R. 1957 S.C. 637; 1957 Cr. L.J. 1014 ; 1975 2 Cr. L.T. 285 (H.P.); Dhani Majhi v. State, (1972) 38 Cut. L.T. 683; (1972) 1 Cut. L.R. (Cr.) 325; I.L.R. 1972 Cut. 910 ; Data Ram v. State of Rajasthan, 1977 Cr. L.J. 1428.

22. Saravanabhavan v. State of Madras, A.I.R. 1966 S.C. 1273 ; Data Ram v. State of Rajasthan, 1977 Cr. L.J. 1428.

23. Ibid ; see also E. G. Barsay v. State of Bombay. (1962) 2 S.C.R.

195 : A.I.R. 1961 S.C. 1762.

24. In re K. Muttiga, 1958 Andh. Pra. 255.

25. Ravindra Singh v. State of Haryana, 1975 S.C.C. (Cr.) 202 : 1975 Cr. L.J. 765 : 1975 B.B.C.J. 221 : (1975) 3 S.C.C. 742 : (1975) Cr. L.R. (S.C.) 27 : A.I.R. 1975 S.C. 856.

1. Abdul Majeed v. Emperor, 1955 Cal. 473 : 157 I.C. 840 : 36 Cr. L.J. 1248 : 39 C.W.N. 1082.

2. Mohan Lal v. Emperor, 1935 All. 477 : 154 I.C. 812 : 36 Cr. L.J. 569.

Neither the personal conduct and antecedents of the principal approver, nor absence of motive on his part or on the part of the investigating agency to implicate individual accused, make the ordinary and well-recognised rule of practice inapplicable.³ It could be a perversion of the lesson gained by accumulated experience of the conduct of an accomplice to adopt any such rule of practice as that, where no corroboration is possible, his testimony may be accepted as true without corroboration. An accomplice is too immoral a person to be worthy of credit without corroboration in material particulars, and, if corroboration is not forthcoming, because it is not possible in the nature of things that it should be forthcoming, it does not make the accomplice less immoral.⁴ The rule is particularly necessary in cases of conspiracy to commit crimes, where the crime of criminal conspiracy is established the moment an agreement between the accused persons to commit such crimes is proved.⁵ It is very difficult to vary the standard of proof required in the case of various approvers.⁶

There must be material corroboration both with regard to the offence and the offender. One accomplice, however, cannot corroborate another. Although a previous statement of an accomplice satisfying the requirements of Sec. 157, can be used to corroborate his testimony, it is not in the nature of an independent corroboration. No court will record a conviction on the uncorroborated testimony of an accomplice, although the Judge might be able to find adequate reasons to act upon it.⁷ In the case of approvers, they must be shown to be reliable witnesses and there should also be sufficient corroboration of their testimony.⁸ Even if an approver makes full disclosure of facts, does not exculpate himself, and on the whole his evidence seems to be truthful, the Court should be cautious in accepting it without corroboration.⁹

14. Reasons for holding accomplice to be untrustworthy. "Accomplice evidence is held untrustworthy for three reasons: (1) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because an accomplice, as a participator in crime, and consequently an immoral person, is likely to disregard the sanctity of an oath; and (3) because he gives his evidence under the promise of a pardon, or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution."¹⁰ As pointed out by Prof. Wigmore: "He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself, and in that respect he has, burnt his ships. But he can escape the consequences of this acknowledgment, if the prosecuting authorities

3. Bimal Prasad Jain v. Emperor, 1934 Lah. 583 : 148 I.C. 745 : 35 Cr. L.J. 752 ; see also Wazir Chand v. Emperor, 1928 Lah. 30 : 102 I.C. 500 : 28 Cr. L.J. 564.

4. Munna Lal v. Emperor, 1925 Oudh 1 : 75 I.C. 753 : 25 Cr. L.J. 49.

5. Bacha Babu v. Emperor, 1935 All. 162 : 155 I.C. 869 : 36 Cr. L.J. 684 : 1935 A.W.R. 1.

6. Wazir Chand v. Emperor, 1928 Lah. 30.

7. Ramaswami Gounder v. State. I.L.R. 1958 Ker. 420.

8. Gundla Narayana. In re, A.I.R.

1959 Andh. Pra. 387 : 1959 Cr. L.J. 947 ; State of Assam v. Hetep Boro Assam L.R. (1972) Assam 71 : 1972 Cr. L.J. 1074.

9. Radhu Kandi v. The State, 1973 (39) C.L.T. 337.

10. Per Scott, J. in Queen-Empress v. Magandal. I.L.R. 14 Bom. 116 ; see also Chetumal v. Emperor, 1934 Sind 185 ; Jai Singh v. Emperor, 1932 Oudh 11 : 136 I.C. 321 : 33 Cr. L.J. 287 ; Bhuboni Sahu v. The King, 1949 P.C. 257 : 76 I.A. 147 : 53 C.W.N. 609.

choose to release him, provided he helps them to secure the conviction of his partner in crime. It is true that this promise of immunity or leniency is usually denied, and may not exist; but its existence is always suspected. The essential element, however, it must be remembered, is this supposed promise or expectation of conditional clemency. If that is lacking, the whole basis of distrust fails. The promise of immunity, then, being the essential element of distrust, but not being invariably made, no invariable rule should be fixed as though it had been made. Moreover, if made, its influence must vary infinitely with the nature of the charge and the personality of the accomplice. Finally, credibility is a matter of elusive variety and it is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be distrusted."¹¹

But, whenever corroboration is looked for, the other evidence must be: (a) from an independent source, and (b) such as to support the direct testimony in material particulars, and (c) must connect the accused with the crime. However, the rule as to the need for corroboration of tainted evidence of an accomplice, or an interested or hostile witness, is not absolute; and, if the Court is satisfied that the witness is truthful and reliable and his evidence does not suffer from any infirmity, it is open to the Court to base a conviction on this sole uncorroborated testimony. The Supreme Court has dealt with these rules of prudence in *Rameshwar v. State of Rajasthan*,¹² *Kashmira Singh v. State of M. P.*,¹³ *Rao Shiv Bahadur Singh v. State of V. P.*,¹⁴ *Swamirathnam v. State of Madras*,¹⁵ *Sarwan Singh v. State of Punjab*,¹⁶ *State of Bihar v. Basawan Singh*,¹⁷ *Jnanendranath Ghose v. State of West Bengal*,¹⁸ *State of Delhi v. Lohia*,¹⁹ *Ramanlal Pandya v. State of Bombay*,²⁰ *Vaikuntam Chandrappa v. State of A. P.*,²¹ *Ram Narayan v. State of Rajasthan*,²² *Ravindra Singh v. State of Haryana*.²³

15. Charge to jury. The evidence of accomplices should not be left to the jury without such direction and observations from the Judge, as the circumstances of the case may require, pointing out to them the danger of trusting to such evidence when it is not corroborated by other evidence.²⁴

11. Wigmore, Ev., s. 2057.

12. A.I.R. 1952 S.C. 54 : 1953 Cr. L.J. 547.

13. A.I.R. 1952 S.C. 159 : 1953 Cr. L.J. 839.

14. A.I.R. 1954 S.C. 322 : 1955 Cr. L.J. 910.

15. A.I.R. 1957 S.C. 340 : 1957 Cr. L.J. 422.

16. A.I.R. 1957 S.C. 637 : 1957 Cr. L.J. 1014.

17. A.I.R. 1958 S.C. 500 : 1958 Cr. L.J. 976.

18. A.I.R. 1959 S.C. 1199 : 1959 Cr. L.J. 1492 : 1960 A.W.R. (H.C.) 8 : 1960 All. Cr. R. 31.

19. A.I.R. 1960 S.C. 490 : 1960 Cr. L.J. 679.

20. A.I.R. 1960 S.C. 961 : 1960 Cr. L.J. 1380.

21. A.I.R. 1960 S.C. 1310 : 1960 Cr. L.J. 1681 : see also *Autar Singh v.*

The State, A.I.R. 1960 Punj. 364 : I.L.R. 1960 Punj. 111 : 1960 Cr. L.J. 989.

22. 1973 W.L.N. 98 : (1973) S.C.C. 805 : (1973) 3 S.C.R. 463 : 1973 Cr. App. R. 161 (S.C.) : 1973 S.C.D. 288 : 1973 S.C. Cr. R. 308 : 1973 U.J. (S.C.) 598 : 1973 S.C.C. (Cr.) 545 : 1973 Cr. L.R. (S.C.) 228 : (1973) Cr. L.J. 914 : A.I.R. 1973 S.C. 1188.

23. 1975 S.C.C. (Cr.) 202 : 1975 Cr. L.J. 765 : 1975 B.B.C.J. 221 : (1975) 3 S.C.C. 742 : (1975) Cr. L.R. (S.C.) 27 : A.I.R. 1975 S.C. 856.

24. *R. v. Elahi Bux*, (1866) B.L.R. Sup. Vol., p. 459 ; *R. v. Baikunthanath*, (1868) 3 B.L.R. 2 note (F.B.) ; *R. v. Karoo*, (1866) 6 W.R. (Cr.) 44 ; *R. v. Mohima Chandra*, (1871) 6 B.L.R. App.

The omission to do so is an error in law²⁵ in the summing up by the Judge, and is, on appeal,¹ a ground for setting aside the conviction when the Appellate Court thinks that the prisoner has been prejudiced by such omission, and that there has been a failure of justice.² In the leading case of *Rex v. Baskerville*,³ Lord Reading, C. J., delivering the judgment of the Court of Criminal Appeal observed: "It has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. This rule of practice has become virtually equivalent to a rule of law, and, since the Court of Criminal Appeal Act came into operation, this Court has held that, in the absence of such a warning by the Judge, the conviction must be quashed. If, after the proper caution by the Judge, the jury nevertheless convicted the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated." This is exactly the law in India so far as accomplices are concerned, and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is, where this class of offence is sometimes tried by a Judge without the aid of a jury. In these cases, it is necessary that the Judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case.⁴

- 108 ; *R. v. Nawab Jan*, (1867) 8 W.R. Cr. 19 ; *R. v. Ganu*, (1869) 6 Bom. H.C. (C.C.) 57 ; *R. v. Sadhu Mandal*, (1874) 11 W.R. Cr. 69 ; *R. v. O'Hara*, (1890) 17 C. 642, 665 ; *R. v. Ram Saran*, (1886) 8 F. 306 ; *R. v. Arumuga*, (1888) 12 M. 196 ; see cases cited, ante, passim ; *R. v. Magan Lall*, (1889) 14 B. 115, 119 ; *Gangappa Kardep-pa v. R.*, 1914 Bom. 305 ; I.L.R. 38 Bom. 156 ; 21 I.C. 673 ; 14 Cr. L.J. 625 ; 15 Bom. L.R. 975.
25. *R. v. Elahi Bux*, 1866 B.L.R. (Sup.) Vol. p. 459 ; *R. v. Arumuga*, *supra* ; *R. v. Nawab Jan*, *supra* ; *R. v. Khotab Sheikh*, (1866) 6 W.R. (Cr.) 17 ; *Emperor v. Wajid Sheikh*, 1933 Pat. 500 ; *Rattan Dhanuk v. Emperor*, 1928 Pat. 630 ; 113 I.C. 329 ; see also cases cited, ante, passim ; see per contra ; *R. v. Chagan Dayaram*, (1890) 14 B. 331, 335 ; *R. v. Ganu*, (1866) 6 Bom. H.C.R. (C.C.) 57 ; *R. v. Stubbs*, 25 L.J. M.C. 16 ; s.c. *Dear* (C.C.) 55 ; *Phillips*, Ev., 95 ; see also S. 297, Cr. P.C. (charge to jury).
1. *Emperor v. Gordhandas Nathalal Patel*, 1943 Bom. 76 ; 205 I.C. 292 ; 44 Cr. L.J. 365 (as a breach of the rule in question is rather a matter of law, it is open to the High Court to interfere in appeal even without a reference under S. 307, Cr. P.C. ; cf. S. 418, Cr. P.C., but see *R. v. Chagan Dayaram*, *supra*, 336 and 35. 435, 439, Cr. P.C. (revisional powers) ; as to proceedings under the Letters Patent, see *R. v. O'Hara*, (1890) 17 C. 642 ; *R. v. Nauroji Dadabhai*, (1872) 9 Bom. H.C.R. 358 ; *R. v. Hurribole Chunder*, (1876) 1 C. 207 ; *R. v. Pitamber Jina*, (1877) 2 B. 81 ; *R. v. Shib Chunder*, (1884) 10 C. 1079 ; *R. v. Pestonjee Dinsha*, (1875) 10 Bom. H.C. R. 75, 89.
2. *R. v. Elahi Bux*, *supra* ; cf. also Cr. P.C., S. 537 ; and see *R. v. Tate*, (1908) C.C.A. 2 K.B. 680 and *R. v. Beauchamp*, (1909) 25 Times L.R. 330.
3. (1916) 2 K.B. 658 ; 86 L.J.K.B. 28 ; 115 L.T. 453 ; 80 J.P. 446 ; 60 S.J. 696 ; 25 Con. (C.C.) 524.
4. *Rameshwar v. State of Rajasthan*, 1952 S.C. 54 ; *Shamsher Bahadur Saxena v. State of Bihar*, 1956 Pat. 404 ; I.L.R. 34 Pat. 761 ; 1956 Cr. L.J. 1220 ; 1955 B.L.J.R. 537 ; see also *Emperor v. Jamaldi Fakir*, 1924 Cal. 701 ; I.L.R. 51 Cal. 160 ; 81 I.C. 712 ; 25 Cr. L.J. 1000 ;

Whether the witness is, in truth, an accomplice is left to the jury to determine and if they conclude him to be such, then and then only are they to apply the rule requiring corroboration.⁵ If the Judge has warned the jury of the need for corroboration and explained what is meant by corroboration, he need not go on to point out what parts of the evidence are corroboration.⁶ It has been held that it is for the Judge to determine whether there is any evidence that does corroborate the story of the approver so far as the complicity of the accused is concerned, and that it is the duty of the Judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story, which do or do not fulfil the requirements referred to above, namely, the evidence corroborating the accomplice's story in material particulars implicating the accused.⁷ But, if the jury were made to understand and were well aware that the sort of corroboration that was required, was corroboration in material particulars tending to connect each of the accused with the offence, it cannot be held, that the omission to state the law on the point, in more precise language, amounted to a misdirection.⁸ The Judge should tell the jury that the corroboration must come from independent witnesses and not from tainted evidence of accomplices.⁹ Where a Judge charged the jury that they were not to convict upon the evidence of G if satisfied that he was an accomplice and uncorroborated but coupled the direction with a strong expression of opinion that G was not an accomplice, it was held that this constituted a misdirection in fact, though not in form, calculated seriously to prejudice the prisoner's case.¹⁰ Where the only evidence of the payment of a bill to the accused, apart from hearsay statements which were not admissible,¹¹ consisted of the uncorroborated evidence of an accomplice, which was further itself improbable and to some extent inconsistent with the story of the other accomplices, the High Court set aside the conviction.¹² It has been held that the conviction of an accused on the uncorroborated testimony of an accomplice is perfectly legal; and that a direction to the jury that it would be their duty to convict the accused, if they believed the accomplice and gave credit to his evidence, is a perfectly legal direction, and that a direction to the jury that the evidence of an accomplice is not

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- 28 C.W.N. 536 : Khadim v. Emperor, 1937 Sind 162 : 169 I.C. 716 : 38 Cr. L.J. 808 ; Emperor v. Nur Ahmed, 1934 Cal. 7 : 38 C.W.N. 108 (case arising out of sexual matters) ; Shibdas Daw v. Emperor, 1934 Cal. 114 : 147 I.C. 1172 : 35 Cr. L.J. 551 : 37 C.W.N. 934 ; Raghunath Pandey v. Emperor, 1933 Pat. 96 : 142 I.C. 809 : 34 Cr. L.J. 421 ; Golam Asphia v. Emperor, 1932 Cal. 295 : 137 I.C. 497 : 33 Cr. L.J. 477 ; Ram Rao Ekoba v. The Crown, 1951 Nag. 237 : 1 I.L.R. 1951 Nag. 349 : 1952 N.L.J. 20 ; Koishuan Chithan v. State of Kerala, (1962) 1 Cr. L.J. 650 ; Dharam Pal v. State, 1971 Cr. L.J. 1750 : A.I.R. 1971 H.P. 17.
5. Wigmore, Ev., Sec. 2060.
6. R. v. Zielinski, (1950) 2 All E.R. 1114 n.
7. Rebati Mohan Chakrabarti v. Emperor, 1929 Cal. 57 : I.L.R. 56 Cal. 150 : I.C. 258 : 30 Cr. L.J. 435 : 32 C.W.N. 945.
8. Hachani Khan v. Emperor, 1930 Cal. 481 : 127 I.C. 767 : 32 Cr. L.J. 53 : 34 C.W.N. 390.
9. Kashem Ali v. Emperor, 1933 Cal. 6 : 140 I.C. 379 : 34 Cr. L.J. 23 : 35 C.W.N. 874.
10. R. v. O'Hara, (1890) 17 C. 642.
11. It was held in the case cited that a statement by a witness that he heard A say in the absence of the accused, that he had paid a sum of money to the accused as a bribe was hearsay and not admissible.
12. Rajoni Kant v. Asan Mullick, (1895) 2 C.W.N. 672. In R. v. Lakshmayya Pandaram, (1899) 22 M. 491. that accomplice's statement was not only corroborated, but was distinctly contradicted by the evidence in the case.

sufficient to find the accused guilty will be a misdirection.¹³ As regards the duty of the Judge in cases in which accomplice's testimony is corroborated in respect of one or some of the accused but not in respect of all, Alderson, B., laid down the law in *R. v. Henkins*,¹⁴ as follows: "Where there is one witness of bad character giving evidence against both prisoners a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both it seems to me it would be unjust to give it a general effect." Following this in *Rex v. Baskerville*,¹⁵ it was observed: "We see no reason in principle why a different rule as to corroboration should apply to a prisoner tried with another, against whom there is corroborative evidence of the accomplice's story, from that applicable if the first prisoner has been tried alone. In that case, the uncorroborated evidence of the accomplice would be admissible against him, but it would be the Judge's duty to give the proper caution to the jury; and it would be equally incumbent upon the Judge to give the warning to the jury, when the prisoner is tried with another against whom there was corroboration of the accomplice's story. If the Judge failed to give the warning, this Court would be bound to set aside the conviction. If the Judge gave the warning, this Court would then have to consider all the circumstances of the case as already indicated." Although it is not usual for the High Court to interfere in revision with the decision of the Lower Court when it is based on a consideration of the evidence, yet where the Lower Courts have not considered the evidence from the point of view that the witnesses were accomplices and where hearsay evidence has been improperly admitted on important points, the High Court will go into the facts of the case.¹⁶ And, it has been held by the Calcutta High Court that an Appellate Court is bound to find whether witnesses alleged to be accomplices were accomplices and to weigh their evidence accordingly.¹⁷ The proper charge to the jury regarding the necessity for corroboration and the danger of convicting on the sole uncorroborated testimony of an accomplice or an interested witness or the prosecutrix in a case of rape are dealt with by the Supreme Court in *Rameshwar Kalyan Singh v. State of Rajasthan*,¹⁸ *Sidheswar Ganguli v. State of West Bengal*,¹⁹ *State of Bihar v. Basawan Singh*²⁰ and *Inanendranath Ghose v. State of West Bengal*.²¹

13. *Ramaswami Gounden v. R.*, (1903) 14 Mad. L.J. 226 : 27 M. 271, per Boddam, J.; *Mani Ram v. Emperor*, 1928 Oudh 207 : 107 I.C. 876 ; see *Muthukumaraswami Pillai v. R.*, (1912) 35 M. 397 : 14 I.C. 896 : 1912 M.W.N. 549 : 12 M.L.T. 1. (It was said by Benson, C.J., that the question whether evidence amounts to corroboration is for the jury, and is for the Judge if he acts without one).
14. (1843) 1 Cox. C.C. 177.
15. (1916) 2 K.B. 658 at 669, 670 : 86 L.J.K.B. 28 : 115 I.T. 453 : 80 J.P. 446 : 60 S.J. 696 : 25 Cox. C.C. 524.
16. *Ramaswami Gounden v. R.*, (1903) 14 Mad. L.J. 226 : 27 M. 271, per Boddam, J.
17. *Amanat Sardar v. Nagendra Biswas*,

- (1910) 38 C. 307 : 9 I.C. 65.
18. 1952 S.C.R. 377 : 1952 S.C.J. 46 : 1952 Cr. L.J. 547 : (1952) 1 M.L.J. 440 : 65 M.L.W. 351 : 1952 M.W.N. 150 : A.I.R. 1952 S.C. 54.
19. A.I.R. 1958 S.C. 143 : 1958 S.C. A. 147 : 1958 S.C.J. 349 : 1958 S.C.R. 749 : 1958 A.W.R. (H.C.) 391 : 1958 Cr. L.J. 273 : 1958 M.L.J. (Cr.) 311 : 1958 Pat. L.R. (S.C.) 1.
20. 1958 S.C.J. 856 : (1958) 2 An. W. R. (S.C.) 136 : 1958 (H.C.) 609 : 1958 B.L.J.R. 618 : 1958 M.L.J. (Cr.) 641 : (1958) 2 M.L.J. (S.C.) 136 : 1958 Cr. L.J. 976 : 1958 All. L.J. 608 : A.I.R. 1958 S.C. 500.
21. A.I.R. 1959 S.C. 1199 : 1959 Cr. L.J. 1402 : 1960 A.W.R. (H.C.) 8 : 1960 All Cr. R. 31.

Jury system of trial has now been abolished since the enforcement of the new Code of Criminal Procedure, 1973. Therefore references in this note to sections of Cr. P. C. are to those of Cr. P. C., 1898. It is likely that the discussion made under this note may continue to be useful for some time more.

16. Nature and extent of corroboration. As regards the nature and extent of the corroboration required, when it is not considered safe to dispense with it, the rules are lucidly expounded by Lord Reading in *Baskerville's case*,²² Bose, J., of the Supreme Court formulated them as follows: "It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear:

'First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says: 'Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of another and independent testimony'. All that is required is that there must be 'some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.'

Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must, in some way, reasonably connect or tend to connect the accused with it by confirming, in some material particular, the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all.....It would not at all tend to show that the party accused participated in it.

Thirdly, the corroboration must come from independent sources, and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal.

Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient, if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, 'many crimes which

22. (1916) 2 K B. 658 at pp. 664 to 679.

are usually committed between accomplices in secret, such as incest, offences, with females' (or unnatural offences) 'could never be brought to justice.'²³

In *Bhiva Doulu Patil v. State of Maharashtra*,²⁴ the Supreme Court considered the combined effect of this section and Illustration (b) to Sec. 114 and observed that according to the former, which is a rule of law, an accomplice is competent to give evidence, and according to the latter, which is a rule of practice, it is almost always unsafe to convict an accused person upon his testimony alone. In *Jnanendra Nath Ghose v. State of West Bengal*,²⁵ it was pointed out that although the approver's evidence is the direct evidence of the crime yet it should be corroborated in material particulars by evidence—

(a) concerning the crime, and

(b) connecting or tending to connect the accused with the crime.

The aforesaid view has been approved and further elucidated by the Supreme Court in *Tribhuvan Nath v. State of Maharashtra*¹ by observing that the corroboration should be such which lends assurance to the reliability of the story testified by the accomplice.

According to statute, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The rule of caution and prudence is based on Illustration (b) to Sec. 114. The nature and extent of corroboration required by this Rule of caution and prudence must, from the very nature of things, vary with the circumstances of each case. What is required is, that some additional evidence must be given, rendering it probable that the story of the approver is true and that it is reasonably safe to act upon it. The corroboration coming from some independent source need not, however, be direct connecting the accused with the crime. Circumstantial evidence can be sufficient to satisfy the test of the rule of caution and prudence.² In view of the relevant portion of Sec. 114 and this section, the principle is,

23. *Rameshwar v. State of Rajasthan*, 1952 S.C. 54 at 57; see also *Shamsher Bahadur Saxena v. State of Bihar*, 1956 Pat. 404; *Ram Dayal v. Emperor*, 1942 Pat. 271; 198 I.C. 78; 23 P.L.T. 606; *Chacko Thomas v. State*, I.L.R. 1951 T. C. 644; 1952 T.C. 155; *Padmaraja Chetty, In re*, 1951 Mad. 746; (1949) 2 M.L.J. 428; 62 L.W. 614; *The State of Bihar v. Basawan Singh*, A.I.R. 1958 S.C. 500; *Sidheswar Ganguly v. State of West Bengal*, 1959 S.C.R. 749; 1958 A.W.R. (H.C.) 391; 1958 Pat. L.R. (S.C.) 1; 1958 M.L.J. (Cr.) 311; A.I.R. 1958 S.C. 143; 1958 S.C.A. 147; 1958 S.C.J. 349; I.L.R. (1971) 2 Delhi 584; I.L.R. (1971) 2 Delhi 426.
24. (1963) 3 S.C.R. 830; (1963) 2 S.C.J. 327; 1963 S.C.D. 276; 1963 A.W.R. (H.C.) 163; 1963 A.L.J. 253; 65 Bom. L.R. 347; 1963 M.P.L.J. 225; 1963 M.L.J. (Cr.) 450; (1963) 1 Ker. L.R. 109; A.

- I.R. 1963 S.C. 599; *Ibrahim Husen v. State*, 1969 Cr. L.J. 739; A.I.R. 1969 Goa 68 (70); *Mohd. Hussain Umar v. K. S. Dalip Singhji*, A.I.R. 1970 S.C. 45 (50); *Ghanshyam Lal Choudhary v. The State of Rajasthan*, 1972 W.L.N. 375 (382); See also *Jagannath Ray v. State*, I.L.R. (1971) 2 Ker. 30; (1972) 38 Cut. L.T. 870; (1972) 1 Cut. L.R. (Cr.) 346.
25. (1960) 2 S.C.A. 180; A.I.R. 1959 S.C. 1199.
1. 1972 Cr. L.J. 1277; 1972 S.C.D. 571; 1972 Cr. App. R. 257 (S.C.); 1972 U.J. (S.C.) 826; 1972 S.C. Cr. R. 458; (1972) 3 S. C. C. 511; 1972 S. C. C. (Cr.) 604; A.I.R. 1973 S.C. 450.
2. *Sohan Singh v. State*, A.I.R. 1961 Punj. 130; 66 P.L.R. 30; *State of Rajasthan v. Sardara*, 1973 Raj. L.W. 290; 1973 W.L.N. 436; 1971 Cr. L.J. 43.

that the accomplice, being a participant in the crime, his testimony suffers from an infirmity and casts a doubt as to its truthfulness. It has, therefore, ordinarily to be taken that his testimony should not be accepted, unless there are other circumstances in the case or other evidence proceeding from independent source lending assurance that the evidence given by the accomplice is truthful. Thus, if a number of participants in the crime corroborate one another, it is a relevant circumstance which can be taken into account in considering whether the evidence of the accomplice should be accepted.³

In a later case the Supreme Court considered the relative scope of Illustration (b) to Sec. 114, and Sec. 133 and observed that the need of corroboration which was a rule of prudence has been by judicial experience elevated into a rule of law, however, the rule is not that conviction without corroboration is illegal but that the necessity of corroboration should be present in the mind of the Judge and must be dispensed with only when circumstances are such that it can be safely dispensed with.⁴

Although, under this section, a conviction is justified in law even on the uncorroborated testimony of an accomplice, yet Courts should be slow to depart from the rule of prudence based on long experience which requires some independent evidence implicating the particular accused.⁵ The Court should give some indication in its judgment that it has had the above rule or caution and prudence in mind and should proceed to give reasons for considering corroboration unnecessary. Ordinarily, the Court should require corroboration, and if there is no corroboration, it must show why it considers it safe to convict the accused without corroboration in that particular case.⁶ In *Kanbi Karsan Jadav v. State of Gujarat*,⁷ it was held that what the law requires in the case of an accomplice's evidence is that there should be such corroboration for the material parts of the story connecting the accused with the crime as will satisfy reasonable minds that the approver can be regarded as a truthful witness. The corroboration need not be by direct evidence of the commission of the offence by the accused. It may merely be by circumstantial evidence of his connection with the crime. But the nature of the corroboration will depend on, and vary with, the circumstances of each case.

It should be appreciated that the coincidence of a number of confessions of co-accused all implicating the particular accused, given independently and without an opportunity of previous concert, might be entitled to great weight.⁸ In the absence of collusion between the accomplices, it is possible to corroborate the evidence of an accomplice with that of another accomplice,⁹ although

3. *Laxman Padma v. State*, I.L.R. 1965 B. 618 : A.I.R. 1965 B. 195; 67 Bom. L.R. 317.

4. *Dagdu v. State of Maharashtra*, (1977) 2 S.C.J. 241 : (1977) 1 M.L.J. (Cr.) 462 : 1977 S.C.C. (Cr.) 421 : (1977) 3 S.C.C. 68 : (1977) Cr. L.J. 1206 : A.I.R. 1977 S.C. 1579.

5. *Bhuboni Sahu v. The King*, 76 I.A. 147, 157 : A.I.R. 1949 P.C. 237, 261.

6. *Rameshwar v. State of Rajasthan*,

1952 S.C.A. 40 : A.I.R. 1952 S.C. 54.

7. 1962 Supp. (2) S.C.R. 726 : (1963) 2 S.C.J. 361 : A.I.R. 1966 S.C. 821 (823) following *Vemireddi Satyanarayanan v. State of Hyderabad*, 1956 S.C.R. 247 (252) : A.I.R. 1958 S.C. 379 (381).

8. *Bhuboni Sahu v. The King*, 76 I.A. 147 : A.I.R. 1949 P.C. 237.

9. *Kuruchiyar Kunhaman v. State of Kerala*, 1974 Ker. L.T. 328.

ordinarily one accomplice cannot corroborate another.¹⁰ In *Swamirathnam v. State of Madras*,¹¹ it has been said that though the corroboration of an approver's evidence need not be of a kind which proves the offence against the accused, it is sufficient if it connects the accused with the crime. The corroboration is required only of material circumstances but not confirmation of every detail deposed to by the accomplice. There must be corroboration both of the crime and of the identity of the person charged. The corroboration must be by independent testimony but not necessarily by direct evidence. Corroborative evidence means evidence which shows or tends to show that the story of the accomplice regarding the fact that the accused committed the crime is true. There must be corroboration not merely that the crime has been committed but also that it was committed by the accused. But circumstantial evidence of the connection of the accused with the crime is sufficient.¹² In *Sarwan Singh v. State of Punjab*,¹³ it has been held that though Courts are naturally reluctant to act on the tainted evidence of an approver unless it is corroborated in material particulars by other independent evidence, it does not follow that independent corroboration should cover the whole of the prosecution story or even all the material particulars, as, in that case, the evidence of the accomplice will be rendered wholly superfluous. It would not be safe to act upon the approver's evidence, merely because it is corroborated in minor particulars, or incidental details, as, in such cases, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true.

17. Corroboration connecting accused with offence. The corroboration must be on a point material to the issue; the testimony of the approver ought to be corroborated in some material circumstance, such circumstance connecting and identifying the prisoner with the offence.¹⁴ The

10. G. S. Chowdhry v. State of Rajasthan, 1972 W.L.N. 375 : 1972 Raj. L.W. 381.
11. A.I.R. 1957 S.C. 340.
12. King v. Baskerville, (1916) 2 K.B. 658, referred to in Rameshwar v. State of Rajasthan, 1952 S.C.A. 40; A.I.R. 1952 S.C. 51; Baudia Naik and others v. State, 1971 Cr. L.R. (Cr.) 19; Kamaludin v. State of Rajasthan, 1975 W.L.N. 80; Maghar Singh v. State of Punjab, A.I.R. 1975 S.C. 1320.
13. A.I.R. 1967 S.C. 637.
14. R. v. Nawab Jan, (1867) 8 W.R. Cr. 19, 20, 23, 25, 26, followed in R. v. Bepin Biswas, (1884) 10 C. 970, 973; R. v. Elahi Bux, (1866) B.L.R. Sup. Vol. p. 459 (F.B.); 5 W.R. Cr. 80; R. v. Baikuntha Nath, (1868) 3 B.L.R. 2 note (F.B.); R. v. Mohesh Biswas, (1873) 10 B.L.R. 455 note; R. v. Imdad Khan, (1885) 8 V. 120, 135; R. v. Sadhu Mundul, (1871) 12 W.R. Cr. 69; R. v. Dwarka, (1866) 5 W.R. Cr. 13; R. v. Imam, (1867) 3 Bom. H.C. R. 57 (C.C.); R. v. O'Hara, (1890) 17 C. 612; R. v. Sugai

Samba, (1893) 21 C. 642, 657; Ashraf Ali v. Emperor, 1915 Cal. 784 : 1. L.R. 42 Cal. 25 : 27 I.C. 839; Thanuvan Retna Karan v. State, 1955 T.C. 87 : 1954 K.L.T. 801; Hari Ram v. Emperor, 1935 Lah. 125 : 1.L.R. 15 Lah. 673 : 155 I.C. 197 : 36 P.L.R. 488; Chacko Thomas v. State, 1952 T.C. 155; Kunj Behari v. State, 1951 Pat. 84-52 Cr. L.J. 766; Ram Chand v. State, 1952 H.P. 57; Ramrao Ekoba v. Crown, 1.L.R. 1951 Nag. 349 : 1952 N.L.J. 20 : 1951 Nag. 237; Dhaju Mandal v. Emperor, 1933 Pat. 112 : 146 I.C. 934; Nanak Chand v. Emperor, 1932 Lah. 73; 133 I.C. 545 : 32 P.L.R. 792; Inder Dutt v. R., 1931 Lah. 408 : 132 I.C. 185; Manohar Mandal v. Emperor, 1930 Cal. 430 : 126 I.C. 775; Kartar Singh v. Emperor, 1936 Lah. 400 : 1.L.R. 17 Lah. 518 : 162 I.C. 511. In R. v. Mohiuddin Sahib, (1901) 25 M. 113, the evidence of the approver was held to be sufficiently corroborated. Stewart Rapalje, op. cit. Sec. 227; Wharton, Cr. Ev., Secs. 441-42.

corroboration falls under two heads: (1) general corroboration, and (2) special corroboration, connecting each of the accused with the offence. The first shows or is meant to show that the man is truthful and has a good memory. With regard to the second, it is settled law, that additional corroboration is required connecting the accused individually with the actual commission of the offence.¹⁵ Evidence in corroboration must be independent testimony connecting or tending to connect the accused with the crime. To amount to corroboration, the evidence must implicate the accused, i.e., it must confirm, in some material particular, not only the accomplice's or approver's evidence that the crime has been committed, but also that the accused committed it.¹⁶ "There is a great difference between confirmation of an accomplice as to the circumstances of the felony and those which apply to the individuals charged. The former only show that the accomplice was present at the commission of the offence, but the latter show that the prisoner was connected with it. This distinction ought always to be attended to. The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged."¹⁷

18. Corroboration must be in material particulars. The evidence of an accessory* must be corroborated in some material particular, not only bearing upon the facts of the crime but upon the accused's implication in it.¹⁸ It is not sufficient that the approver should be corroborated with regard to the actual commission of the crime itself, for such corroboration merely shows that he himself took part in the offence. Experience requires that the approver should also be corroborated in material points as to the part played by his accomplices.¹⁹ The corroboration ought to consist of some circumstance that affects the identity of the person accused. A man, who has been guilty of a crime himself, will always be able to relate the facts of the case, and if the confirmation be only on the truth of that story without identi-

15. *Ranbir Singh v. Emperor*, 1932 Lah. 201 : 136 I.C. 19 : 33 P.L.R. 241.

16. *Bacha Babu v. Emperor*, 1935 All. 162 : 155 I.C. 369 : 1935 A.W.R. 1 ; *Gosakh Nath v. Emperor*, 1935 All. 86 : 152 I.C. 934 ; *Swami-rathnam v. State*, A.I.R. 1957 S.C. 340.

17. *R. v. Wilkes*, (1836) 7 C. & P. 272, per Alderson, B. cited in *R. v. Elahi Bux*, (1866) B.L.R. Sup. Vol., p. 459 (F.B.) ; *R. v. Mohiuddin Sahib*, (1901) 25 M. 143, 147 ; *Jiwan v. Emperor*, 1934 Lah. 23 (2) : 147 I.C. 245 : 34 P.L.R. 866 ; *Wazir Chand v. Emperor*, 1928 Lah. 30 : 102 I.C. 500 ; *Kunj Behari v. State*, 1951 Pat. 84 ; see also *Sikandar Mian v. Emperor*, 1937 Cal. 321 : I.L.R. (1937) 2 Cal. 315 : 41 C.W.N. 611 (sexual offence).

18. *Mahadeo v. The King*, 1936 P.C. 242 : 163 I.C. 681 : 1936 A.L.J. 869 : 11 L.W. 253 ; see also *Nitai*

Chandia v. Emperor, 1937 Cal. 433 : 170 I.C. 201 (S.B.) ; *Shibdas Daw v. Emperor*, 1934 Cal. 144 : 147 I.C. 1172 : 37 C.W.N. 934.

19. *Jagwa Dhanuk v. King-Emperor*, 1926 Pat. 232 : I.L.R. 5 Pat. 63 : 93 I.C. 884 : 7 P.L.T. 396 ; see also *Kattu v. Emperor*, 1927 Lah. 10 : 98 I.C. 190 ; *Khadim v. Emperor*, 1937 Sind 162 : 169 I.C. 716 ; *Khairo v. Emperor*, 1937 Sind 221 : 170 I.C. 922 : 31 S.L.R. 470 ; *Har Prasad v. Emperor*, 1952 Bom. 184 : I.L.R. 1952 Bom. 427 : 53 Bom. L.R. 938 ; *Ram Singh v. Crown*, 1951 Simla 178 ; *Veukata-subba Reddi v. Emperor*, 1931 Mad. 689 : I.L.R. 54 Mad. 931 : 134 I.C. 1143 ; *Jai Singh v. Emperor*, 1932 Oudh 11 : 136 I.C. 321 ; *Emperor v. Maqbool Ahmad*, 1932 Oudh 317 : 11 R. 7 Luck. 511 : 139 I.C. 751 ; *Tolu v. State*, 1971 Raj. L.W. 456 : 1971 W.L.N. (Part D) 74.

fying the persons, that is no corroboration at all.²⁰ It has been said in a Bombay case that it is not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence which directly connects the accused with the offence. But, there must be some evidence which tends to show that the story of the approver or accomplice is true in so far as it relates to the accused.²¹ It is an established rule of practice that as a general rule the accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches.²² The accomplice must, in most cases, be corroborated as to all of the persons affected by his evidence. If he is corroborated in his evidence as to the one prisoner, there will still be need of corroboration of his testimony with respect to the other prisoners.²³ But corroborative evidence tending to connect the accused with the crime, described by an approver, does not need to be evidence connecting the accused in every detail with the particular crime. Evidence is only required which tends to connect the accused with the crime.²⁴ "It is sufficient if the evidence is confirmatory of some of the leading circumstances of the story of the approver as against the particular prisoner, so that the Court may be able to presume that he has told the truth as to the rest. The true rule on the subject of the corroboration of the evidence of approvers probably is that if the Court is satisfied that the witness is speaking the truth in some material part of his testimony, in which it is seen that he is confirmed by unimpeachable evidence, there may be just ground for believing that he also speaks truth

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20. *R. v. Farler*, (1837) 8 C. & P. 106, cited in *R. v. Elahi Bux*, 1866 B. L. R. (Sup.) Vol. p. 165; see also *Ambica Charan v. Emperor*, 1931 Cal. 697 at 702; 134 I.C. 1121; 35 C.W.N. 1270 (S.B.) where Rankin, C. J. repeated this language as that of an English case without citing this case, *Roscoe, Cr. Ev.*, 13th Ed., 110; and see *R. v. Stubbs*, (1855) 25 L. J. M.C. 16, per Creswell, J.: "You may take it for granted that the accomplice was at the committal of the offence, and may be corroborated as to the facts; but that has no tendency to show that the parties accused were there"; see also *R. v. Ram Saran*, 1885 A.W.N. 311.
21. *Shankarshet v. Emperor*, 1933 Bom. 482; I.L.R. 58 Bom. 40; 147 I. C. 25; 35 Bom. L.R. 1040; see also *Gopal Das v. Emperor*, 1945 Sind 132; I.L.R. 1944 Kar. 456; 221 I.C. 358.
22. *R. v. Krishnabhat*, (1887) 10 B. 319; *R. v. Budhu Nanku*, (1876) 1 B. 475; *R. v. Malapa*, (1874) 11 Bom. H.C.R. 196; *R. v. Ram Saran*, (1885) 8 A. 306, and cases cited, ante; *Ranbir Singh v. Emperor*, 1932 Lah. 204; *Ganu Chandra v. Emperor*, 1932 Bom. 286; I.L.R. 56 Bom. 172; 137 I.C. 174; 34 Bom. L.R. 303; *Chinnaswami*,

- In re*, A.I.R. 1960 Mad. 462; *Swaminatham v. State*, A.I.R. 1957 S.C. 340.
23. *Abdul Karim v. R.*, (1904) 1 All. L.J. 110; *Nga Po Aung v. Emperor*, 1937 Rang. 264; 170 I.C. 645; *Nazir v. Emperor*, 1933 All. 31; I.L.R. 55 All. 91; 143 I.C. 67; 1932 A.L.J. 1125; *Rattan Dhanuk v. Emperor*, 1928 Pat. 630; 113 I. C. 329; 9 P.L.T. 672. But see *Papaa Kamal Khan v. Emperor*, 1935 Bom. 230; I.L.R. 59 Bom. 486; 156 I.C. 615; 37 Bom. L.R. 366 (the rule of the Court which requires corroboration of the evidence of an accomplice as against each accused, if it applies at all, applies with very little force to a case in which the accused is charged with extorting a bribe from other persons. The objections which usually arise to the evidence of an accomplice do not really apply where the alleged accomplice is not a willing participant in the offence, but is really a victim of that offence); *Suleman v. Emperor*, 1923 Lah. 385; 76 I.C. 716.
24. *Mst. Khushali v. Emperor*, 1938 Lah. 339; 175 I.C. 548; *Rameshwar Kalyan Singh v. State of Rajasthan*, 1952 S.C. 54; *Chinnaswami*, *In re*, A.I.R. 1960 Mad. 462.

in other parts as to which there may be no confirmation."²⁵ When corroboration is required it is not necessary that an accomplice should be corroborated in every material particular, because if such evidence could be found, it would be unnecessary to call the accomplice; but he must be confirmed in such and so many material points as to satisfy the Court or jury of the truth of his story.¹ It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true.² "All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or the complainant) is true and that it is reasonably safe to act upon it."³ It is to be remembered that the amount of corroborative evidence varies with the facts and circumstances of each particular case. Where the approver's deposition makes a deep impression of veracity on the mind of the Judge, only the minimum of corroboration is necessary, much or little, the purpose of corroborative evidence is to satisfy the Court that when the approver implicates a particular individual, he does so truly.⁴ In a case of conspiracy, if there is corroboration not only of the general fact of the existence of a conspiracy but also of the participation in it of any particular accused, it would not be necessary that there should be corroboration of all the specific acts in the conspiracy said to have been done by that accused unless the evidence of the accomplice on the point was intrinsically open to suspicion.⁵

19. Corroboration as to corpus delicti. "Not only as to persons spoken of by an accomplice, must there be corroborative evidence, but, which is more important still, as to the *corpus delicti* there must be some *prima facie* evidence pointing the same way, to make the evidence of an accomplice satisfactory."⁶

20. Corroboration by independent evidence. The corroboration must be by independent evidence. "Independent" merely means independent

25. *R. v. Kala Chand*, (1869) 11 W.R. Cr. 21, per Norman, J.; *Gafoor v. Emperor*, 1936 Rang. 373; 164 I. C. 677.

1. *R. v. Gallagher*, (1875) 15 Cox. C. C. 291; *R. v. Barnard*, 1 C. & P. 88; *R. v. Boyes*, (1861) 1 B. & S. 311, 320; *Rameshwar Kalyan Singh v. State of Rajasthan*, 1952 S.C. 54; *Chacko Thomas v. State*, 1952 T. C. 155; I.L.R. 1951 T.C. 644; *Kesar Singh v. State*, 1954 Punj. 286; 56 Cr. L.J. 86; *State v. Anil Ranjan Dutta*, 1952 Cal. 534; 53 Cr. L.J. 1154; *Padmaraja Shetty, In re*, 1951 Mad. 746; *Shamsher Bahadur Saxena v. State of Bihar*, 1956 Pat. 404; *Barkati v. Emperor*, 1927 Lah. 581; 103 I.C. 49; *Bishnu Padu v. R.*, 1943 Cal. 441; I.L.R. (1944) 2 Cal. 327;

221 I.C. 547; *Md. Yunus v. The State of Bihar*, 1977 Cri. L.J. 1243 (Pat.).

2. *Sarwan Singh Rattan Singh v. State of Punjab*, 1957 S.C. 637, 641; 1957 S.C.J. 699; *State of Bihar v. Srilal*, A.I.R. 1960 Pat. 459; 1960 B.L.J.R. 565.

3. *Rameshwar Kalyan Singh v. State of Rajasthan*, 1952 S.C. 54; *Chinnawami, In re*, A.I.R. 1960 Mad. 462.

4. *Gopal Das Shivalomal v. Emperor*, 1945 Sind 132; I.L.R. 1944 Kar. 456; 221 I.C. 358.

5. *Satyanarayana v. Emperor*, 1944 Pat. 67; I.L.R. 22 Pat. 681; 212 I.C. 298.

6. *R. v. Chatur Parshotam*, 1 B. 476, note.

of sources which are likely to be tainted. It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or accomplice, should itself be sufficient to sustain conviction; all that is required is that there must be "some additional evidence rendering it probable that the story of the accomplice (or the complainant) is true and that it is reasonably safe to act upon it." The independent evidence must not only make it safe to believe that the crime was committed, but must in some way reasonably connect the accused with it; the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another accomplice.⁷ The corroboration, when required, must be independent of the accomplice or of a co-confessing prisoner.⁸ The evidence of one accomplice does not corroborate the evidence of another.⁹ The evidence of two or more accomplices requires confirmation equally with the testimony of one.¹⁰ It must be inde-

7. *Shamsher Bahadur Saxena v. State of Bihar*, 1956 Pat. 404; *Rameshwar v. State of Rajasthan*, 1952 S. C. 54; *Kesar Singh v. State*, 1954 Punj. 286; 56 Cr. L.J. 86; *Padmaraja Shetty*, In re, 1951 Mad. 746; *Ambica Charan Roy v. Emperor*, 1934 Cal. 697; 134 I.C. 1121; 33 Cr. L.J. 19; 35 C.W.N. 1270; *Emperor v. Wajid Sheikh*, 1933 Pat. 500. See *The State of Bihar v. Basawan Singh*, 1958 S.C. 500; 1958 Cr. L.J. 976 (corroboration may be by circumstantial evidence); *State of Bihar v. Srilal*, A.I.R. 1960 Pat. 459; 1960 Cr. L.J. 1380; *Ramanlal v. State of Bombay*, A.I.R. 1960 S.C. 961, following A.I.R. 1959 S.C. 1199; *Chinnaswami*, In re, A.I.R. 1960 Mad. 462; *Autar Singh v. State*, A.I.R. 1960 Punj. 364; I.L.R. 1960 Punj. 111; 1960 Cr. L.J. 989.

8. *Abdul Karim v. R.*, (1904) 1 All. L.J. 110; see *R. v. Babar Ali Gazi*, 1915 Cal. 731; I.L.R. 42 Cal. 789; 28 I.C. 657; 16 Cr. L.J. 321; 19 C.W.N. 584; 21 C.L.J. 492; *Chacko Thomas v. State*, 1952 T.C. 155.

9. *R. v. Malapa*, (1874) 11 Bom. H. C.R. 196, 198; but see second illustration appended to illust. (b), Sec. 114, remarks thereon in *R. v. Sadhu Mundal*, (1854) 21 W.R. 69, 71 and remarks of Peacock, C.J., in *R. v. Elahi Bux*, (infra) and see *R. v. Chagan Dayaram*, (1890) 14 B. 331, 339; *R. v. Chutterdharee Singh*, (1866) 5 W.R. 60; *Mahadeo v. Emperor*, 1936 P.C. 242; 163 I.C. 681; 40 C.W.N. 1164; *Bhuboni Sahu v. The King*, 1949 P.C. 257; 76 I.A. 147; 53 C.W.N. 609; *Thanuvan Ratnakaran v. State*, 1955 T.C. 87; 56 Cr. L.J.

847; 1954 K.L.T. 801; *Rangaswami Chettiar v. State*, 1953 T.C. 280; 54 Cr. L.J. 1334; 1953 K. L.T. 160; *J. M. Cohen v. The King*, 1949 Cal. 594; 51 Cr. L.J. 120; 1949 A.W.R. (Sup.) 70; 53 C.W.N. 479; *Nawal Kishore Rai v. Emperor*, 1943 Pat. 146; I.L.R. 22 Pat. 27; 206 I.C. 109; 41 Cr. L.J. 494; *Surajpal Singh Indrapal Singh*, In re, 1938 Nag. 328; I.L.R. 1938 Nag. 516; 176 I.C. 853; 39 Cr. L.J. 818; 1938 N.L.J. 185; *Nitai Chandra Jana v. Emperor*, 1937 Cal. 433; 170 I.C. 201; 38 Cr. L.J. 852 (S.B.); *Nga Po Aung v. Emperor*, 1937 Rang. 264; 170 I.C. 645; 38 Cr. L.J. 948; *Khadim v. Emperor*, 1937 Sind. 162; 169 I.C. 716; 38 Cr. L.J. 808; 31 S.L.R. 82; *Kamboji Venkataramanna v. R.*, 1934 Mad. 248; 149 I.C. 964; 35 Cr. L.J. 1040; 67 M.L.J. 74; *Mallu Marheta v. Emperor*, 1933 Nag. 352; 146 I.C. 701; 35 Cr. L.J. 213; 16 N.L.J. 186; *Hafijuddi v. Emperor*, 1934 Cal. 678; 151 I.C. 486; 35 Cr. L.J. 1357; 38 C.W.N. 777 (S.B.); *Kashem Ali v. Emperor*, 1933 Cal. 6; 140 I.C. 379; 34 Cr. L.J. 23; 35 C.W.N. 874; *Beni Madho v. Emperor*, 1933 Oudh 355; 146 I.C. 1064; 10 O. W.N. 688; *Hakami Singh v. Emperor*, 1929 Lah. 850; *Nga Aung Pe v. Emperor*, 1937 Rang. 209; 169 I.C. 705; 38 Cr. L.J. 785.

10. *R. v. Dwarka*, (1866) 5 W.R. Cr. 18; *R. v. Noakes*, 5 C. & P. 326; *R. v. Ram Saran*, 1885 A.W.N. 311; *R. v. Elahi Bux*, 1866 B.L.R. (Sup.) Vol. 1, p. 459 at 468; 5 W.R. Cr. 80, (F.B.); but see preceding note.

pendent of the accomplice or of the confessing co-accused.¹¹ It has been held, in some cases, that the evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence implicating both himself and accused.¹² But in *The King v. Nga Myo*,¹³ a Full Bench of the Rangoon High Court laid down certain propositions in this connection and expressly said that in so far as they differ from the dicta on the same point in *Aung Hla v. Emperor*,¹⁴ must be regarded as superseding the earlier dicta. The propositions laid down are :

"First: Provided it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit of their statements, and, if this be the case, a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused where the presumption of their unreliability has, in the special circumstances, been rebutted. Secondly: Evidence from a source which is not *prima facie* unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit. Thirdly: Corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. But, it may consist of extraneous proof of a fact relating to that very person's prior conduct. What has been said a accomplices applies to approvers and *vice versa*."¹⁴⁻¹ Of course, the testimony of an approver can be used for the purpose of corroboration, if the taint attached to it is removed to such an extent that the Court is prepared to believe the testimony of the approver in the same way and to the same extent as the testimony of an ordinary witness whom it considers to be worthy of credit.¹⁵ There may be circumstances, such as where previous concert by the informers is highly improbable, in which the agreement in their stories, together with corroboration which is afforded by the circumstance that their stories cannot have been arranged between them beforehand, must be taken into account.¹⁶

11. *Sheroo v. Emperor*, 1925 Nag. 78 : 81 I.C. 891 : 25 Cr. L.J. 1067.
12. *Aung Hla v. Emperor*, 1931 Rang. 235 : I.L.R. 9 Rang. 404 : 1931 Cr. C. 875 (S.B.) ; *Emperor v. Nirnal Jiban Ghose*, 1935 Cal. 553 : I.L.R. 62 Cal. 238 : 157 I.C. 387 (S.B.) ; *Purnananda Das Gupta v. Emperor*, 1939 Cal. 65 : I.L.R. (1939) 1 Cal. 1 : 179 I.C. 506 : 40 Cr. L.J. 199 : 68 C. L. J. 206 (F.B.) ; *Debi Dayal v. Emperor*, 1942 Oudh 435 : 201 I.C. 411 : 43 Cr. L.J. 661, each approving and following the previous ones.
13. 1938 Rang. 177 : 175 I.C. 465 : 39 Cr. L.J. 581 (F.B.).
14. 1931 Rang. 235 : I.L.R. 9 R. 404 (S.B.).
- 14-1. *The King v. Nga Myo*, 1938 Rang. 177 ; see also *Sharif v. Emperor*, 1944 Lah. 472 : I.L.R. 1944 Lah. 463 : 216 I.C. 253 : 46 P.L.R. 355 ; *Achhay Lal Singh v. Emperor*, 1947 Pat. 90 : I.L.R. 55 Pat. 347 : 228 I.C. 567 : 48 Cr. L.J. 242 : 1947 P.W.N. 69 ; *Pratab Singh v. Emperor*, 1926 All. 705 : 96 I.C. 127 : 27 Cr. L.J. 879.
15. *Hakam Singh v. Emperor*, 1929 Lah. 850.
16. *R. v. Ningappa*, 2 Bom. L.R. 610 ; see also *Mahant Narain Das v. Emperor*, 1922 Lah. 1 : I.L.R. 3 Lah. 144 : 68 I.C. 113 : 23 Cr. L.J. 513 ; *The King v. Nga Myo*, 1938 Rang. 177 : 175 I.C. 465 : 39 Cr. L.J. 581 (F.B.).

21. Previous statements of accomplice. It has been held that previous statement made by the accomplice himself, though consistent with the evidence given by him at the trial or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not at all improve in value by repetition.¹⁷ But, in a case in the Madras High Court it was held, that such previous statements legally amount to corroboration though the weight attached to them must vary.¹⁸ Referring to Sec. 157, post, their Lordships of the Supreme Court observed: "The section makes no exception." Therefore, provided the conditions prescribed, that is to say, "at or about the time, etc." are fulfilled, there can be no doubt that such a statement is legally admissible in India as corroboration. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of Sec. 118 its legal admissibility as corroboration cannot be questioned. To state this is, however, no more than to emphasise that there is no rule of thumb in these cases. When corroborative evidence is produced, it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand its weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind may be more than enough in itself to justify acceptance of the complainant's story. It all depends on the facts of the case.¹⁹

22. Confession of co-accused. It has also been held, that the confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others, because such a confession cannot be put on a higher footing than the evidence of an accomplice, and is moreover not given on oath or subject to the test of cross-examination, and is guaranteed by nothing except the peril into which it brings the speaker and which it is generally fashioned to lessen. Tainted evidence is not made better by being corroborated by other tainted evidence.²⁰ A Full Bench of the Madras High Court has held, that, in view of the provisions of Sec. 30 of this

17. *R. v. Malapa*, (1874) 11 Bom. H. C.R. 196; *R. v. Bepin Biswas*, (1884) 10 C. 970; and see note to Sec. 157, post. This view was rejected by the majority of the Court in *R. v. Nilakanta*, (1911) 35 M. 247; 14 I.C. 849 (Sup.).

18. *Muthukumarasami Pillai v. R.*, (1912) 35 M. 397 (they might, for instance, be important if it was alleged that the witness had been recently influenced, per Benson, C. J.); and see *R. v. Akbar Badoo*, (1910) 34 B. 599 (previous statements admissible to corroborate statements at trial).

19. *Rameshwar v. State of Rajasthan*, 1952 S.C. 54 at p. 58.

20. *R. v. Malapa*, (1874) 11 Bom. H. C.R. 196 at 198; *R. v. Bepin Biswas*, (1884) 10 C. 970; *R. v. Baijoo Chowdhry* (1876) 25 W.R. Cr. 43; *R. v. Krishnabhar*, (1885) 10 B. 319; *R. v. Jaffen Ali*,

(1875) 19 W.R. Cr. 57; *R. v. Budhu Nanku*, (1876) 1 B. 475; *R. v. Uddhan Bind*, (1875) 19 W. R. Cr. 68; *Bhubani Sahu v. The King*, 1949 P.C. 257; 76 I.A. 147; 53 C.W.N. 609. In re *Muttiga*, 1936 Andh. Pra. 255; *Nazir v. Emperor*, 1933 All. 31; 1 I.L.R. 55 All. 91; 148 I.C. 67; *Mahadeo v. Emperor*, 1924 Oudh 65; 10 C. L.J. 200; *Faquir Singh v. Emperor*, 1939 Lah. 429; 124 I.C. 219; 40 Cr. L.J. 897; 41 P.L.R. 338; *Latafat Hossain Biswas v. Emperor*, 1928 Cal. 745; 33 C.W.N. 58; *Provincial Government of C. P. v. Raghuram Rodaji*, 1942 Nag. 127; 1 I.L.R. 1942 Nag. 749; 203 I.C. 214; 44 Cr. L.J. 18; 1942 N.L. J. 491; *R. v. Mohan Lal*, (1881) 4 A. 46; *R. v. Sadhu Mundal*, (1874) 21 W.R. Cr. 69; *R. v. Ram Saran*, (1885) 8 A. 311.

Act, the confession of a co-accused can be accepted as corroboration of the approver's evidence.²¹ But, as has been pointed out in a case by a Bench of the same Court, Sec. 30 does not affect the rule of practice that the Courts should be loath to accept tainted evidence as a corroboration of an approver's evidence. The confession of a co-accused cannot afford better or more reliable evidence than that of an accomplice. If an accomplice's evidence is tainted evidence, the confession of a co-accused also is tainted evidence. Section 30, Evidence Act, does not compel a Court to accept the confession of a co-accused as corroboration of the approver's evidence. It only empowers the Court to take into consideration such confession as against the person jointly tried with him or against the person who makes such a confession. Though an accomplice's evidence is legal evidence and is not excluded by any of the provisions of the Evidence Act, it has been held that as a rule of practice such evidence should not be accepted as corroborative evidence. The same principle should apply even in the case of a confessional statement.²² Referring to the above Full Bench case of the Madras High Court,²³ in which the Court founded a conviction upon the evidence of an accomplice supported only by the confession of a co-accused, in *Bhuboni Sahu v. The King*,²⁴ their Lordships of the Privy Council observed: "Their Lordships whilst not doubting that such a conviction is justified in law under Sec. 133, Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused given independently and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused." Where several persons are indicted and the evidence of the accomplice is confirmed as to some only and not as to others, the Court ought, as a general rule (and in trial by jury the latter ought to be advised), to acquit those against whom there is no corroboration.²⁵ The confession of a co-accused is not substantive evidence. If the other evidence is insufficient to establish a *prima facie* case the confession cannot be brought in aid to support such evidence.¹

23. Retracted confession. The retracted confession of an accused may be sufficient corroboration of the approver's story as against himself but not against a co-accused.² A retracted confession does not come within the definition of evidence contained in Sec. 3. But, where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Sec. 30 may be thrown into the scale as

21. In re B. K. Rajagopal, 1944 Mad. 117 : I.L.R. 1944 Mad. 308 : 211 I.C. 367 : 45 Cr. L.J. 373 (F.B.).

22. Padmaraja Shetty, In re, 1951 Mad. 746.

23. In re B. K. Rajagopal, 1944 Mad. 117 : I.L.R. 1944 M. 308 : 211 I.C. 367 (F.B.).

24. 1949 P.C. 257 at 261 : 76 I.A. 147.

25. R. v. Webb, (1835) 6 C. & P. 595 ; R. v. Morris, 7 C. & P. 270 and see R. v. Stubbs, (1855) 4 W.R. 85, remarks of Jervis, C.J. ; Roscoe, Cr. Ev., 16th Ed., 140,

141 ; R. v. Ram Saran, 1885 A.W.N. 311, 312 ; R. v. Imam, (1867), 3 Bom. H.C. 57 ; R. v. Elahced Buksh, (1886) 1 B.L.R. Sup. Vol. p. 459 following R. v. Stubbs, supra.

1. Thangbal v. Government of Manipur, 1968 Manipur 34 : 1968 Cr. L.J. 514.

2. Pallia v. Emperor, 1919 Lah. 356 : 49 I.C. 604 : 20 Cr. L.J. 188 ; Baboo Singh v. Emperor, 1936 Oudh 156 : 159 I.C. 875 : 37 Cr. L.J. 163.

an additional reason for believing that evidence.³ As regards the use of retracted confession their Lordships of the Supreme Court observed: "Then, as regards its use in the corroboration of accomplices and approvers, a co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the evidence is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who, though not an accomplice, is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice, provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it."⁴ Not infrequently one is apt to fall in error in equating a retracted confession with the evidence of an accomplice and, therefore, it is advisable to clearly understand the distinction between the two. The distinction is that in the case of an accomplice the corroboration must be in material particulars but in the case of corroboration of a retracted confession of an accused, if the general trend of the prosecution evidence corroborates the essential part of the confessional statement, the confession can be accepted as true.⁵

The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement general corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars. In addition, the Court must feel that the reasons given for the retraction in the case of a confession are untrue.⁶ As pointed out by Hidayatullah, J. (as he then was), a retracted confession must be looked upon with greater concern unless the reasons for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false. A retracted confession is a weak link against its maker and more so against a co-accused.⁷

24. Corroboration need not be by direct evidence. "The corroboration need not be by direct evidence but the accused committed the crime; it is sufficient, if it is merely circumstantial evidence of his connexion with the crime. Were the law otherwise, many crimes which are usually committed between accomplices in secret... could never be brought to justice."⁸ Where

3. *Kashmira Singh v. State of Madhya Pradesh*, 1952 S.C. 159 : 1952 S.C. A. 474 : 1952 S.C.J. 201 : 1952 S.C.R. 526 : 53 Cr. L.J. 839 : 1952 A.W.R. (Sup.) 64 : (1952) 1 M. L.J. 754 : 1952 M.W.N. 402 : 1952 M.W.N. Cr. 106 ; *Rattan Lal v. State*, 1955 Punj. 110 : 56 Cr. L.J. 797 ; *Gunadhar Das v. State*, 1952 Cal. 618 : 53 Cr. L.J. 1343 ; *Baboo Singh v. Emperor*, 1936 Oudh 156 : 159 I.C. 875 : 37 Cr. L.J. 163.
4. *Kashmira Singh v. State of Madhya Pradesh*, 1952 S.C. 159 at pp. 160-161 ; *Sahu Khesan v. State*, 32 Cut. L.T. 1140 (1144).
5. *Darbari Kumar v. State*, I.L.R.

- 1969 Cut. 417 : 1970 Cr. L.J. 580 : A.I.R. 1970 Orissa 54 (55).
6. *Subramania Goundan v. State of Madras*, 1958 S.C. 66 at 72.
7. *Haroon Haji Abdulla v. State of Maharashtra*, (1968) 2 S.C.R. 641 : 1968 S.C.D. 391 : (1968) 2 S.C.J. 534 : 10 Bom. L.R. 540 : 1968 M.L.J. (Cr.) 416 : 1968 Cr. L.J. 1017 : 17 Law Rep. 13 : A.I.R. 1968 S.C. 832 (837).
8. *Rex v. Baskerville*, (1916) 2 K.B. 658 at 667 ; *Rameshwar v. State of Rajasthan*, 1952 S.C. 54 ; *Shamsher Bahadur Saxena v. State of Bihar*, 1956 Pat. 404 ; *In re Bodhu Sanyasi Patrudu*, 1957 Andh. Pra. 482 : 1957 Cr. L.J. 939 ; *Chacko Tho-*

corroboration is by circumstantial evidence, it should sufficiently implicate the accused : it should show or tend to show that the accused committed the crime though it may not be itself sufficient for conviction. Mere existence of motive for the commission of the offence is not sufficient corroboration. Evidence of an isolated instance of association is not by itself of much corroborative value unless it is combined with other evidence of the same nature. A circumstance which has no criminal significance or which is susceptible of explanation is not sufficient corroboration against the accused.⁹ A circumstance cannot furnish corroboration of the story of an accomplice against an individual accused if either it has no criminal significance apart from details of the accomplice's story which are not themselves proved by independent evidence or the circumstance is susceptible of an innocent explanation which the Court accepts as probable.¹⁰ The evidence of an accused person's conduct may be used as corroboration of an approver's story.¹¹ The existence of general hostility, general enmity and a desire, however strong, or a motive, however effective, to procure the death of another person may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must point indubitably to the identification of the person charged with the particular act with which the direct evidence connects him.¹² The statement of an approver that the accused used deadly weapons cannot be said to have been sufficiently corroborated by the mere fact that such weapons were produced by the accused when the recovery took place before the approver gave his evidence.¹³ In a dacoity case, mere recovery of articles which are incapable of identification is not sufficient corroboration of the approver's story¹⁴ but the fact that a large amount of the

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- mas v. State, 1952 T.C. 155 ; Padmaraja Shetty, In re, 1951 Mad. 746; Ram Rao Ekoba v. The Crown, 1961 Nag. 237 : I.L.R. 1951 Nag. 349 ; Dhanapati De v. Emperor, 1946 Cal. 156 : I.L.R. (1944) 2 Cal. 312 : 225 I.C. 153 : 47 Cr. L.J. 695 ; Ram Dayal Kahar v. Emperor, 1942 Pat. 271 : 198 T.C. 78 : 43 Cr. L.J. 296 ; Safdar Ali Shah v. Emperor, 1941 Lah. 82 : 193 I.C. 878 : 42 Cr. L.J. 497 ; Abdul Salam v. Emperor, 1935 All. 132 : 154 I.C. 1015 : 36 Cr. L.J. 617 : 4 A.W.R. 1171 ; Mohan Lal v. Emperor, 1935 All. 477 : 154 I.C. 812 ; Shankar Shet Ram Shet Uravane v. Emperor, 1933 Bom. 482 : I.L.R. 58 Bom. 40 : 147 I.C. 25 : 35 Bom. L.R. 1040 ; The State of Bihar v. Basawan Singh, A.I.R. 1958 S.C. 500 ; The State of Bihar v. Srilal, 1960 Pat. 459 : 1960 Cr. L.J. 1360 ; Ramanlal v. State of Bombay, A.I.R. 1960 S.C. 961 : 1960 Cr. L.J. 1380 (direct evidence not necessary) ; Antar Singh v. State, A.I.R. 1960 Punj. 364 : 1960 Cr. L.J. 989 : I.L.R. 1960 Punj. 111.
9. Debi Dayal v. Emperor, 1942 Oudh 435 : 201 I.C. 411 : 43 Cr. L.J. 661.
10. Shankar Shet Ram Shet Uravane v. Emperor, 1933 Bom. 482 : I.L.R. 58 B. 40 : 147 I.C. 25.
11. Chattru v. Emperor, 1928 Lah. 681 : 111 I.C. 435 : 29 Cr. L.J. 851 relying on R. v. Feigenbaram, (1919) 1 K.B. 431 : 88 L.J.K.B. 551 : 120 L.T. 572 : 26 C.C. 387.
12. Kalwa v. Emperor, 1926 All. 377 : I.L.R. 48 All. 409 : 95 I.C. 74 : 27 Cr. L.J. 746 : 24 A.L.J. 410 ; see also Debi Dayal v. Emperor, 1942 Oudh 435 : 201 I.C. 411 : 43 Cr. L.J. 661 ; In re Maddi Subbanna, 1939 Mad. 469 : 183 I.C. 564 : 40 Cr. L.J. 801 ; Jiwan Singh v. Emperor, 1934 Lah. 23 (2) : 147 I.C. 215 : 35 Cr. L.J. 352 ; Ahmad Nur v. Emperor, 1923 Lah. 76 : 68 I.C. 821 : 23 Cr. L.J. 597 ; Dhamu Beldar v. King-Emperor, 1921 Pat. 406.
13. Shera v. Emperor, 1943 Lah. 5 : 203 I.C. 62 : 44 Cr. L.J. 62 ; see also Channan Singh v. Emperor, 1927 Lah. 78 (2) : 99 I.C. 929 : 28 Cr. L.J. 193.
14. Shah Alim v. The Crown, 1925 Lah. 44 : 84 I.C. 1052 : 26 Cr. L.J. 412 ; but see Hazara Singh v. Emperor, 1924 Lah. 727 : 82 I.C. 707 : 25 Cr. L.J. 1347.

stolen property was found in the possession of one of the accused is sufficient corroboration of the evidence of an approver.¹⁵ The fact that the accused was stained with human blood is not sufficient corroboration of the approver's story of murder being committed by him.¹⁶ But, it has been held, that the discovery of blood in the convict's house and on his finger nails, and his suspicious conduct on the day of murder, furnish an adequate corroboration of the approver's testimony.¹⁷ The fact that the accused was seen talking to the deceased on the evening on which he disappeared,¹⁸ or that the accused was seen with the approver a few days before the dacoity,¹⁹ is not sufficient corroboration of approver's story.²⁰

25. Extent of corroboration. As regards the extent of corroboration, in *King-Emperor v. Malhar*,²¹ after referring to the leading case of *Elahee Buksh*,²² the learned Judges observed: "Illustration (b), Sec. 114, directs attention to the general principle that it is unsafe to convict on the evidence of accomplices unless corroborated in material particulars. But, along with this principle, must be borne in mind the qualifications, taken apparently from Peacock, C. J.'s judgment, contained in the further illustrations which the Court is directed to consider when determining whether the general maxim does or does not apply to a particular case. They show, that all persons, coming technically within the category of accomplices, cannot be treated as on precisely the same footing. The nature of the offence, and the circumstances in which the accomplices make their statements, must always be considered. No general rule on the subject can be laid down. The Legislature has not done so; and the Courts, whose function it is to interpret the law, cannot do so. The decisions, however, show the principle on which Judges have acted in particular cases, and it is the duty of their successors to consider those principles and determine to what extent they are applicable to the circumstances of other cases."²³ The extent of the corroboration must necessarily vary, (a) with the circumstances of each case, and also (b) according to the circumstances of the offence charged,²⁴ including (c) the character and (d) antecedents of the accomplice, and (e) the degree of suspicion attached

15. *Maula Dad v. Emperor*, 1925 Lah. 426 : 86 I.C. 69 : 26 Cr. L.J. 693; see also *Wadhawa v. The Crown*, 1923 Lah. 389 (2) : 76 I.C. 819 : 25 Cr. L.J. 259 ; *Sher Singh v. Emperor*, 1932 Lah. 621 : 140 I.C. 19 : 33 Cr. L.J. 916.

16. *Jit Singh v. King-Emperor*, 1925 Lah. 526 : 86 I.C. 811 : 26 Cr. L.J. 875.

17. *Ghulam Hassan v. King-Emperor*, 1921 Lah. 392 (2) : 3 I.L.J. 405.

18. *Emperor v. Ram Karan*, 1925 Lah. 600 : 88 I.C. 453 : 26 Cr. L.J. 1141.

19. *Hazara Singh v. Emperor*, 1924 Lah. 727 : 82 I.C. 707 : 25 Cr. L.J. 1347 ; see also *Maula Dad v. Emperor*, 1925 Lah. 426 : 86 I.C. 69.

20. But see *Hakim v. King-Emperor*, 1923 Lah. 153 : 84 I.C. 647 : 26 Cr. L.J. 343.

21. I.L.R. 26 Bom. 193 : 3 Bom. L. R. 694.

22. 5 W.R. Cr. 80 : (1886) B.L.R. (Sup.) Vol. p. 459.

23. See also *Deo Nandan Pershad v. Emperor*, I.L.R. 33 Cal. 649 : 3 Cr. L.J. 452 : 10 C.W.N. 669 ; *Raghunath v. Emperor*, 1933 Pat. 96 : 142 I.C. 809 : 34 Cr. L.J. 421 ; *K. H. Bhattacharjee v. Emperor*, 1944 Cal. 374 : 215 I.C. 298 : 46 Cr. L.J. 94 : 48 C.W.N. 632.

24. *Rameshwar Kalyan Singh v. State of Rajasthan*, 1952 S.C. 54 : *Emperor v. Nirmal Jiban Ghose*, 1935 Cal. 513 : I.L.R. 62 Cal. 238 : 157 I.C. 387 : 36 Cr. L.J. 1115 : 39 C.W.N. 744 (S.B.) ; *Aung Hla v. Emperor*, 1931 Rang. 235 : I.L.R. 9 Rang. 404 (S.B.) ; *Debi Dyal v. Emperor*, 1942 Oudh 435 : 201 I.C. 411 : 43 Cr. L.J. 661 ; *Chetumal v. Emperor*, 1934 Sind 185.

to his evidence.²⁵ It will depend much upon (f) the nature of the crime, and (g) the degree of moral guilt attached to its commission, and (h) if the offence be one of a purely legal character, or if it imply no great moral delinquency, the parties concerned, though in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence.¹ The application of the rule is for the discretion of the Judge by whom the case is tried, and in the application of the rule much depends on the nature of the offence, and the extent of the complicity of the witness in it,² and the circumstances under which the accomplice makes his statement.³ The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence, which is necessary in any case, depends upon the particular facts and circumstances of each case.⁴ Ordinarily speaking, the evidence of an accomplice should be corroborated in material particulars. At the same time, the amount of criminality is a matter for consideration; when a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at the surrounding circumstances in order to arrive at a conclusion, whether the facts, deposed to by the person alleged to be an accomplice, are borne out by these circumstances, or whether the circumstances are of such a nature, that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice.⁵ The explanations appended to Sec. 114, illustration (b) go to show that the force of the presumption to be drawn varies as the malice to be imputed to the deponent. Whatever attenuates the wickedness of the accomplice tends at the same time to diminish the presumption that he will not acknowledge and confess it with sincerity and truth.⁶

If the position of a witness is somewhat analogous to that of an accomplice, though not exactly the same, there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy reasonable minds that the witness can be regarded as truthful.⁷

25. *Hakam Singh v. Emperor*, 1929 Lah. 850; *Jagwa Dhanuk v. King-Emperor*, 1926 Pat. 232 : I.L.R. 5 Pat. 63 : 93 I.C. 834 : 27 Cr. L.J. 484.

1. *R. v. Boyes*, (1861) 1 B. & S. 311, 320, 322 : Taylor Ev., S. 968, and cases there cited; see first supplementary illustration to Illus. (b), S. 114; see also *Chetumal v. Emperor*, 1934 Sind 185.

2. *R. v. Boyes*, (1861) 1 B. & S. 311: 30 L.J.Q.B. 302; *Srinivas Mall v. Emperor*, 1947 P.C. 135 : I.L.R. 26 Pat. 460; *Kamal Khan v. Emperor*, 1935 Bom. 230 : 156 I.C. 616 : 36 Cr. L.J. 968; *Pyarey Mohan v. State*, 1956 All. 358 :

1956 Cr. L.J. 687; *Chetumal v. Emperor*, 1934 Sind 185.

3. *Chetumal v. Emperor*, 1934 Sind 185.

4. *Emperor v. Jamuna Singh*, 1947 Pat. 305 : I.L.R. 25 Pat. 612.

5. *Kamala Prasad v. Sital Prasad*, (1901) 28 C. 339 : s.c. 5 C.W.N. 517.

6. *Muhammad Panah v. Emperor*, 1934 Sind 78 (2) : 150 I.C. 917 : 35 Cr. L.J. 1170.

7. *V. Satyanarayan Reddy v. State of Hyderabad*, A.I.R. 1956 S.C. 379 (381) (case of solitary witness for commission of crime); *Rupa Saura v. State*, (1969) 35 Cut. L.T. 175 (178).

26. **Some Supreme Court cases and other cases.** In *Sarwan Singh v. State of Punjab*,⁸ the accused was charged with the offence of murder. It was held: "The problem posed by the evidence given by an approver has been considered by the Privy Council and Courts in India on several occasions. It is hardly necessary to deal at length with the true legal position in this matter. An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted, it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. But it must never be forgotten that before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is, whether, even as an accomplice, the approver is a reliable witness. If the answer to the question is against the approver, then there is an end of the matter, and no question, as to whether evidence is corroborated or not, falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of an approver."

In *State of Bihar v. Basawan Singh*,⁹ it was held :

"The principles, on which the employment of magistrates as witnesses of police traps has been condemned, have hardly any application where the magistrates concerned are executive magistrates who perform no judicial functions, or where the officers concerned are the officers of the Anti-Corruption Department, whose duty it is to detect offences of corruption. In the case before us, Mukharji and Misra belonged to such a department. More-

8. 1957 S.C.J. 699 : 1957 Cr. L.J. 1014 : A.I.R. 1957 S.C. 637 ; *Dhani Majhi v. State*, (1972) 38 Cut. L.T. 683 (689) ; *Lacchi Ram v. State of Punjab*, (1967) 1 S.C.R. 243 : A.I.R. 1967 S.C. 792 ; *Sheshamma Bhumanna v. State of Maharashtra*, (1971) 1 S.C.R. 617 : (1971) 2 S.C. Cr. 9 : 1971 S.C.D. 115 : (1971) 1 S.C.J. 556 : 1971 M.L.J. (Cr.) 274 : 73 Bom. L.R. 806 : 1970 Cr. L.J. 1158 : 1970 K. I.T. 669 : A.I.R. 1970 S.C. 1330 (1333) ; *Piara Singh v. State*, (1969) 3 S.C.R. 236 : (1969) 2 S.C.R. 318 : 1970 S.C. Cr. R. 112 :

(1969) 1 S.C.C. 379 : 1969 S.C.D. 919 : 1969 M.L.J. (Cr.) 871 : A.I.R. 1969 S.C. 961 (965) ; *State of Gujarat v. Girasia Mangalsinh*, (1970) 11 Guj. L.R. 258 (260) ; *Abraham John v. State of Kerala*, 1969 K.L.R. 471 (478) : 1969 Cr. L.J. 1577 ; *Sarbjit Singh v. State of Punjab*, 1970 Cr. L.J. 944 ; *Devi Prasad v. State*, 1967 Cr. L.J. 134 : A.I.R. 1967 All. 64 (68) ; *State of Rajasthan v. Chhuttanlal*, I I.R. (1969) 19 Raj. 747 : 1970 Cr. L.J. 1206.

9. 1958 S.C.J. 856 : 1958 Cr. L.J. 976 : A.I.R. 1958 S.C. 500.

over, however inexpedient it may be to employ magistrates as trap witnesses, their evidence has to be judged by the same standard as the evidence of other partisan or interested witnesses, and the inexpediency of employing magistrates as trap witnesses cannot be exalted into an inflexible rule of total rejection of their evidence, in the absence of independent corroboration. The learned Solicitor-General referred, in the course of arguments, to the difficulty of detecting corruption cases and of securing conviction in such cases. We do not think that such a consideration should influence the mind of a judge. Whatever be the difficulties, *admissible evidence given in a case must be judged on its own merits, with due regard to all the circumstances of the case.* In some of the cases which have been cited at the bar a distinction has been drawn between two kinds of 'traps'—legitimate and illegitimate—as in *In re M. S. Mohidin*¹⁰ and in some other cases, a distinction has been made between tainted evidence of an accomplice and interested testimony of a partisan witness, and, it has been said, that the degree of corroboration necessary is higher in respect of tainted evidence than for partisan evidence.¹¹ We think that, for deciding the questions before us, such distinctions are somewhat artificial, and in the matter of assessment of the value of evidence and the degree of corroboration necessary to inspire confidence, no rigid formula can or should be laid down." The approver's evidence must show that he is a reliable witness, and secondly, there should be corroboration on material particulars. Corroborative evidence must relate to the identity of the accused in connection with the crime.¹² It does not seem to be the law that, if the money given as bribe is provided by a particular officer of the police, then the evidence of all the witnesses becomes the evidence of accomplices and must be looked at with suspicion. Thus, where the police or anybody else has not done any act in order to oblige any particular person, but it is one of those cases where a complaint was made to the police that the accused was demanding a bribe from the complainant and the police thereupon provided the money and were witnesses to the passing of the money, their evidence may be accepted.

As regards corroboration of accomplice witnesses, it is not necessary that there should be independent corroboration of every material circumstance. All that is required is that there must be some additional evidence, rendering it probable that the story of the accomplice or the complainant is true, and that it is reasonably safe to act upon it. The corroboration need not be direct evidence. It is sufficient, if it is merely circumstantial evidence of the connection of the accused with the crime.¹³

"This court could not have intended to lay down that the evidence of an approver and the corroborating pieces of evidence should be treated in two different compartments, that is to say, the courts shall have first to consider the evidence of the approver *de hors* the corroborated pieces of evidence and reject it if it comes to the conclusion that his evidence is unreliable, but if it comes to the conclusion that it is reliable then it will have to consider whether that evidence is corroborated by any other evidence. This Court

10. 1952 Cr. L.J. 1245.

11. See *Ram Chand Tolaram Khatri v. The State*, A.I.R. 1956 Bom. 287.

12. *Jnanendranath Ghose v. State of West Bengal*, A.I.R. 1959 S.C. 1199 : 1959 Cr. L.J. 1492 : 1960

All. Cr. R. 31 : 1960 A.W.R. (H.C.) 8.

13. *Ramanlal v. State of Bombay*, A.I.R. 1960 S.C. 961 : 1960 Cr. L.J. 1380.

did not lay down any such proposition. In that case,¹⁴ it happened that the evidence of the approver was so thoroughly discrepant that the Court thought that he was a wholly unreliable witness. But, in most of the cases, the said two aspects would be so interconnected that it would not be possible to give a separate treatment, for as often as not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence. We must also make it clear that we are not equating the evidence of Lawrence with that of an approver; nor did the Special Judge or the High Court put him exactly on that footing. The learned Special Judge in his judgment observed: 'He (Lawrence) is obviously decoy or spy and agent provocateur and his evidence will have, therefore, to be approached with great caution and much weight cannot be attached to it unless it is corroborated by other independent evidence and circumstances in the case. . . . Not being tainted evidence, it would not suffer from a disability of being unworthy of acceptance without independent corroboration. But being interested evidence, caution requires that there should be corroboration from an independent source before its acceptance. To convict an accused on the tainted evidence of an accomplice is not illegal but it is imprudent; to convict an accused person upon the partisan evidence of a person, at whose instance a trap is laid by the police, is neither illegal nor imprudent but inadvisable. . . . Shri Lawrence's evidence can, therefore, be accepted and relied upon, only if it is corroborated by other independent evidence and circumstances in the case'. The learned Judges of the High Court practically adopted the same attitude in the manner of their approach to the evidence of Lawrence. The learned Judges observed: 'To convict an accused person upon the partisan evidence of a person at whose instance a trap is laid by the police is neither illegal nor imprudent, because it is just possible that in some cases an accomplice may give evidence because he may have a feeling in his own mind that it is a condition of his pardon to give that evidence, but no such consideration obtains in the case of the evidence of a person who is not a guilty associate in crime but who invites the police to lay a trap. All the same, as the person who lodges information with the police for the purpose of laying a trap for another, is a partisan witness interested in seeing that the trap succeeds, it would be necessary and advisable to look for corroboration to his evidence before accepting it. But the degree of corroboration in the case of tainted evidence of an accomplice would be higher than that in the case of a partisan witness. In our opinion, all these decisions would clearly establish that it would not be safe to rely on the evidence of Lawrence who is admittedly a decoy or trap witness, without his testimony being corroborated from independent sources.' Even Mr. Amin, learned Special Counsel, on behalf of the State, asked the courts to proceed to examine the evidence of Lawrence on the basis that he was a decoy or trap witness. We are definitely of opinion that both the courts had approached the evidence of Lawrence from a correct standpoint. Though Lawrence was not an approver, he was certainly an interested witness in the sense that he was interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon such evidence without

14. Sarwan Singh v. The State of Punjab, 1957 S.C.R. 953 at p. 959 : 1957 S.C.J. 699 : 1957 A.W.R. (Sup.) 99 : 1957 Cr. L.J. 1014:

1957 M.P.C. 781 : (1957) 1 M.L.J. (Cr.) 672 : I.L.R. 1957 Punj. 1602 : A.I.R. 1957 S.C. 637 at p. 641.

corroboration. It would be equally clear that the evidence was not a tainted one, but it would only make a difference in the degree of corroboration required rather than the necessity for it."¹⁵

27. Corroborative proof. (1) *Matters.* Regarding the nature of the proof in corroboration, it will be seen that Illustration (b) to Section 114, is silent as to the materials on which the accomplice evidence is to be corroborated. For this purpose, not only evidence but other "matters" before the Court can be taken into account in considering whether the accomplice is to be trusted.

Following *Aung Hla v. R.*,¹⁶ dissented from in *Nga Aung Pe v. R.*,¹⁷ it has been held in *R. v. Nirmal Jiban Ghose*,¹⁸ that it is for the Court to determine in the particular circumstance of each case, whether the matter before it tending to corroborate the evidence of the approver (which may or may not be evidence strictly so called and as defined in the Evidence Act) is worthy of credence and is sufficiently reliable to be treated as evidence against the accused, and acted upon. And the evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being jointly tried with the accused for the same offence implicating both himself and the accused.

As to the demeanour of an approver while in the witness-box, as a corroborative matter, *see post*.

(2) *Nature of corroborative evidence.* The evidence in corroboration, which may be available under the Act, may be of those facts which are relevant as substantive evidence against an accused person, having the effect of showing, or tending to show, the complicity of the accused with the crime. To corroborate such facts, other facts which render these facts or the facts in issue in the case highly probable may be also proved (Sec. 11, Evidence Act).

(3) *Section 156, Evidence Act.* Further, Section 156 of the Act provides that some other facts, not directly relevant, may, in the discretion of the Court, be admitted in order to corroborate the testimony of a witness. The principle upon which this last-mentioned section is founded is, that there is often no better way of testing truthfulness of a witness than by ascertaining the accuracy of his statement as to the surrounding circumstances. When a

15. *Major E. G. Barnay v. State of Bombay*, A.I.R. 1961 S.C. 1762 at p. 1780 : (1961) 2 Cr. L.J. 828. See also *Charl v. State*, A.I.R. 1959 All. 149 : 1959 Cr. L.J. 268 ; *In re Gundla Narayana*, A.I.R. 1959 A.P. 387 ; *Ashutosh Roy v. State*, A.I.R. 1959 Orissa 159 : 1959 Cr. L.J. 1197 ; *Balbir Singh v. The State*, A.I.R. 1959 Punj. 332 : 1959 Cr. L.J. 901 ; *Autar Singh v. The State*, A.I.R. 1960 Punj. 364 : I.L.R. 1960 Punj. 111 : 1960 Cr. L.J. 989 (for necessity for corroboration of accomplice's evidence. The position of an unwilling party doing act

under pressure is not that of an accomplice) ; *Kishen Dayal v. The State*, 1958 Raj. L.W. 596. Partisan witnesses distinguished from accomplice in *Kishen Dayal v. The State*, 1958 Raj. L.W. 596. See also *Kunhi Mahommed v. The State*, A.I.R. 1959 Ker. 88 : 1959 Cr. L.J. 457.

16. (1931) 1 L.R. 9 Rang. 404 : A.I.R. 1931 R. 235.
17. 38 Cr. L.J. 785 : 169 I.C. 705 : A.I.R. 1937 R. 209.
18. 39 C.W.N. 744 : 157 I.C. 387 : 36 Cr. L.J. 1115 : A.I.R. 1935 C. 513.

witness, whom it is intended to corroborate, gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies: A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed. 'Independent' evidence of these facts may be given in order to corroborate his evidence as to the robbery itself. The section makes provision for eliciting circumstances from the witness in order to prepare grounds for the corroboration of those circumstances and it provides for the admission of evidence, not of proving directly any relevant fact, but of testing the credibility of the witness.

It may be remarked in passing that, in examining an accomplice, he should be asked about the surrounding circumstances, and independent evidence of these facts should be given, so that the Court can see whether it can believe the accomplice's evidence.

(4) *Rules as to corroborative evidence.* Certain rules are applicable to all evidence of a corroborative nature and are stated below:

(a) *It must be admissible.* In the first place, the evidence in corroboration must not be inadmissible in law. In a prosecution under Sec. 337, I. P. C., the fact, that other boys like the complainant, visited the accused in his room, does not amount to corroborative evidence, nor would such fact be evidence (being evidence of similar facts inadmissible to prove the main fact).¹⁹ Such evidence must be corroborative of the same offence as deposed to by the accomplice, and be not merely substantive evidence of several similar offences.

In a case of bringing different voters in which distinct charges on eight counts of bribery were made, it was held doubtful, if the evidence of different voters proving bribery in the distinct cases, was of the corroborative character required by law,²⁰ because all the persons were not concerned in the same offence in which they came to give evidence, and, if the witness spoke the truth, each case was separate. But, in such a case, Martin, B., charged the jury: "Assume for purposes of the present discussion that this man was speaking the truth. Is there any law which prohibits a Jury from believing a man who (it must be assumed for the sake of the argument) spoke the truth simply because he is not corroborated? I know of no rule of law myself, but there is a rule of practice which has become so hallowed as to be deserving of respect." The Jury in this case returned a verdict of guilty on one count only, and, on a motion for a new trial, the Court held, that the directions to the Jury were right, even supposing that the witnesses could be considered as accomplices of the defendant. The law on the subject was correctly laid down in *R. v. Stubbs*.²¹ It is not a rule of law that an accomplice must be corroborated in order to render a conviction valid, but it is a rule of general and usual practice to advise Juries not to convict on the evidence of an accomplice alone. The application of the rule, however, is a

19. *Bal Mukundo Singh v. R.*, (1935)

61 C.L.J. 583.

20. *R. v. Boyes*, (1861) 1 B. & S. 311.

30 L.J.Q.B. 302.

21. (1855) 25 L.J.M.C. 16 : 4 W.R. 85.

matter for the discretion of the Judge by whom the case is tried. It is not necessary that there should be corroboration of the very fact; it is enough, if evidence be such as to confirm the Jury in the belief that the accomplice is speaking the truth.

It will be seen that, in the above case, the rule, as laid down in this section, was applied in support of the conviction.

(b) *It must not be ambiguous.* If the facts to be proved are of an ambiguous nature they cannot be corroborative evidence. Hence, such facts, as are not more consistent with the testimony than the reverse, are inadmissible.²²

Thus, letters found in the possession of an accomplice, which were so ambiguously worded as to admit of no unfavourable inference being drawn against an accused person without, in the first place, accepting as correct the interpretation suggested by the accomplice himself, were held as not affording any corroboration of the story told by the accomplice.²³

On an indictment against a prisoner for receiving stolen oats, a certain quantity of oats was found on the prisoner's premises, which the prosecutor believed to be his but he could not positively identify them; it was held, that there was no adequate confirmation of the thief's evidence.

The corroborative facts need not happen subsequent to the date of the fact to be corroborated.²⁴ Nor need they be discovered, or come to the knowledge of the police, after an information was supplied by the accomplice.

In *Ibrahim v. R.*,²⁵ the evidence of certain witnesses supported the approver as to the association of the accused both before and after the dacoity. Such witnesses were first examined by the police and on getting information from these witnesses as to the movements of the party, the police examined the accused who was subsequently made an approver. It was argued that the evidence of the witnesses was not real corroboration, because the approver's statement came after the statement of the witnesses, but it was held, that it could not be said as a point of law that the evidence of the witnesses, who supported the evidence of the approver, was not corroborative evidence because the evidence was known to the police, before the approver was examined. Whether the approver was tutored to make the statement, which fitted in with the evidence of witnesses who had been previously examined, was a different question.

(c) *It must be independent.* The words 'evidence in corroboration of the approver' imply evidence other than that of the approver. A person does not corroborate himself. Hence the corroborative evidence must be some

22. Phipson on Evidence, 11th Edn., pp. 677-681. See also *R. v. Karoo*, (1866) 6 W.R. Cr. 44, 45.

23. *R. v. Chatur*, (1876) Rat. Unrep. 102.

24. See Ill. (b) to S. 156, Indian Evi-

dence Act.; Phipson, 11th Edn., p. 677.

25. (1925) 42 C.L.J. 496, 499; 26 Cr. L.J. 1146; 88 I.C. 458; A.I.R. 1926 C. 374.

additional evidence extraneous to the accomplice's evidence.¹ So, it has been held, that the accomplice must be corroborated by independent testimony.² A statement made by an approver under Sec. 164 does not amount to the corroboration of his evidence. An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition.³ Corroboration of an accomplice's evidence must be found not in his own previous confession but elsewhere, because an approver like an accomplice does not corroborate himself. But the confession can be referred to in order to show that the story as related has been consistent throughout.⁴

The intrinsic probability of the accomplice's statement is not by itself a corroboration of the truthfulness of an accomplice, though it may affect the degree of corroborative proof. So also a detailed and coherent statement of facts extending over a long period, which is difficult to remember and reproduce on suggestion, and which would be marked by discrepancies, if inspired, would not, by itself, afford a corroboration.⁵

(5) *Previous statements*, Sec. 157. An earlier statement of the same accomplice, whether it be a confession or not, requires consideration in this connection. Section 157 of the Act provides thus: "In order to corroborate the testimony of a witness, his former statement relating to the same fact, at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved."

The section accordingly provides that a previous statement is not altogether inadmissible in evidence for some corroborative purpose but whether it can be used as corroborative of the accomplice, in so far as he accuses another, is the question. Where the accused gave a girl poison to be administered to her husband, and the girl was tendered a pardon and made a prosecution witness and a statement of hers taken down by a private individual and a confession made by her before a Magistrate were put in, it was held by Rankin, C. J., Malik, J., and Guha, J., that the statement of the girl and her confession before the Magistrate were admissible in evidence under Sec. 157, Evidence Act, and that it did not seem that these documents were to be regarded from the standpoint of confession of a co-accused, and their admissibility in law is admissibility as evidence which confirms and tends to confirm the story which the girl gave in the witness-box.⁶

It will be observed that Sec. 157 does not lay down that the earlier statement of the accomplice would be corroboration of the accomplice in material particulars.

(6) *Complicity of accused*. In *R. v. Bepin Biswas and others*¹ the High Court (Prinsep and Macpherson, JJ.) observed: "The mere repetition of

1. *Nga Aung Pe v. R.*, A.I.R. 1937 Rang. 209; *R. v. Nga Myo*, 1938 Rang. 177; 175 I.C. 465; 39 Cr.

L.J. 581 (F.B.).

2. See *R. v. Bykunt Nath*, (1868) 10 W.R. Cr. 17; *R. v. Baskerville*, (1916) 2 K.B. 658; *Barkati v. R.*, 103 I.C. 49; 28 Cr. L.J. 625; A. I.R. 1927 L. 581.

3. *Bhuboni Sahu v. The King*, 76 I.A. 147; 1949 M.W.N. 444; 1949 A. L.J. 283; A.I.R. 1949 P.C. 257; *Khairo v. Emperor*, 31 S.L.R. 470;

170 I.C. 922; 38 Cr. L.J. 995; A.I.R. 1937 Sind 221.

4. *Ranjha v. State*, A.I.R. 1951 H.P. 75; 1952 Cr. L.J. 15.

5. *Siar Nonia v. R.*, (1913) 18 C.W. N. 530.

6. *Amode Ali Sikdar v. R.*, (1931) 35 C.W.N. 573; I.L.R. 58 C. 1228; 134 T.C. 896; A.I.R. 1931 C. 757.

7. I.L.R. (1884) 10 Cal. 970, 973. See *R. v. Karoo*, (1866) 6 W.R. Cr. 44.

the same statement of facts without contradiction or material discrepancy is, no doubt, recognized by Sec. 157, Evidence Act, as some corroboration of the truthfulness of that statement, but the Judge has lost sight of the fact that from the position occupied by an approver witness, his evidence is necessarily regarded with very great suspicion as being tainted, and that although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person, that his evidence should be accepted with greatest caution. Nothing is easier for a man than to narrate events with accuracy, and yet more so, when coming to describe the acts of a particular person, to change his personality so as to exculpate a guilty friend, and to implicate an innocent person or any enemy.

"It is for this reason, that the rule stated in the case of *R. v. Nawab Jan*,⁸ has always been accepted. . . . It is not necessary for us to consider whether the rule should be extended as far as to exclude a statement made before arrest; but we have no doubt at all that the exact correspondence in details of several statements made by an approver in the course of a trial, is not corroborative evidence such as we ordinarily require to make it safe to convict any particular prisoner."

In *R. v. Bykunt Nath Banerjee*,⁹ Phear, J., said: "Obviously the bare confirmation of the statement made by the approvers that the endorsing took place after Kali Kant's death is no confirmation of their statement."

In *R. v. Malapa*,¹⁰ Nanabhai Haridas, J., in delivering the judgment said: "The Sessions Judge has made use of Murgia's statements, made on different occasions to his parents and to police officers shortly after the murder. But such corroboration, we think, hardly suffices. It can scarcely be said to answer the purpose for which Juries are advised by Judges to require the evidence of an accomplice to be confirmed. From the position in which he stands it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoners by some independent reliable evidence. But his statement, whether made at the trial or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not at all improve in value by repetition.

"The force of any corroboration by means of previous consistent statements must evidently depend upon the truth of the proposition that he who is consistent deserves to be believed. If that proposition be not universally true, what becomes of the virtue of previous consistent statements? One may persistently adhere to falsehood once uttered if there is a motive for it; and should the value of such a corroboration ever come to be rated higher than it now is, nothing would be easier than for designing and unscrupulous persons to procure the conviction of any innocent man, who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times and places, implicating those innocent men."

In *R. v. Nilakanta*,¹¹ Sankaran Nair, J., took the same view; observing that if one accomplice does not corroborate another in this respect, *a fortiori*,

8. (1867) 8 W.R. Cr. 19 (26).

9. (1868) 10 W.R. Cr. 17, 18.

10. 11 Bom. H.C.R. 196 (see also 1952

S.C. 54).

11. I.L.R. (1912) 35 Mad. 247.

a man's own statement made on a previous occasion cannot be said to be a corroboration of the later statement for this purpose. But White, C. J., and Ayling, J., remarked (p. 271): "If this is intended as a proposition of law we cannot accede to it, though as a proposition of fact with reference to the facts of the particular case before the Court, it may have been indisputable."

The question coming before five Judges in review under Sec. 6 of the Letters Patent in sub-nominee *Muthukumaraswami Pillai v. R.*¹² it was held (by Benson, Wallis and Miller, JJ.)¹³ that in law the previous statement of an accomplice can legally amount to corroboration of the evidence given by him at the trial. Per Benson, J.: "I do not think there is anything in the Indian Evidence Act to exclude the evidence of accomplices from the plain and express rule in Sec. 157, nor can it be suggested that 'corroborate' is used in Sec. 157 in a different sense from that in which it is used in Illustration (b) to Sec. 114. The former statement of an accomplice is, therefore, legally admissible to corroborate his testimony at the trial and the weight to be attached to it, or, in other words, how far it does really corroborate the evidence given at the trial must vary with the facts of each case. No hard and fast rule, capable of mechanical application, can be laid down. In the great majority of cases it would, no doubt, be found to be merely the repetition of tainted evidence affording no ground for believing it to be true, and, therefore, adding nothing whatever to its value. On the other hand, if there was evidence, or even a suggestion, put forward by the defence that the evidence, given by the witness at the trial was the result of recent influences brought to bear upon him, it would be most important to be able to prove that the witness had made statements to the same effect as his evidence at the trial long before the influences relied on by the defence had been brought to bear upon him (p. 427). If it is necessary in this case to determine whether the phrase 'material particulars' in Illustration (b) to Sec. 114, is to be regarded, as, in some sense, a technical expression implying corroboration by independent and untainted evidence, I am unable to go so far and to say that as a matter of law the previous statement of an accomplice can never amount to corroboration in material particulars (p. 430). If there are some circumstances in which a prior statement may amount to sufficient corroboration, we cannot say as a matter of law that a prior statement can never be corroboration in material particulars, though, no doubt, in the great majority of cases, it will be found that the prior statements do not add anything to the credibility of the evidence given at the trial... How far a prior statement does corroborate evidence given at the trial is a matter to be determined by the Jury or, where there is no Jury, by the Judge." (p. 431).

Per Wallis, J.: "Previous statements admissible as corroboration under Sec. 157 of the Indian Evidence Act may or may not amount to sufficient corroboration and whether they will be so or not depends upon the facts and circumstances of the particular case (pp. 441-442). Taken by itself the previous statement may of course be as tainted and untrustworthy as the evidence in the box and not supply any real corroboration; but, on the other hand, the circumstances in which it was made may afford strong corroboration of its truthfulness apart from the credibility of the accomplice." (p. 442).

Per Miller, J.: "I see danger and not safety in ruling out as admissible in the case of accomplice witnesses any tests of credibility which are

12. I.L.R. (1912) 35 Mad. 397.

13. The Bench consisted, besides, of

Abdur Rahim, J and Sundara Ayyar, J..

available in the case of other witnesses whether the test applied tends to confirm or to discredit the evidence." (p. 454).

Per Sundara Ayyar, J.: "The previous statement of an accomplice cannot legally amount to corroboration within the meaning of illustration (b) to Sec. 114 of the Indian Evidence Act. The question whether it is admissible at all as corroborative evidence under Sec. 157 for any other purpose is not free from doubt. It is possible to hold that it is admissible for proving his consistency and as disproving a suggestion that it was recently concocted by him. But I am inclined to think that it would be dangerous to admit it even for this limited purpose of proving his consistency. To do so would lead to the danger of its being relied on to prove the truth of the evidence also. This is likely to defeat the object of the rule requiring independent evidence of corroboration. The safer rule, in my opinion, would be to hold that Sec. 114, Evidence Act, illustration (b), requires the rejection of the previous statement altogether." (p. 524).

In *Barkat Ali v. R.*,¹⁴ it was held that previous statements of an accomplice may amount to corroboration.

In *R. v. Nga Myo*,¹⁵ Roberts, C. J., observed: "If a person A is giving evidence as to the confession of a crime and declares that he made similar statements about the time of its commission, he does not thereby corroborate himself, nor strengthen his own testimony. But if in support of A's evidence, it is proved from another source that A did make a statement of a kind similar to his evidence, about that time, then the fact thus proved may be taken as corroboration of A's statement in evidence that he did so, and as showing the consistency of his testimony and conduct. For example, the contents of a first information report are not evidence of the truth of the matters stated therein; but it may be proved in evidence that A made it and the contents of the report may be proved in order to corroborate A's testimony when he is later called as a witness."

In the above case, Roberts, C. J., pointed out that such earlier statements of the accomplice are not, strictly speaking, corroborative of the truth of the matter stated by the accomplice and if proved by other evidence is corroborative of the fact that such a statement was made and as showing the consistency of the accomplice testimony and conduct.

Confessions made by approvers are not substantive evidence, but may be used only for the purpose of contradicting or corroborating their deposition in Court.¹⁶ It would thus appear that though previous statements are admissible for certain purposes, they do not form such corroborative evidence as is required in the case which must be independent evidence implicating the accused.

(10) *Police statement of the approver.* In *Nilkanta's case*, it was held by all the Judges, following the Calcutta decision in *Fanindra Nath Banerjee v. R.*,¹⁷ that statements of the approver made before the police during investiga-

14. (1917) 18 Cr. L.J. 29 : 36 I.C. 861 : A.I.R. 1917 L. 52.

15. 39 Cr. L.J. 581 : 175 I.C. 465 : A.I.R. 1938 Rang. 177 (F.B.).

16. *Nitai Chandra Jana v. R.*, (1937) 38 Cr. L.J. 852 : 170 I.C. 201 : A.I.R. 1937 C. 433. See also *Bhu-*

boni Sahu v. The King, A.I.R. 1949 P.C. 257.

17. I.L.R. 36 Cal. 281. See *R. v. Nga Tha Din*, I.L.R. (1926) 4 Rang. 72 : 96 I.C. 145 : 27 Cr. L.J. 881 : A.I.R. 1926 R. 116.

tion could be used to corroborate him; but, subsequent to the above decision, the law has been changed and an use by the prosecution of any such statements, oral or reduced to writing, is not permitted by the present Sec. 162, Cr. P. C. (now see Section 162 of 1973 Code).¹⁸

In Nilkanta's case, it was held by White and Ayling, JJ., that the confession of the approver before the police could be used to show that his evidence at the trial was true, but Sankaran Nair, J., held that the confession is not the less a confession because it is sought to be used against other persons and the confessions made to the police are inadmissible in evidence against the other accused under Sec. 25. The question coming before a Special Bench, it was held by Benson, Wallis and Sundara Ayyar, JJ., that a statement of a confessional nature made by a witness to a police officer was inadmissible for all purposes.

When the statements are admissible confessions, how far they can be used as evidence against a person on joint trial has been discussed before. Regarded as a piece of evidence to corroborate the approver, it will be seen that such statements do not come from an independent source. Besides, the corroboration which is afforded by such statements is corroboration only of the narrative of the accomplice.

(11) *Statement of another accomplice.* When instead of the statement of the same accomplice, a statement of another accomplice is put forward either in the shape of evidence of another approver or a confession of a co-accused person on joint trial, the question arises, if such evidence is legal or sufficient for corroboration purposes. Such evidence comes no doubt from a fresh source but is not independent in the sense that it can stand by itself.

The practice of requiring the evidence of an accomplice to be confirmed applies equally when two or more accomplices are produced against a prisoner. In a case, where two accomplices spoke distinctly as to the prisoner, Littledale, J., told the Jury that if their statements were the only evidence, he could not advise them to convict the prisoner, adding that it was not usual to convict on the evidence of one accomplice without confirmation and that, in his opinion, it made no difference whether there were more accomplices than one.¹⁹

In the case of *R. v. Dwarka*,²⁰ it was distinctly laid down that "the evidence of two more accomplices requires confirmation equally with the testimony of one."

In *R. v. Ram Saran*,²¹ Straight, J., observed: "There must be some corroboration independent of the accomplice, or, as in the present case, of the accomplice and the co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. I may add that it is of no value and makes no difference if there are two accomplices. A second accomplice does not improve the position of the first, nor does the fact that there are two, make it necessary that both should be corroborated."

18. See *Azimuddi v. R.* (1926) 44 C. I. J. 253; *A.I.R.* 1927 Cal. 17.

19. *R. v. Noakes*, 5 C. & P. 326

20. (1866) 5 W.R. Cr. 18; see *Sahra v. R.*, 20 P.R. Cr. 1919; *Kisan v. R.*, 67 I.C. 343; 6 N.L.J. 52;

1922 Nag. 172; *Md. Usuf v. R.*, 114 I.C. 457; 30 Cr. L.J. 311; 1929 Nag. 215; *Bacha Babu v. R.*, 155 I.C. 369; *A.I.R.* 1935 All. 162 (a conspiracy case).

21. 1885 A.W.N. 311, 313.

In *R. v. Maganlal*,²² several persons who offered bribes to the accused were examined as witnesses and, in the opinion of the Magistrate, there was no reason to disbelieve their evidence. The convictions were held illegal, there being no evidence to corroborate the witnesses for the prosecution, all of whom were accomplices.

In *R. v. Chatur*,²³ West and Nanabhai Haridas, JJ., stated: "The statement of one accomplice is not strengthened by the concurrent statements of any number of accomplices. The corroboration must proceed from an independent source. So, it has been held, that two or three accomplices are the same as one in the absence of corroboration implicating the accused.²⁴ Because the accomplice's evidence comes from a tainted source the nature of corroboration is not mere evidence of a tainted kind but fresh evidence of an untainted kind.²⁵ So in *R. v. Genu Gopal*,¹ it was held that the corroboration of an accomplice must, therefore, be by unimpeachable or independent evidence, as distinguished from that derived from the earlier statements of the same accomplice or the statements of other accomplices.

Again, it was held in *Kashemali v. R.*,² that the corroboration in material particulars must come from independent witnesses and not from the evidence of an accomplice. When the only evidence against an accused person is a confession of an accomplice and the evidence of other accomplices, omission in the charge to the Jury to point out this requirement of the law is serious misdirection.

A co-prisoner's confession is no corroboration or no corroboration of any value of an accused person on trial who did not confess. Such a confession cannot be a reliable corroboration of an approver's testimony against an accused person on trial, because such a confession cannot be put on a higher footing than the co-accused's evidence if he also were admitted to give evidence as an accomplice.

In *R. v. Bepin Biswas and others*,³ the High Court (Prinsep and Macpherson, JJ.) observed: "The Judge has further misdirected the jury in telling them to regard as evidence in corroboration of the approver, the statements made by the prisoners Bepin and Kunju when examined by the Magistrate. Such statements are no legal corroboration of the tainted evidence of the approver. Statements so made are certainly of no higher value than that of an approver. It should also be remembered that a prisoner under trial would have the advantage of cross-examining an approver, whereas the statement of a fellow prisoner, which would be as much tainted as that of an approver, would be subject to no such test.⁴ In the case now before us, we would further point out that the fact that the statements made by Bepin and Kunju before the Magistrate were made in the absence of the other prisoners

22. I.L.R. (1889) 14 Bom. 114.

23. Rat. Un Cr. Case: 102 : Cr. Rg. 17-1-1876.

24. *Ambica Charan Roy v. R.*, (1931) 35 C.W.N. 1270 ; *Hafizuddin v. R.*, (1934) 38 C.W.N. 777 ; *Mahadeo v. R.*, (1936) 40 C.W.N. 1164 ; *Lafat Hossain Biswas v. R.*, (1928) 33 C.W.N. 58.

25. *Nga Aung Pe v. R.*, 169 I.C. 705 : 1937 Rang. 209 ; *R. v. Malapa*, (1874) 11 Bom. H.C.R. 196 ; *R.*

v. Baijoo Chowdhry, (1876) 25 W.R. Cr. 43.

1. Unrep. Bom. 840.

2. (1932) 36 Cr. L.J. 874 ; see 36 Cr. L.J. 686 ; *Nga Aung Pe v. R.*, (*supra*) ; *Bimal Krishna v. R.*, (1935) 39 C.W.N. 761 : 37 Cr. L.J. 840 : 163 I.C. 566 : 9 R.C. 30.

3. I.L.R. (1884) 10 Cal. 970, 974.

4. *R. v. Naga*, 23 W.R. Cr. 24.

whom it is intended to implicate thereby, should alone have induced the Sessions Judge to caution the Jury against attaching any weight to them at all, except as against those who made them."

In *R. v. Malapa*,⁵ Nanabhai Haridas, J., said: "But it is also contended that the confession of Parapa, the fellow prisoner of the accused, affords further corroboration. We cannot accede to this contention. Under Sec. 30 of the Evidence Act, we may, no doubt, take into consideration Parapa's confession as against the accused; but we do not think we can use it to corroborate the evidence of the approver Murgia, because it cannot be put upon a higher footing than Parapa's evidence would be, if he also were admitted to give evidence as an accomplice. In such a case, the evidence of one accomplice could not be taken to corroborate the evidence of the other; but the evidence of either would require corroboration before it could be acted on."

In *R. v. Budhu Nanku and others*,⁶ the conviction of seven of the appellants was based on the testimony of two approvers who were not corroborated as to the identity of the appellants, except by the confessions of other persons tried with them. The High Court (Westropp, C. J., and Nanabhai Haridas, J.) held that the conviction based on the testimony of approvers, uncorroborated as to the identity of the accused persons, could not be sustained; and that confessions of co-prisoners, implicating him, could not be accepted as evidence to corroborate the testimony.⁷

In *R. v. Jaffir Ali*,⁸ it was held, that a confession admissible under Sec. 30 cannot be used as evidence corroborating in any way the evidence of approvers against persons who did not confess. Glover, J., remarked, "tainted evidence is not better by being doubled in quantity" (p. 58). The same Judge in *R. v. Baijoo Chowdhry and others*,⁹ said: "Tainted evidence is not made better by being corroborated by other tainted evidence." The same view was taken in *R. v. Udhan Bind and others*,¹⁰ where Kemp, J., in delivering judgment said: "The statement of Mohun not being corroborated in any material points, except by the confessing prisoner Chooramun, whose statement labours under the same infirmity as that of the approver Mohun, we think that, taking all the circumstances of the case into consideration, it would not be safe to convict the prisoners upon this evidence" (p. 69). See also *R. v. Bepin Biswas*,¹¹ where it was held that to tell a Jury that the confession of a fellow-prisoner is a corroboration was a misdirection.

In *R. v. Chand*,¹² four accused persons, B, C, M and T being committed for trial on a charge of murder, B was made an approver, and M and T pleaded guilty; and the trial thereupon proceeded against C alone: it was held by Nanabhai Haridas and Birdwood, JJ., that the statements of M and T could not be used against C to corroborate the evidence of the accomplice B; and that as M and T pleaded guilty, and as the trial proceeded against C alone, he was not being tried together with them and Sec. 30 of the Evidence Act had no application to their statements.

In the trial of R, S and M, upon a charge for murder, the evidence for the prosecution consisted of (i) the confession of P, (ii) the evidence of an

5. (1874) 11 Bom. H.C.R. 196.

6. I.L.R. 1 Bom. 475.

7. See also *Vyasa Rao v. R.*, 9 I.C. 897; 12 Cr. L.J. 150.

8. (1873) 19 W.R. Cr. 57.

9. (1876) 23 W.R. Cr. 43.

10. (1875) 19 W.R. Cr. 68.

11. I.L.R. (1894) 10 Cal. 970, 971.

12. Unrep. Bom. 400.

accomplice, (iii) the evidence of witnesses who deposed to the discovery in R's house of property belonging to the deceased, and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found. It was held that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner.¹³

So, it has been held, that the confession of a co-accused person corroborated by the confession of other accused persons is insufficient for conviction.¹⁴

In *Bhuboni Sahu v. The King*,¹⁵ their Lordships of the Privy Council held, that "although a conviction founded on the evidence of an approver supported only by the confession of a co-accused may be justified in law under Sec. 133, Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused given independently and without an opportunity of previous concert, might be entitled to great weight, we would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience which requires some independent evidence implicating the particular accused."¹⁶

The evidence of one accomplice, who is himself unworthy of credit, cannot be corroborated or confirmed or strengthened by the evidence of another accomplice who is equally unworthy of credit. In the case of the evidence of several accomplices, the Court must take the evidence of each of the accomplices separately and decide whether or not that evidence is worthy of credence and ought to be acted upon without further corroboration. If it is satisfied that any one of the accomplices is so deserving of credence, there is an end of the matter. If, on the other hand, the evidence of each of the accomplices is unworthy of credence, the Court before convicting any of the accused persons, must be satisfied that as against that accused person, there is testimony, independent of that of the accomplices, which connects or tends to connect him with the crime.

The evidence of one accomplice is not available as corroboration of another.¹⁷ The Lahore High Court stated in *Sharif v. Emperor*,¹⁸ that it has been held, time after time, that the evidence of one approver cannot be corroborated by that of another approver. There must be independent corroboration.

(12) *Retracted confession of a co-accused.* Where the confession of a co-accused is retracted, such a confession of a co-accused is not the testimony of an accomplice within the meaning of Sec. 133. The law, with regard to a retracted confession, or rather its evidentiary value when it is sought to be used as against a co-accused, is well settled so far as the Calcutta High Court is concerned. It has been laid down in a long series of cases of which it is necessary only to refer to *Yasin v. R.*,¹⁹ and *R. v. Lalit Mohan Chuckerbutty*,²⁰ that a retracted confession should practically carry no weight as against the

13. *R. v. Ram Saran*, 1885 A.W.N. 311.

14. *Takanah v. R.*, (1905) 10 C.W.N. 16; but see *Nga Hla Maung v. Emperor*, 38 Cr. L.J. 774.

15. A.I.R. 1949 P.C. 257.

16. See also *Kashmira Singh v. State of M. P.*, 1952 S.C.R. 526 : 1952 S.C.J. 201 : 1952 S.C.A. 474 : 1952

S.C. 159.

17. *J. M. Cohen v. The King*, 1949 Cal. 594 : 53 C.W.N. 479; *Kunj Behari v. State*, 1951 Pat. 84.

18. 1944 Lah. 472 : I.L.R. 44 Lah. 465 : 216 I.C. 253.

19. I.L.R. (1901) 28 Cal. 689.

20. I.L.R. (1911) 38 Cal. 559.

person other than the maker.²¹ As corroborative of the testimony of an accomplice witness, it cannot also be used, as it does not come from an independent reliable source and is practically of no weight.

In *Baboo Singh v. R.*,²² the evidence against Baboo Singh was the retracted confession of Kallan Khan and that confession alone primarily and directly connected Baboo Singh with the murder of the deceased. The Sessions Judge finding the retracted confession corroborated, treated it as substantive evidence against Baboo Singh. It was held by the Oudh Chief Court, that little or no reliance could be placed on such a retracted confession, so far as the co-accused is concerned, and further the Court should not legitimately apply rules of prudence (i.e., the accomplice should be corroborated in material particulars) which relate to the sworn testimony of an accomplice or approver to the retracted confession of a confessing prisoner, and by means of the application of these rules impliedly make the retracted confession substantive evidence against the persons accused along with the confessing prisoner.

(13) *Retracted deposition of a witness.* A confession of a co-accused, which is retracted, may indeed not be used as corroborative evidence.²³ In the above-noted case, as regards the accused's participation in the crime, the best corroboration was found in his judicial confession. He was found working in a jute mill, taken into custody and produced before a Magistrate for recording his confession. The confession was retracted on the grounds that it was not voluntarily made and that it was not true. It was held, that when the co-accused makes studious attempts in his confession to show that he was an unwilling accomplice in the commission of the crime, his confession cannot be used against the other accused, but it can be used to a limited extent against himself, as corroborating the evidence of a witness, when the evidence of that witness is the main evidence against him, and that portion of the confession, which incriminates the maker, may be used as corroborative of the evidence of such witness.²⁴ In this connection it may be mentioned that it would be highly unsafe to use the retracted deposition of a witness admitted under Sec. 288, Cr. P. C., (no corresponding section in 1973 Code) as corroboration of a retracted confession.²⁵

(14) *Several statements made without concert.* Regarding the above general rule that an accomplice cannot be corroborated by the testimony of another accomplice, Sir Barnes Peacock, C. J., in *R. v. Elahee Buksh*,¹ after quoting the dictum of *R. v. Noakes*,² said: "This, as a general rule, is correct for otherwise two companions in guilt might get off by confessing and falsely accusing two innocent persons. But if two or three persons should be apprehended at different places at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion might be proved in corroboration of his evidence; such statement being admissible as corroborative evidence under Act II of 1855, Sec. 31 (now Sec. 157 of the Act). The evi-

21. *Movzes v. R.*, (1924) 40 C.L.J. 551.

22. (1935) 37 Cr. L.J. 163.

23. *Paramhansa Jadab v. State*, A.I.R. 1966 Orissa 144 : 1963 O.J.D. 372.

24. *Ibid.*

25. *R. v. Jadub Das*, I.L.R. (1900) 27

Cal. 295 : *Pirithi v. R.*, 1917 Lah. 331 : 40 I.C. 703.

1. (1866) 5 W.R. Cr. 80 ; see also *Bhuboni Sahu v. The King*, 1949 P.C. 257 : 76 I.A. 147 : 62 L.W. 664.

2. (1832) 5 C. & P. 326.

dence of the several accomplices, so corroborated, might be sufficient to satisfy a Jury, although the evidence of one of them alone could not have been safely acted upon. These are matters to which the attention of a Jury ought, under all circumstances, to be specially directed with proper remarks from the presiding Judge, according to the rule laid down by Mr. Justice Butler in the case already cited."

In the second illustration appended to the exception to illustration (b) of Sec. 114 it is laid down: "A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable." Such facts should be considered by the Court in seeing whether the maxim of corroboration does or does not apply to the case.

This illustration, as observed before, is in accordance with the language of Peacock, J., in the case of *R. v. Elahee Buksh*.³ With respect to this illustration, Phear, J., in the case of *R. v. Sadhu Mundul*,⁴ observed: "It is true that the instance of corroboration which is appended to illustration (b) of Sec. 114, and which has been already referred to, is corroboration to be found in accounts of an occurrence given by accomplices; but it is noticeable that the Legislature expressly makes it a condition to the validity of this corroboration that these accomplices should have been captured on the spot and kept apart from each other, and, moreover, there is not the slightest indication that the Legislature intended in this passage by the term 'accounts given by the accomplices' anything other than accounts given in due course of examination as witness. In view therefore of the stringent condition, which the Legislature has here prescribed as essential to the corroborative force of the accomplice's account, we think that the mere confessions of prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence under Sec. 30, do not come within the scope of this legislative declaration, that, under the special circumstances mentioned, the account given by one accomplice may be treated as corroboration of the account given by another."

It is submitted that it is not necessary that the accounts should be given as witness, provided the statements made by them are proved according to law. Neither is it a necessary condition that the several accomplices should be captured on the spot and kept apart. These circumstances are only illustrative of the fact that in certain circumstances the account of different accomplices may be accepted by the Court as corroboration.

The result is, that although the evidence of one accomplice is not sufficient corroboration of that of another so as to justify a conviction, yet, there may be circumstances, such as, where previous concert by the informer is highly improbable, in which the agreement in their stories cannot have been arranged between them beforehand, which must be taken into account.⁵

In *Darya v. R.*,⁶ it has been observed, that "if ample opportunity of consultation is shown, the corroborative value would be greatly diminished,

3. (1866) B.L.R. (Sup.) Vol., p. 459.

4. (1874) 21 W.R. Cr. 69.

5. *R. v. Ningappa*, (1905) 2 Bom. L.R. 610.

6. 77 I.C. 904 (Lah.).

but in the present case, there was nothing to suggest collaboration. There is, consequently, no reason why the two statements should not be given weight for corroborative purposes."

In *R. v. Chagari Dayaram*,⁷ Birdwood, J., observed: "The evidence of the accomplices has not, moreover, the merit of having been given without the possibility of any sort of concert. The witnesses are said to have been all present, when each was examined by the *mamlatdar*. This circumstance deprives their evidence of the value, which it would undoubtedly have had, if they had been examined separately and had then confirmed each other's statements in all details."

In *Lala v. R.*,⁸ Chevis, J., said that "in cases where a large number of persons have been arrested by the police and confessions are obtained one after the other, it is likely enough that those confessions should agree with each other, each man would be likely to name, as far as possible, those persons who have already been named in the previous confession. The fact of any particular person having been named in the confession of more than one of the co-accused cannot be regarded as sufficiently reliable corroboration of the statement of an approver. In such a case, each person accused is entitled to claim that as against him the statement of the approver shall be corroborated by some reliable evidence."

In *Mahant Narayan Das v. R.*,⁹ it was held that the statement of one of the accused persons who had denied his complicity before the Committing Magistrate but in the Sessions Court pleaded guilty and at the conclusion of the prosecution case made a statement inculcating himself and other persons, must be regarded as tainted and should not in that case be used to corroborate the testimony of the accomplices; and, it was further held that the evidence of one approver cannot be said to corroborate another, except where both have, at the earliest opportunity, and, before there has been any chance of collaboration, deposed to the same acts having been committed by a particular accused person.

In *Hakam v. R.*,¹⁰ it has been held, that the testimony of an approver is of little value as a piece of corroborative evidence. The testimony of an approver can be used for corroboration, if the taint is removed to such an extent that the Court is prepared to believe it in the same way as the testimony of an ordinary witness.

*Ordinarily, the testimony of one accomplice would not be sufficient to corroborate that of another.*¹¹ But an exception arises. As the Supreme Court has held, if several accomplices, simultaneously and without previous concert, give a consistent account of the crime implicating the accused, the court may accept the several statements as corroborating each other.¹² But it

7. I.L.R. (1890) 14 Bom. 331, 339.

8. (1921) 23 Cr. L.J. 158 (Lah.).

9. I.L.R. 3 Lah. 144.

10. A.I.R. 1929 Lah. 850.

11. See Note 20, ante, p. 2302 and the cases collected in fn. 6 on that page.

12. Mohd. Hussain Umar v. K. S. Dilip Singhji, (1970) 1 S.C.R. 130;

1970 S.C.D. 58 : 1970 S.C. Cr. R. 76 : (1970) 1 S.C.J. 149 : 72 Bom. L.R. 774 : 1970 Cr. L.J. 9 : 1970 M.L.J. (Cr.) 68 : A.I.R. 1970 S.C. 45 (56) following Haroon Haji Abdulla v. The State of Maharashtra, 70 Bom. L.R. 540 (545) : A.I.R. 1968 S.C. 832 (837) : I.L.R. (1974) 2 Delhi 706.

*must be established that the several statements of the accomplices were given independently and without any previous concert.*¹³

(15) *Absence of concert—Effect.* S. K. Ghose, J., in *Bimal Krishna Biswa v. R.*,¹⁴ said: "It has been held, in some cases, that it is not illegal to base a conviction on such testimony, if it is corroborated by other accomplice evidence. But, that is not tantamount to saying that independent corroboration is not necessary, or that the corroboration of one tainted evidence by another tainted evidence is independent corroboration. Merely because a particular thing is not illegal, is no reason for doing that particular thing; the question is what is just and proper in each case. The qualification of illustration (b) only points out that, in a particular case, there may be circumstances, showing previous concert among accomplices to be highly improbable, which may lessen the degree of independent corroboration required. But these circumstances have themselves to be proved by independent evidence, and it does not make the rule of caution inapplicable."

Henderson, J., held in the above case: "But in order that the evidence of the accomplices may be safely relied on as mutually corroborative, the Court must have the guarantee that they were not acting in concert, or that they had no opportunity of consultation, or that there was no bargain between them and the prosecution to the effect that they might be dealt with leniently, if they agreed to give evidence."

(16) *Proof of absence of concert.* It has been pointed out by Richards, C. J., that where several accomplices implicate the same accused person without any previous collusion the assurance, in such a case, is derived, not because each of the accomplices corroborates the other, but because another circumstance, viz., the mention of the same accused without any collusion comes into existence in such a case and that really corroborates the accomplice or accomplices. Says the learned Chief Justice: "There is nothing in the Evidence Act to suggest that the word 'corroboration' in British India has a specialised and different meaning from that which it bears in other parts of the British Empire. Corroboration means independent testimony. When in the case of an accomplice it is desirable because the accomplice's evidence comes from a tainted source, the nature of corroboration required is not mere evidence of a tainted kind but fresh evidence of an untainted kind. . . . Since Sec. 133, Evidence Act, lays down that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, it follows that if there be three accomplices A, B and C, the Court may reject the evidence of A and convict upon the uncorroborated evidence of B and C or reject A's and B's evidence and proceed to convict upon C's evidence alone. But it is a misuse of words to say that the evidence of any one of these witnesses can 'corroborate' that of others: there is no corroboration between accomplices, if the source of their evidence is tainted, and a Court which convicts, in such a case, is convicting upon uncorroborated testimony. It is important to realise what is and is not corroboration. Once the evidence of a witness is open to suspicion and by a rule of prudence corroboration is required... it is not corroboration at all, unless it proceeds from

13. Mohd. Husain Umar v. K. S. Dalip Singhji, (1970) 1 S.C.R. 130, citing Bhubuni Sahu v. The King, 76 T.A. 147 (156-57); A.I.R. 1949

P.C. 257 (260-61); Y. Hanuman v. State of Kerala 1974 Ker L.T. 328
14. (1935) 39 C.W.N. 761.

an untainted source, or from a source, which though tainted corroborates the testimony of an accomplice on matters implicating the accused with a criminal offence in such circumstances that the Court is satisfied that there can have been no collusion between the tainted witnesses, and that therefore the objection that the evidence is tainted has lost its force. It must be observed that there is a danger as to this collusion. The question of probability of their collusion, even in a case such as is mentioned in the second illustration given to Sec. 114, must not altogether be left out of account. An approver displays characteristics of the meanest type and when dishonour stands confessed as it does by the evidence of an accomplice, though in law a conviction may follow on his uncorroborated testimony, the utmost care should be taken by the Court or Jury or by the appellate tribunal to see that the special circumstances of the case justify reliance upon this rule of law to the exclusion of the rule of practice dictated by reasonable caution and endorsed by the wisdom of the Judges over a considerable period of years in a large number of widely differing cases".¹⁵

In *R. v. Nga Myo*,¹⁶ the same learned Judge (with whom the other Judges concurred) said: "If A, B and C say that their accounts ought to be believed because they were kept apart, such statement would also have to be viewed with suspicion. But, if from a source which is not open to suspicion at all, there is evidence which convinces the Court that A, B and C were really kept apart and had no opportunity of making up their stories together, then it is clear that a fact has been proved which renders the stories credible and may rebut the presumption that the accounts given by A, B and C are unreliable. It is not the mere fact that the accounts corroborate each other, but the additional fact that they had no opportunity of collusion (which must be proved from a source which is not unworthy of credit) which may enable a Court to dispense with the need for corroboration of the accomplices. In the case of a co-accused it will generally be found that his confession is even more open to suspicion than is the evidence of an accomplice. Nevertheless, it is a 'matter', which the Court can take into consideration when deciding whether the guilt of an accused person has been proved beyond reasonable doubt. In most cases, it can add little, if any, weight to the evidence of an accomplice or approver. But, if the presumption of its unreliability has been rebutted by extraneous evidence the fact may enable it to add weight to the evidence of an approver or an accomplice, or may even dispense with the necessity for corroboration in the particular case. The test, in all these cases, is whether the sum total of the matters before the Court has satisfied the Court that it is safe to record a conviction."

The view, in short, is that, although the cumulative evidence of two or more accomplices given without collusion may have the effect of not requiring corroboration in such a case, such a case forms an instance where the special circumstance in which Sec. 133 applies comes into existence and that the evidence becomes acceptable, not because of the agreement *inter se* of such witness but because a circumstance that is, an agreement of the several statements has come into existence, in such a case, so that the rule that one tainted evidence cannot corroborate another is not affected by such a case.

15. *Nga Aung Pe v R.*, (1937) 38 Cr. L.J. 785 : 169 I.C. 705 : A.I.R. 1937 Rang. 209.

16. 175 I.C. 465 : 1938 Rang. 177 (F.B.).

It was held in *Nga Tun Shwe v. Emperor*¹⁷ that the evidence of an approver can be corroborated by the confession of a co-accused jointly tried, even though the confession is retracted, but the ruling is of doubtful authority after the Special Bench decision in *R. v. Nga Myo*.¹⁸ In the above case of *R. v. Nga Myo*,¹⁹ the learned Judges said: "We should lay down clear propositions which interpret the Evidence Act and which are to be applicable to all Courts in British Burma for the future. We also desire to state that in questions relating to matters expressly provided for in the Evidence Act, it must not be dealt with as a mere modification of the Law of Evidence prevailing in England. The Evidence Act is, as it was intended to be, a complete code of the Law of Evidence in British Burma.

From a consideration of all the matters to be dealt with it is apparent, first: Provided it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit of their statements, and if this be the case, a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused, where the presumption of their unreliability has, in the special circumstances, been rebutted. Secondly: That evidence from a source, which is not *prima facie* unworthy of credit, may prove a fact which displaces, in a particular case, the presumption that an accomplice is unworthy of credit. Thirdly: That corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. But, it may consist of extraneous proof of fact relating to that very person's prior conduct."

(17) *Nature of corroborative evidence.* It is not possible to enumerate, classify or define the kind of evidence which may corroborate an accomplice. Neither is it possible to lay down the extent of corroboration required in a particular case. What appears to be required is that there should be some fact deposed to independently, altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it.²⁰

It has been observed in *R. v. Baskerville*,²¹ that the nature and extent of corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be, in a high degree, dangerous to attempt to formulate the kind of evidence which would be regarded as corroborative, except to say that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. There must be evidence which associates, or tends to associate, each individual accused with the crime, or there must be such evidence as to the identity of the accused as satisfies the Court that when the approver speaks as to the complicity of this accused and that accused in the offence, he speaks the truth.²² There must be sufficient evidence rendering it

17. (1937) 98 Cr. L.J. 705 following *Nyein v. R.*, I.L.R. (1935) 11 Rang. 4.

18. 1938 Rang. 177 : 175 I.C. 465 (F.B.).

19. *Ibid.*

20. *R. v. Birkett*, (1839) 8 C. & P. 732 ; *Emperor v. Ram Singh*, 1948 Lah. 24.

21. (1916) 2 K.B. 658.

22. *Khairo v. R.*, (1937) 98 Cr. L.J. 995.

probable that the story of the accomplice is true and that it is reasonably safe to act upon it.²³ In other words, it should be such corroboration as would induce a prudent man, on the consideration of all the circumstances, to believe that the accomplice's evidence is true not only as to the narrative of an offence but also as far as it affects such person thereby implicated.²⁴ The corroborative evidence must be such as to satisfy the Court that the approver has not substituted the name of one or more of the accused for that of some other person, possibly a particular friend of his own, who actually took part in the guilt.²⁵

The position is summed up by Bhide, J., in *Hariram v. R.*,¹ thus : Corroboration is not necessary in all details. The evidence in corroboration must be independent and must affect the accused by connecting or tending to connect the accused with crime. It is not necessary that it should relate to the actual commission of the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. What is necessary is corroboration in material particulars, which will satisfy the Court of the truth of the story related by the accomplice, in so far as it implicates the accused.

The Supreme Court in *Rameshwar v. State of Rajasthan*,² while commenting on the nature and extent of corroborative evidence required to support the evidence of an accomplice, stated that it would be impossible, rather dangerous, to formulate such evidence. Its nature and extent must necessarily vary, stated their Lordships, with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear. First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain the conviction. Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or the complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.³

(18) *Extent of corroboration.* The proposition that an accomplice must be corroborated does not mean that there must be cumulative or independent testimony to the same facts to which he has testified. So, evidence in a mur-

23. *Barkati v. R.*, 103 I.C. 49 : 1927 Lah. 581.

24. *R. v. Srinivas Krishna*, 7 Bom. L. R. 969.

25. *Sheo Narain Singh v. R.*, (1925) 26 Cr. L.J. 1317 ; *R. v. Bhim Rao*, 26 I.C. 72.

1. (1934) I.L.R. 15 Lah. 673 ; *Amulya Ratan Mukerjee v. The State*, 74 C. W.N. 378 (382).

2. 1952 S.C. 54.

3. See also *Shamsher Bahadur v. Bihar State*, I.L.R. 34 Pat. 781 : 1956 Pat. 404.

der case that a coat belonging to the deceased was found in defendant's possession is proper corroboration, though the accomplice testified to the killing and not to the taking of the coat.⁴

In *R. v. Chatur*,⁵ the following remarks of the Attorney-General in Despard's case were quoted with approval: "When I say accomplices ought to be confirmed by collateral testimony do not mistake me to state that every word which accomplice utters must be spoken to by some other witness, because if that were so there would be no need of an accomplice in any case but that of treason."

At the same time, it would be obviously unjust to give the corroboration, in some immaterial part, the general effect of corroboration as to the whole of such testimony; as in such a case, the caution which necessitates the rule would not be satisfied as to the parts where the corroboration does not reach.

The corroboration need not be of a kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime.⁶ It is trite knowledge and only commonsense, that the evidence of accomplice, although it may require corroboration, need not be corroborated in regard to every small detail. for, if there be such corroboration the evidence of the accomplice would be totally unnecessary.⁷ It would not be right to expect that the independent corroboration required to support the evidence of the accomplice should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted, it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details, because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true.⁸

The Courts require that the evidence of an accomplice should be corroborated in material particulars. But that does not mean that corroboration should be in regard to all the particulars of the case, because, if that were so, then there would be no necessity for the evidence of the accomplice at all for the case of the prosecution in that event could have been proved by independent evidence. It is precisely because the case of the prosecution cannot be proved wholly and fully by independent evidence that the law permits the evidence of an accomplice. Therefore, the corroboration that is required in law is not a corroboration of every particular in respect of which the accomplice or approver gives his evidence, but the corroboration must be such as would lead the Court to believe that the evidence that the accomplice is giving is truthful evidence, and that it would be safe to act upon that evidence. The corroboration that the Court requires is for its own guidance, for its own mental satisfaction, in order to arrive at the conclusion that it would not be unsafe to act on the testimony of one who is unworthy of credit. Therefore, corroboration must be sought by the Courts from that point of view. The Courts have gone so far, as to lay down that there must be sufficient evi-

4. Underhill Cr. Ev., S. 730.

5. (1876) Rat. Unrep. Cr. 102.

6. S. Swaminathan v. State of Madras, 1957 S.C. 340: 1957 Cr. L.J. 422.

7. The State v. Anil Ranjan, 1952 Cal. 534.

8. Sarvan Singh v. State of Punjab, 1957 S.C. 637: 1957 S.C.J. 699 : 1957 A.W.R. (Sup.) 99: 1957 Cr. L.J. 1014 1957 M.P.C. 781: (1957) 1 M.L.J. (Cr.) 672: I.L.R. 1957 Punjab. 1602.

dence independently of the confession which would warrant a conviction of the accused, i.e., the corroboration must come from independent sources, and therefore, it is that ordinarily the testimony of one accomplice is regarded as insufficient to corroborate that of another. A corroboration need not be direct evidence that the accused committed the crime. It is sufficient, if it is merely circumstantial evidence of his connection with the crime. Further it is not sufficient that there should be corroboration of the accomplice evidence that a crime was committed but there should be corroboration of his testimony that the accused was in some way connected with the crime.⁹

(19) *Material particulars.* The question remains what is the particular part or parts of the testimony of the accomplice which ought to be corroborated so as to give the testimony of the accomplice credit for the whole of it against a particular accused.

Speaking broadly, the evidence in a criminal case against an accused person turns mainly on two points, viz., (1) that a criminal act has been committed, and (2) that the guilt of such act attaches to the accused person, though the evidence is not separable into different parts, or applicable to one only of those propositions apart from the other.

(20) *Accomplice's own complicity.* That part of an accomplice's evidence by which he connects himself with the crime establishes only that he is a real accomplice. In describing the circumstances of the offence, he may have no inducement to speak falsely, but, on the contrary, every motive to declare the truth. As to his own complicity in the crime, a tested admission of the crime by the accomplice is ordinarily sufficient without any corroboration to show his own complicity.

(21) *Corpus delicti.* As against another accused the *corpus delicti* (the body, substance or foundation of the offence), is as much to be established as the accused's complicity with the crime. West and Nanabhai Haridas, JJ., on the authority of Lord Ellenborough's ruling in the trial of Colonel Despard¹⁰ held that not only as to persons spoken of by an accomplice must there be corroborative evidence, but, which is more important still as to the *corpus delicti* there must be some *prima facie* evidence pointing the same way to make the evidence of an accomplice satisfactory. As has been recognised in many cases, the man who charges another with the commission of a crime, in which he is implicated, requires the corroboration as to the particular person, but still more as to the existence itself of any crime, or of the particular crime from the penalty of which he is made free—on the understanding that his testimony will be valuable for the prosecution.¹¹

In *Nikunja Behari Roy v. R.*,¹² in which the accused C was charged with abetting particular acts of criminal breach of trust by A, it has been held that in the absence of any corroboration of the confession of A, relating to those specific acts of criminal breach of trust, B cannot be convicted of abetment of those acts.

9. L.S. Raju v. State of Mysore, 1953 Bom. 297; I.L.R. 1953 B. 670.

10. 28 State Trials 346.

11. Chatur v. R., (Unrep. Bom. 102); R. v. Budhu Nanka, (1876) I.L.R. 1 Bom. 475; R. v. Baskerville, (1916) 2 K.B. 658 (corroborative evidence must be evidence which implicates

him, i. e. which contains in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it). Hafijuddi v. R., (1934) 38 C.W.N. 777.

12. (1900) 5 C.W.N. 294.

(22) *Complicity of accused.* While, therefore, some confirmation of the accomplice's evidence, as to the existence of the crime, should not be altogether overlooked for the purpose of establishing the approver as an approver or for proving the *corpus delicti* against the accused, the more important and essential corroboration is the corroboration on points which connect the accused with the guilt charged. As observed in *R. v. Hanmant*,¹³ when it is once established that the witness is an accomplice, then the next practical question arises, who are the other accomplices and it is at that stage, when his evidence has to be weighed; that there comes into application the maxim that it is unsafe to convict upon the evidence of an accomplice unless he is corroborated in material particulars.

Some Judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others were satisfied with confirmatory evidence as to *corpus delicti* only but others, with more reasons, had thought it essential that *corroborative proof should be given of the prisoner having actually participated in the offence; and when several prisoners are tried, that confirmation should be required as to all of them before all can be safely convicted.*¹⁴ This last is undoubtedly the prevailing opinion now.

The reason for such corroboration as to the identity of the accused is given by Lord Abinger in *R. v. Farler*,¹⁵ thus: "In my opinion, corroboration ought to consist in some circumstance that affects the identity of the party accused. A man, who has been guilty of a crime himself, will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat and steal your property, it would be no corroboration that he had stated the facts correctly; that he had described how the person did put the knife to the throat, and did steal the property, it would not at all tend to show that the party accused participated in it."

In *R. v. Wilkes*,¹⁶ a similar rule was laid down by Baron Alderson in a case of sheep stealing. He said: "There is a great difference between confirmation to the circumstances of the felony and those which apply to the individual charged: the former only prove that accomplice was present at the commission of the offence; the latter show that the prisoner was connected with it. This distinction ought always to be attended to." In his summing up, the learned Judge said: "The confirmation of the accomplice, as to the commission of the felony, is really no confirmation at all, because it would be confirmation as much if the accusation were against you and me, as it would be as to those prisoners who are now upon their trial. The confirmation which I always advise Juries to require is the confirmation of the accomplice, in some fact, which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise Juries never to act on the evidence of an accomplice unless it is confirmed as to the particular person who is charged with the offence." In *R. v. Addis*,¹⁷ Patterson, J., stated: "The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offence charged against the prisoner."

13. (1904) 1 Cr. L.J. 412.

14. *R. v. Stubbs*, (1855) 25 L.J.M.C. 16.

15. (1897) 3 C. & P. 108; see also *R.*

v. Kelsey, (1838) 2 Lew C.C. 45.

16. (1836) 7 C. & P. 272.

17. (1834) 6 C. & P. 388.

(23) *Justice Maule's dictum.* Mr. Justice Maule, one of the wisest and practical minded Judges that ever sat on the English Bench, in *R. v. Mullins*,¹⁸ said: "I quite agree that the confirmation of an accomplice as to the mere fact of a crime having been committed, or even the particulars of it, is immaterial, unless the fact of the prisoner being connected with it is proved. It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates."

(24) *Connecting accused.* In the case of *R. v. Chutterdharee Singh and others*,¹⁹ Campbell, J., observed thus: "But dealing with the evidence as a matter of fact, I am sure that nothing can be more applicable to the case than the remarks on the evidence of accomplices contained in the charges to Juries by Judges whom we all so eminently respect as Lord Abinger and Baron Alderson, and which are usually quoted on the subject. It was pointed out in very clear language that not only is the evidence of accomplices without confirmation most unsafe, but also, even when the general credibility of the story is confirmed by overwhelming evidence, it is very unsafe to convict, without some corroborative evidence connecting the particular person accused with the transaction; because the general story may be perfectly true—the accomplice may really have taken part in the crime as described—his times, places and circumstances may be exact, and yet he may at his pleasure put in one man as an actor instead of another. These cautions are especially applicable to this country. I have seen a great deal of the working of Detective Departments, and I well know that, while well worked they have led to great results, they are also very liable to abuse. An accepted approver regularly employed by the Department—a villain of the deepest dye according to his own showing—seems to the people to have life and death in his hands: those whom he denounces are carried before a dreaded Inquisitional Tribunal; those whom he spares are spared. It is necessary, then, to watch the evidence of such men with very great care."

In the case of *R. v. Nawab Jan*,²⁰ Macpherson, J., said: "Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the accomplice says are true."

(25) *Independent evidence.* In *R. v. Bykunt Nath Banerjee*,²¹ Phear, J., said: "It has been observed by Judges that, in the nature of the things, no one knows so well the actual facts of the case as the approver, who, by his own admission, has taken a part in them. And as he has confessed his own guilt, there is generally no reason why he should misrepresent them, except so far as it may be possible for him thereby to shift a measure of culpability from his own shoulders to those of someone else, viz., of course, to those of the prisoners against whom he is giving testimony. Hence, the question always is, in any given case—is the approver speaking the truth—not merely when he details the general facts, but when he says that the prisoners participated in the transaction, and did that which it was necessary that he should have done in order for him to become criminally liable to the charge made against him? In saying, then, that before the evidence of an accomplice can be safely depended upon, so far as it affects the prisoner, it ought to be corroborated, I understand that other evidence, from sources indepen-

18. (1848) 3 Cox. C.C. 526.

19. (1866) 3 W.R. Cr. 59.

20. (1867) 8 W.R. Cr. 19, 26.

21. (1868) 10 W.R. Cr. 171.

dent of the approver, should be forthcoming, relative to facts which implicate the prisoner in the same way as the story of the approver does."

In *R. v. Mahesh Biswas and others*,²² Phear, J., said: "Very possibly there may be material to show that the story told by the accomplice is not a made-up one. It is almost invariably the case that this is so; for, if the accomplice's story is in any respect true, i.e., if he really were present, as he says he was, at the time of the occurrence to which he deposes, all his principal facts would be real and his statement of them might be corroborated in some particular or other by the collateral circumstances of the case. The question then is not, whether the story is generally true, but whether it is true in particular points which affect the persons who are accused by him, because it is just at those points that the reason for suspicion and uncertainty comes into force."

In *Jamiruddi Masalli v. R.*²³ after quoting with approval the observations of Macpherson, J., in *R. v. Nawab Jan*,²⁴ Prinsep and Stephen, JJ., said: "So also it has been held, that, as a general rule, Courts ought not to convict upon an accomplice's testimony, unless it is confirmed not only as to the offence, but as to the identity of the individual prisoner as the person or one of the persons, who participated in the offence, and the Juries ought to be so advised and directed."²⁵

In *Siar Nonia v. R.*,¹ it was pointed out that what is required is corroboration by some untainted evidence and it must be in a material particular pointing not only to the crime but to the participation of the accused in that crime. So, it has been held that in laying down in Sec. 114, Evidence Act, that the accomplices should be corroborated in material particulars, it is meant that the material particulars must implicate the accused in order that the corroboration may be such as is intended by Sec. 114.²

In *Ambica Charan Roy v. R.*,³ Chief Justice Rankin said: "Nevertheless the broad principle upon which the English practice (of requiring corroboration of an accomplice's statement) has always proceeded is as plain and necessary as ever. Corroboration ought to consist of some circumstance that affects the identity of the accused. . . . We have always to be careful lest the names of the individual accused are introduced in the texture of a story the outline of which is true enough. It is not a question of asking for corroboration of every act ascribed to the conspirator. No one has ever demanded that. Corroboration need not be sufficient by itself to prove the guilt of the man. It is sufficient if, in some circumstance, there is independent implication. However difficult it may be to prove the charge, we have, I think, to look carefully at the evidence to see if there is independent evidence implicating each one of these other accused which would enable us to rely upon the general truth either of the approver's evidence or of the confession of the co-accused which seems to be in outline true."

22. (1873) 19 W.R. Cr. 16, 21.

23. (1902) I.L.R. 29 Cal. 782.

24. (1867) 8 W.R. Cr. 19.

25. Palavasam, (1863) Weir 535.

1. (1913) 18 C.W.N. 550 (cf. *R. v. Nilakant*, I.L.R. 35 Mad. 247, 270.

2. *Shibadas v. R.* 147 I.C. 1172 :

1934 Cal. 114; *Gafoor v. R.*

(1939)

37 Cr. L.J. 992 (Rang); *R. v. Lalit Mohun Chukerbutty*, 1910 I.L.R. 38 Cal. 559, 579; 15 C.W. N. 593.

3. (1931) 35 C.W.N. 1270; 134 I.C. 1121; 33 Cr. L.J. 19; A.I.R. 1931 C. 697.

Straight, C. J., in *R. v. Baldeo*,⁴ referring to the observations of Maule J., in *R. v. Mullins*,⁵ said, that they are singularly apposite to this country where those who have to administer justice, unfortunately know what a perverted ingenuity there is for concocting charges, and supporting them by the most elaborately fabricated network of perjured testimony.

In *R. v. Ram Saran*,⁶ Straight, J. (after quoting the charge of Lord Abinger to the Jury, already quoted and several English cases) went on to say: "So that, as I understand the rule, there must be some corroboration independent of the accomplice, or, as in the present case, of the accomplice and the co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him." Further, not only is it necessary that the evidence should be corroborated in material particulars, but the corroboration should extend to the identity of the accused person.

In *R. v. Imdad Khan*,⁷ Petheram, C. J., remarked that he entirely and absolutely agreed with the judgment of Straight, J., in the case of *R. v. Ram Saran*,⁸ and with his opinions expressed therein, which the authorities have referred to established.

In the case of *R. v. Baji Krishna*,⁹ Crowe, J., said: "As regards the statements of the approvers, I see no reason for thinking that it is other than a true and circumstantial account of the events as they happened. But however convincing their evidence may be of the facts necessary to be proved, it has become a settled course of practice not to convict an accused person on the uncorroborated testimony of an approver, and it has been held that the corroboration ought to consist in some circumstance that affects the identity of the accused person. The amount of corroboration must depend on the circumstances of the particular case."

(26) *Illustrations from cases.* There being thus a distinction between evidence corroborating the circumstances of the crime and evidence corroborating the complicity of the accused, we may now refer to some decided cases to see what evidence has been held on this ground, not to be corroborative of the accomplice's evidence.

Where the accomplice proved that the thieves took a ladder from certain premises and the witness proved that the ladder was so taken away, it was held that proving by other witnesses that the robbery was committed in the way described by the accomplice was not such confirmation as will entitle the evidence to credit so as to affect other persons and that it was really no confirmation at all, as everyone will give credit to a principal felon, for, at least knowing how the felony was committed.¹⁰

Where certain sheep were stolen, and the accomplice stated where the skins were hid and the skins were found in the place stated by the accomplice: a mutton corresponding in size with the sheep stolen were found in the house where the prisoner resided, the finding of the skins was held to be no corroboration of the accomplice against the prisoner, because the accomplice might have put the skins there himself. "But", said Patterson, J., "the finding of the

4. (1886) 1 L.R. 8 All. 509, 513.

5. (1848) 3 Cox C.C. 526.

6. 1885 1 L.R. 8 All. 306, 310, 312.

7. 1 L.R. 8 All. 120, 138.

8. (1885) 1 L.R. 8 All. 306.

9. 6 Bom. L.R. 481 : 1 Cr. L.J. 56

10. *R. v. Webb*, (1854) 6 S and 583.

nutton in the prisoner's house is such a confirmation of the accomplice's evidence as I must leave to the jury."¹¹

In *R. v. Tulsi Dosad*,¹² Mitter, J., said: "It is true that a sindmaree was found by the police in the courtyard of the prisoner's house, but this circumstance cannot be regarded as corroborative of the approver's evidence. It does not 'connect or identify the prisoner with the particular offence' of which he has been accused, and it cannot therefore be accepted as legal corroboration."

In *R. v. Issen Mundle*,¹³ the Sessions Judge considered the evidence of the accomplice, corroborated as it was by the finding of certain property hid in dry river, sufficient evidence. Jackson, J., remarked: "But this though good corroboration of the approver being one of the dacoits, is no corroboration as against the prisoners."

It is no corroboration of the approver's statement in material particular that marks of blood were found at the spot which the approver pointed out as the place where the deceased fell.¹⁴

The result of medical examination in a case if it corroborates the approver's statement is corroboration of his statement against himself but does not help the prosecution in any way to prove that the prisoner was one of the persons who caused the deceased's death; it is corroboration of the accomplice's testimony only to this extent, namely, it shows that his story as to the manner and the mode of man's death is correct and therefore it serves to make it most probable that he, the accomplice, was present when the death was caused. In other words, it is corroboration of the accomplice's story as against himself, but is not corroboration of the story so far as it goes to implicate the prisoner.¹⁵

(27) *What is not corroboration.* In *Jamiruddi Masalli v. R.*,¹⁶ the corroborative evidence adduced in the case was discussed at length by Prinsep and Stephen, JJ. In this case, the approver stated that he with the three appellants and others, amongst whom was Babuali, used to assemble at the house of Moharali Karikar, where they used to have a singing party, and that one day they assembled there and started in two parties to Gopalpur to commit the dacoity. The Sessions Judge laid before the Jury evidence that the singing parties used to take place. The High Court said: "That surely was no evidence connected with this dacoity." The Sessions Judge next laid before the Jury evidence to show that Babuali spent a good deal of his time at Gopalpur, from which he asked the Jury to find that Babuali had an opportunity to gain information that Mangan's house, where the dacoity was committed, was worth robbing, and that from this there is some corroboration of the approver's story that he got information on which they committed the dacoity. The High Court remarked: "It does not follow that, because Babuali used to go to Gopalpur, that he acquired this information or that gave it to the approver, and in no point of view could this be regarded as evidence corroborating the statement of the approver that the appellants were present at this dacoity..... The approver stated that on arriving at Man-

11. *R. v. Birkett*, (1839) 8 C and P.

732.

12. 3 B.L.R.A. Cr. 66.

13. (1865) 3 W.R. Cr. 6.

14. In re Muthan Papayya, (1909) 10

Cr.L.J. 567.

15. *R. v. Sadhu Mundal*, (1874) 21 W. R. 69, 71.

16. (1902) I.L.R. 29 Cal. 782.

gan's house, where they committed the dacoity, they armed themselves with sticks which they took from an adjoining pan-garden. On this the Sessions Judge lays before them as corroborative evidence the statement of Bhuban Das, who owns a pan-garden and who states that next morning he found some sticks missing". The High Court was of opinion that this was not evidence corroborating the statement of the approver, that these appellants committed the dacoity. The approver next stated that after committing the dacoity they left on the Sankurpur *math* a *bati* and two *thalis*, which they had taken from this house. The High Court observed: "The statement of the boy who found these articles is laid before the Jury as corroborative evidence, though, as in the case of the sticks, it does not in any way affect the presence of the appellants at the dacoity. For the same reason any conversation that Bahadur may have had with the approver after the dacoity is no corroborative evidence against the appellants. That Jadu Nath Pramanick may have met the two parties on the evening just before the dacoity armed with sticks does not necessarily prove anything; and if they were so armed, it is not easy to understand why they should have taken sticks from the pan-garden just before the dacoity. The Sessions Judge, however, did not lay any stress on this evidence. We may here point out that the statement of a third person who was told by Jadu Nath of this occurrence, is not admissible as evidence except to corroborate or contradict the evidence of Jadu Nath. The last point enumerated by the Sessions Judge is regarded as very important corroborative evidence. It is the evidence of an Honorary Magistrate who went with the police and was shown by the approver the different places that they went to. This may be accepted as corroborating the approver's story of the occurrence, but it certainly does not corroborate his statement, that the appellants were with him. It can be properly regarded only as illustrating the statement made by the approver. Here we would draw attention to the judgment of Peacock, C. J., in *Elahee Buksh v. R.*,¹⁷ in which he points out the necessity for guarding against the introduction of the names of persons committing a crime as one of the chief reasons for requiring corroboration of the statement of an approver in order to convict a person accused by him."

The High Court added: "We think...there has been misdirection by the Sessions Judge in his charge to the Jury. He has laid before the Jury evidence against the prisoners corroborating the statement of the approver's evidence which cannot properly be so regarded, inasmuch as it relates to matters not affecting any of them."

In *R. v. Lalit Mohan Chukerbutty*,¹⁸ it was held that verification proceedings do not add any value to an approver's evidence or to confessions, and cannot be regarded as corroboration.

In *Kattu v. R.*,¹⁹ the Sessions Judge relied upon two circumstances in corroboration of the testimony of the approver; one was that on the 6th October, 1925, the appellant dug out Rs. 13 from a place in the compound of his house and this was the exact amount which according to the approver was given to him as his share of the booty. On the point, the High Court observed: "The money, however, is not ear-marked and there is no evidence on the record beyond the testimony of the approver that the rupees recovered from the compound of the prisoner formed part of the price which the deceased had received for his camel." The other circumstance relied on by the Sessions

17. (1866) 5 W.R. Cr. 80.

18. (1910) 1 L.R. 38 Cal. 559 [compare *Ledu v. R.*, (1925) 1 L.R. 52

Cal. 595].

19. (1926) 98 I.C. 190:27 Cr. L J 1294: A.I.R. 1927 L. 10.

Judge was the recovery of the blade of a takum from the witness Dube in consequence of the information supplied by the prisoner. The High Court did not attach any great value to this recovery observing that the blade did not bear any mark of blood and there was no evidence outside the deposition of the approver which would show that this was the weapon with which injuries were caused to the deceased. The High Court held that neither of the two circumstances connected the prisoner with the commission of the murder, observing "There may be a strong suspicion against him, but suspicion, however grave, can never be regarded as a substitute for proof."

(28) *Where there are more than one accused.* From what has been stated before it follows that where the approver speaks to the guilt of more prisoners than one and is confirmed as to some of them only the Jury should be advised to acquit those as to whom there is no corroboration.

In *R. v. Wilkes*,²⁰ Alderson, B., said: "With respect to the prisoner Wilkes, it is proved by the witness that the prisoner Wilkes told him nearly the same story as the accomplice has told you today. If you believe that witness, there is confirmation of the accomplice as to the prisoner Wilkes; you will say, whether with these confirmations, you believe the accomplice or not. If you think that his evidence is not sufficiently confirmed as to one of the prisoners, you will acquit that one; if you think he is confirmed as to neither, you will acquit both; if you think he is confirmed as to both, you will find both guilty."

In *R. v. Jenkins*,²¹ Alderson, B., told the Jury that where there is one witness of bad character giving evidence against both the prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to other. "If, therefore, you find there is corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to be unjust to give it a general effect."

In *R. v. Moores*,²² (Alderson, B., and William, J.), it was held, that "if A is charged as a principal and B as a receiver, an accomplice when called to give evidence against A ought to be confirmed as to some matters affecting B and a confirmation as to the guilt of A does not advance the case against B."

In *R. v. Wells*,²³ on an indictment against a principal and his accessories, the case against the principal was proved by the testimony of an accomplice who was confirmed as to the accessories but not as to the principal. Little-dale, J., held that there being no confirmation against the principal felon, the case failed altogether.

(29) *Charge to the Jury.* In *R. v. Stubbs*,²⁴ Jervis, C. J., said: "My practice in a case like the present is to tell the Jury that in my opinion, where an accomplice speaks as to three persons, and is confirmed only as to two of them, it is safer to require confirmation as to all three; as nothing is more easy than, for an accomplice to put the third man in his own place, and that prudence and practice therefore require confirmation as to all the prisoners, but the Jury if they please can act on the unconfirmed testimony of the accomplice." And Parke, B., said: "Throughout the whole of my experience I have uniformly laid down the rule to be as stated by the Chief Justice. It

20. (1836) 7 C. & P. 272.

21. (1845) 1 Cox. 177.

22. (1836) 7 C. and P. 270.

23. (1929) M. and M. 326.

24. (1855) 25 L.J.M.C., 16:1 Jur. N.S. 115.

is competent to the Jury to find prisoners guilty upon the unsupported evidence of an accomplice; but Judges have always told Juries to require confirmation before they do so. Some Judges think that, if there is confirmation as to one prisoner that is sufficient. My practice is different, and I tell the Juries not to find prisoners guilty, unless the accomplice's evidence is confirmed, not only as to facts but also as to identity." (Wightman and Cresswell, JJ., concurred).

In *R. v. Baskerville*,²⁵ the Lord Chief Justice said: "We see no reason in principle why a different rule as to corroboration should apply to a prisoner tried with another, against whom there is corroborative evidence of the accomplice's story, from that applicable if the first prisoner had been tried alone. In that case, the uncorroborated evidence of the accomplice would be admissible against him, but it would be the Judge's duty to give the proper caution to the Jury; and it would be equally incumbent upon the Judge to give the warning to the Jury when the prisoner is tried with another against whom there was corroboration of the accomplice's story. If the Judge failed to give the warning, this Court would be bound to set aside the conviction."

In *R. v. Imam Valud Baban*,¹ Couch, C. J., quoting *R. v. Stubbs*,² said: "This may now be taken to be the established practice in England; and it would certainly be unsafe to depart from it in India." Straight, J., said: ".....the accomplice must be corroborated, not only as to one, but as to all, of the persons affected by the evidence, and because he may be corroborated in his evidence as to one prisoner it does not justify his evidence against another being accepted without corroboration."

In *R. v. Baldeo*,³ it was held that criminal courts dealing with an approver's evidence in a case where several persons are charged, should require corroboration of his statements in respect of the identity of each of the individual accused.

(30) *Confession as corroborative evidence.* One kind of such direct evidence is the confession of the accused person himself, which, if forthcoming, will furnish a corroboration as against him.⁴ In such a case, where the confession is oral, the actual words used by the prisoner should be clearly proved.⁵ The statement must show criminality, otherwise it is useless.⁶ And the confession must be an admissible one. In the case of *R. v. Garbad Bechar*,⁷ the accused made a detailed confession before the Committing Magistrate, but, on his examination being read over to him in conformity with Sec. 364,⁸ Cr. P. C., he retracted and stated that he had made the confession because he had been beaten by the police. The Magistrate found his allegation to be false and the Sessions Judge, concurring with him on this point, convicted the accused on the approver's statement, corroborated by the confession so made. The High Court ruled out the confession and observed: "...in fact, there is no admissible confession on the record, and as there is

25. (1916) 2 K.B. 658.

1. 3 Bom. H.C.R. 57 (see also Abdul Karim v. R., 1 A.L.J. 110).

2. (1855) 25 L.J.M.C. 16 : 1 Jur. N.S. 115.

3. 1886 I.L.R. 8 All. 509.

4. *R. v. Jaffir Ali and others*, (1873) 19 W.R. Cr. 57, 62.

5. *Nawab Bibi v. R.*, 20 Punj. Rec. 22 of 1885.

6. *R. v. Petumber Dhoobee*, (1870) 14 W.R.Cr. 10, 11.

7. 9 Bom. H.C.R. 944.

8. Now see Section 281 of the Code of 1973.

nothing to corroborate the evidence of the approver on any material part of the case, the Court is unable to rely on the approver alone."

Where the confession is retracted, it may be used to corroborate an approver, though it is the duty of the Court to scrutinise such evidence with very great care⁹ and if there is no other reliable evidence in corroboration of the retracted confession, it is not sufficient for conviction.¹⁰

(31) *Retracted confession as corroboration.* In *Lalan Malik v. R.*,¹¹ a confession was made to a private person immediately after the occurrence and before the arrival of the police. It was repeated two days later to a First Class Magistrate but was retracted four months after. The story, told at the retraction, being disbelieved, the confession was held sufficient corroboration of the approver against the maker.

In *Hayat v. R.*,¹² the High Court held that there was a very strong additional piece of corroboration of the evidence of the accomplice in the shape of a confession made by Habib on the 7th December and subsequently retracted. In this confession, Habib carefully avoided saying that he took any actual hand in the murder but he stated that he was one of the original conspirators and that he was present and saw the murder being committed without attempting to interfere. The High Court believed the confession to have been voluntarily made but did not take this confession into account against any of the co-accused, inasmuch as Habib certainly did not intend to implicate himself though he actually did so. Against Habib, the confession was taken into account and according to the opinion of the Court such confession provided valuable corroboration of the story told by the approver.

(32) *Corroboration by circumstantial evidence.* In connection with the corroboration of the accomplice by circumstantial evidence, it will be remembered that a fundamental principle of universal application in convicting a person on circumstantial evidence is that in order to justify the inference of guilt on such evidence, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of his guilt,¹³ and that circumstances of strong suspicion are not enough, even though the party offers no explanation of them.¹⁴

In such cases, the distinct and proving power of circumstantial evidence depends upon its incompatibility with any reasonable hypothesis other than that of the truth of the principal fact in proof of which it is adduced.¹⁵

Another principle, which is to be borne in mind in cases of circumstantial evidence adduced in proof of guilt of the accused, is, that there is always the danger that suspicion may take the place of legal proof, and therefore it

9. *Nga Hla Maung v. R.*, (1937) 38 Cr. L. J. 774; 169 I.C. 425; A.I.R. 1937 R. 218.
10. *Nazir v. R.*, 1933 All. 31; 143 I.C. 67; I.L.R. 55 A. 91.
11. (1911) 16 C.W.N. 669.
12. (1922) 23 Cr. L.J. 561; 68 I.C. 401; A.I.R. 1922 L. 119 (2).
13. *Hurjee Mull v. Imam Ali*, (1903) 8 C.W.N. 278, 286; *R. v. Jagatram*, (1918) 48 I.C. 167; 19 Cr. L. J. 187; A.I.R. 1919 L. 440; *Salab v. R.*

- (1917) 42 I.C. 129; 18 Cr. L. J. 897; A.I.R. 1917 L. 89; *Chiraguddin v. R.*, (1941) 18 C.W.N. 1144; *Muzaffar Sheik v. R.*, (1940) 44 C.W.N. 860; *R. v. Naibulla*, (1941) 46 C.W.N. 106.
14. *Mahommed Ali v. R.*, 1929 Lab. 61; *Samanta v. R.*, (1915) 20 C.W.N. 166; *Promode v. Madan*, 1923 Cal. 228.
15. *Hurjee Mull v. Imam Ali*, (1903) 8 C.W.N. 278.

is right to recall the warning addressed by Mr. Baron Alderson to the Jury in *R. v. Hodge*,¹⁶ where he said: "The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form part of one connected whole; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself to supply some little link that is wanting, to take for granted some fact consistent with the previous theories and necessary to render them complete."¹⁷

Although the above are the rules in cases of convicting a person on evidence of a circumstantial nature, yet, when such evidence is used to corroborate the accomplice's testimony, it is not necessary to establish through such evidence alone that the accused committed the crime, and it is enough, if the circumstances show or tend to show his association with the crime.

The Calcutta High Court (Harrington and Pargiter, JJ.) observed in *R. v. Elliot and another*¹⁸: "It is true that D'Cruz was an accomplice, his evidence ought to be corroborated and it is corroborated by the proof of a number of circumstances. If each circumstance be taken singly, it is no doubt easy to attack it and to say that this or that particular point is consistent with the innocence of the appellants. But, in our opinion, that would be an erroneous way of dealing with the evidence of corroboration. *The whole of the evidence as to corroboration must be looked at*, and if it be shown that, wherever the narrative of D'Cruz comes in contact with persons outside the actors in this transaction, it is corroborated, that circumstance must go strongly to support the truth of the story although, if one takes each point of contact separately, one may say that this or that circumstance is not inconsistent with the innocence of the accused."

The rule on the subject is thus very clearly stated by Cave, J., in *re Meunier*¹⁹: "It is impossible to deal with the point by taking separately each single fact stated and saying it is a small matter and does not amount to corroboration; that may be so, but the whole of the facts taken together form a strong body of circumstantial evidence in confirmation."²⁰

Corroboration, said Chief Justice Rankin in *Ambica Charan Roy v. R.*,²¹ need not be sufficient by itself to prove the guilt of the man. *It is sufficient if, in some circumstance, there is dependent implication.*

(33) *Corroboration by finger impressions.* We shall now notice the worth of some such circumstantial evidence which comes up now and then for consideration. There may be cases in which finger impressions might have been left by the culprit in some article, for instance, on paper (as was in the case of Kangali Charan mentioned in Henry's Finger-prints, pp. 50-53) or on the sill, the paint of which had been soft enough to retain impressions (see a case mentioned at p. 85 of the same book).

"Those who have made finger-prints their special study have come to the conclusion that their similarity is, as a rule, evidence of personal identity and their dissimilarity will, therefore as a rule, be evidence of the reverse."²²

16. (1838) 2 Lew C.C. 227.

17. *Barindrakumar Ghosh v. R.*, 1909 I.L.R. 37 Cal. 467, 508.

18. Unrep.

19. L.R. (1894) 2 Q.B. 415.

20. See also *R. v. Nungapa*, 2 Bom.

L.R. 610.

21. (1931) 35 C.W.N. 1270.

22. See Galton on Finger Prints, Chaps. VI and VII—per Banerjee, J., in *R. v. Fakir Mahomed Sheikh*, 1 C.W.N. 88, 89.

Mr. Galton thus records the result of his examination of many sets of prints taken at different times and covering the interval from childhood to boyhood, from boyhood to early manhood, from early manhood to middle age and from middle age to extremely old age: "As there is no sign, except in one case, of change during any of these four intervals which together almost wholly cover the ordinary life of man, we are justified in inferring that between birth and death there is absolutely no change, in, say 699 out of 700 of the numerous characteristics of the markings of the fingers of the same person such as can be impressed by him whenever it is desirable to do so. Neither can there be any change after death up to the time when the skin perishes through decomposition."

If the finger impression of the accused taken before or after the offence, agrees with the impression left on any article at the time of the commission of the offence, it is a very good corroboration of the story of the approver regarding the identity.

(34) *Corroboration by impressions of shoes, etc.* "Similarly, the impressions of shoes, or of shoe-nails, or of other articles of apparel, or of patches, abrasions or other peculiarities therein, discovered in the soil or clay, or snow, at or near the scene of crime, recently after its commission, frequently lead to the identification and conviction of the guilty parties."²³ To guard against error, it is manifest that the recency of the discovery and comparison of the impressions, relatively to the time of occurrence of the *corpus delicti*, and before any persons, other than the perpetrators of the offence may have resorted to the spot, is of the highest importance. The practice to give evidence that the shoes had been placed upon the footmarks and that the shoes when so placed fitted into the impression, is a very bad one, and vigorously denounced by Parke, J., who desired the Jury to reject absolutely such a method of identification.²⁴ "Nor must it be overlooked, that even where the identity of footmarks has been established beyond all doubt, they may have been fabricated with the intention of diverting suspicion from the real offender, and fixing it upon an innocent party and that in other respects this kind of evidence may lead to erroneous interpretation and inference." (Note—The boots or shoes never ought to be put into the footprints at all. The impressions for comparison should be made by the side and at a sufficient distance from those in question. Where the character of the soil and the interval of time permit such a thing, the most satisfactory mode of proof is to dig out and preserve the original footprints; where that cannot be done, casts in plaster of paris should be taken. Where neither of these methods is adopted and the identification is sought to be established merely by the Police evidence, Juries are apt to pay very little attention to it).²⁵

As regards footprints, Ogston¹ remarks that the impression by the naked foot varies in the same individual according to whether he was standing, walking or running at the time. Casts of footprints may be obtained by Hugolin's method, viz., heat the ground by holding over it a pan of burning charcoal, then dust stearic acid into the footprint, let this solidify and from the mould thus obtained take a cast in plaster of paris.²

23. *Wills' Cr. Ev.*, 6th Edn., p. 214.

24. *R. v. Shant*, (1830) 1 *Lew. C.C.* 116.

25. *Wills' Cr. Ev.*, 6th Edn. pp. 219.

20.

1. *Lect. on Med. Jur.*, p. 63.

2. *Lyon's Medical Jurisprudence for India*, 4th Ed., p. 147.

(35) *Other corroboration.* In a charge for murder, it has been held that the fact that the deceased was last seen alive in company with the accused and the approver, is a strong circumstance which corroborates the testimony of the approver.³

In *Mannalal v. R.*,⁴ it has been held that demeanour cannot be a substitute for corroboration. It would be wholly unsafe to treat a piece of circumstantial evidence which is widely dissociated from the *corpus delicti*, as a material particular to be of any corroborative value to the evidence of an accomplice. The favourable impressions on the Judge's mind as to the demeanour of an accomplice are too ephemeral to take the place of corroboration in material particulars.

(36) *Motive.* The motive of a crime, if proved, may furnish a reason for committing the crime but the evidence as to the existence of a motive does not show that one did, as a matter of fact, commit the crime, and so does not furnish any corroboration of the accused's connection with the crime. In *Tafani Sheikh v. R.*,⁵ it has been held that "the evidence of motive can never, by itself, be sufficient to corroborate any statement which requires corroboration in material particulars. Motive is not a material particular. It is not the duty of the prosecution to prove any motive in a case." Their Lordships, in this case, held that material corroboration means such corroboration that the accused not only had some reason to go with the other murderers, but that he did as a matter of fact go with them.

In *Vaithinatha Pillai v. R.*,⁶ their Lordships of the Privy Council observed, that however strong and convincing the evidence of an adequate motive may be, that evidence can never counteract the harm done by the reception of inadmissible evidence, or the injustice it may lead to, nor by itself supply the want of all reliable evidence, direct or circumstantial, of the commission of the crime with which the accused person may be charged.⁷ So, it has been held that motive for the murder will not take the place of evidence of identification, nor will it afford corroboration of the confession.⁸

The mere uttering of a threat some months before the murder took place, even if it is established by satisfactory evidence that such a threat had been used, cannot of itself be taken to show that the person uttering the threat was connected with the death, which took place some months later, of the person against whom the threat had been uttered.⁹

Getting up money to pay bribe falls short of proving that bribe was given and shows only that the accused had money to pay. It is not proof of a circumstance that affects the person charged with the offence.¹⁰

(37) *Conduct of approver.* It has been said in *R. v. Nga Myo*,¹¹ that though corroboration must proceed from a source extraneous to the person

3. *Mahommed v. R.*, (1935) 36 Cr. L.J. 1202. See *Kehr Singh v. R.*, (1921) 22 Cr. L.J. 161 (Lah.).

4. (1923) 25 Cr. L.J. 49 (Oudh.)

5. (1911) 15 Cr. L.J. 323.

6. (1915) 18 C.L.J. 365; 17 C.W.N. 1110.

7. See also *Kalwa v. Emperor*, (1926) 27 Cr. L.J. 746 (All.) ; *Sheo Amber v. R.*, (1923) 25 Cr. L.J. 391 ;

Gobarava v. R., (1929) 31 Cr. L.J. 881 (Nag.) (F.B.).

8. *R. v. Dhyamu*, (1899) 1 Bom. L.R. 428.

9. *Kartar Singh v. R.*, (1936) 37 Cr. L.J. 597.

10. *In re Vyasa Rao*, (1911) 12 Cr. L.J. 150.

11. 1938 Rang. 177.

whose testimony it is sought to corroborate, it may consist of extraneous proof of a fact relating to that very person's prior conduct.

(38) *Conduct of the accused.* In *Chatru v. R.*,¹² it has been held, following the English decision in *R. v. Feigenbaum*,¹³ that the evidence of an accused's conduct is **corroboration**.

When a woman was accused of administering a noxious drug with a view to cause miscarriage, evidence of the father of the woman to whom it was administered, that he had accused the prisoner of administering it and that he did not deny it, was held corroboration.¹⁴

In *R. v. Sabit Khan*,¹⁵ Scott, J., on a difference of opinion between Heaton and Shah, JJ., agreeing with Heaton, J., said thus: "I start with the fact that Mahomed Khan was murdered and buried within a mile of his house. Evidence that when that man has been murdered and buried within a mile of his house, his brother and his enemy seeking to profit by his disappearance tell a false story as to his whereabouts, affirming him to have gone to Miraj, tends to connect the brother with crime. So does the evidence that the brother has been seen on several occasions giving grain to the confessed murderer to whom he had no ostensible reason to be charitable. So does the evidence that when trying to collect rents due to the murdered man he calls the tenants and tells them a false story that he has received a letter of authority from his brother." The term 'abscond' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense are to hide oneself; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply to the commencement of the concealment. If a person, having concealed himself before process issues, continues to do so after it has issued, he absconds.¹⁶

In *R. v. Gobardhan*,¹⁷ Edge, J., said: "As to the fact that Gobardhan was a party to that murder, the only corroboration of Mahasukha's evidence which I find, taking the view of the whole of evidence which I do, is afforded by Gobardhan himself. He absconded and remained away until he was arrested months after Nihal Singh's death. Gobardhan and his witnesses gave a false account as to the time when he left his village, and he has never given another. This, I think, is some corroboration of Mahasukha's evidence that Gobardhan was a party to the murder, and is sufficient for us to act upon." In the same case, Straight, J., said: "I agree... with the learned Chief Justice that the absconding of Gobardhan from his village contemporaneously with the murder of Nihal Singh, is a corroboration of a kind that, in a case like the present may be acted upon—an absconding which he has faintly attempted to account for, but has given no proof to explain.

Macpherson and Glover, JJ., in delivering the judgment in *R. v. Sarab Roy*,¹⁸ observed: "Under certain circumstances, the case against an accused person is certainly strengthened by his running away, and it is so to some extent in the present instance. But a man who runs away may be, and often

12. 1928 Lah. 681.

13. (1919) 1 K.B. 431 (decided after the Criminal Evidence Act was passed in England in 1898).

14. *R. v. Cramp*, (1880) 14 Cox 390 (Denman, J.); Archbold, Criminal Evidence, 23rd Ed., p. 391.

15. I.L.R. 43 Bom. 739; 51 I.C. 657; A.I.R. 1919 B. 164.

16. *Madapusi Srinivasa Ayyangar v. R.*, I.L.R. 4 Mad. 393, 397.

17. 1870 I.L.R. 9 All. 528, 555.

18. (1866) 5 W.R. Cr. 28.

is, innocent, and any presumption of guilt which may arise from such a course, is usually but a very small item in the evidence on which a conviction is based. There are many considerations other than those of his own guilt, which, as it appears to us, may very possibly have moved the prisoner to act as he did in this respect."

This ruling was approved by Broadhurst, J., in *R. v. Gobardhan*.¹⁹

In *Asfar Sheikh v. R.*,²⁰ the High Court pointed out that absconding is a matter which is equally consistent with innocence as with guilt and that it can only be considered with the rest of the evidence and it is for the Jury to attach any weight which the rest of the evidence enables them to do, but it is in itself a circumstance of no weight.

The evidence of the conduct of an accused person, unless it is incompatible with his innocence, is, in fact, a make-weight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperament, surroundings and other circumstances as to how a man would act in particular situation and all these combine to form a most fallacious basis for assured conclusions.²¹

In *Gurbin Bind v. R.*,²² the High Court (Wilson and Macpherson, JJ.) said: "Even assuming that it (the statement of the approver) is admissible, there is, we think, an absence of any sufficient corroborative evidence. Proof of his absconding is not sufficient. He belonged to a suspected class of person; and when several of that class were implicated in the case, it is quite possible that he thought it advisable to leave the village."

Mr. Wills in his *Circumstantial Evidence*, 6th Edn., p. 125, says: "These several acts (i.e., acts of concealment, disguise, flight, and other indication of mental emotion usually found in connection with guilt) in all their modifications are indications of fear; but it would be harsh and unreasonable to interpret them invariably as indications of guilty consciousness, and greater weight has sometimes been attached to them than they have: fairly warranted. Doubtless the manly courage and integrity always commands the respect of mankind, and all tribunals do homage to the great principles from which consistency springs; but it does not follow, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, that the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt; and every man is therefore entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty.²³ Mr. Justice Abbott on a trial for murder, where evidence was given of flight, observed in his charge to the Jury, that "a person, however conscious of innocence, might not have courage to stand a trial, but might, although innocent, think it necessary to consult his safety by flight." "It may be," added the learned Judge, "a conscious anticipation of punishment for guilt, as the guilty will always anticipate the consequences; but at the same time, it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this is."²⁴

19. 1870 I.L.R. 9 All. 528.

20. (1910) 15 C.W.N. 198.

21. Per Jenkins, C.J., in *Jogjiban Ghose v. R.*, (1909) 13 C.W.N. 681.

22. (1884) I.L.R. 10 Cal. 1097, 1100.

23. Per Gurney, B., in *R. v. Belaney*, 20 C.C. Sess. Pap. 441 (1844).

24. *R. v. Donnall*, Shorthand Report by Fraser, (1817) pp. 175, 176.

In his charge to the Jury upon the trial of Professor Webster for murder, Chief Justice Shaw of Massachusetts, said: "Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon the charge of a crime so heinous that who of us can say how an innocent or a guilty man ought or would be likely to act in such a case? or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected? or that a guilty man, who by knowledge of his danger might be somewhat braced up for the consequences, would always appear agitated or the reverse?"²⁵

"It is not possible to lay down any express test by which these various indications may be infallibly referred to any more specific origin than the operation of fear. Whether that fear proceeds from the consciousness of guilt, or from the apprehension of undeserved disgrace and punishment and from deficiency of moral courage, is a question which can be judged of only by reference to concomitant circumstances. Prejudice is often epidemic, and there have been periods and occasions when public indignation has been so much and so unjustly aroused as reasonably to deter the boldest mind from voluntary submission to the ordeal of a trial. The consciousness that appearances have been suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct apparently incompatible with innocence, and drawn down the unmerited infliction of the highest penalty. The inconclusiveness of these circumstances is strikingly exemplified by a case, where the Magistrate was so fully convinced of the prisoner's innocence, that he allowed him to go at large on bail to appear at the assizes. The Coroner's inquest having brought in a verdict of 'guilty' against him, he endeavoured to escape from the danger of a trial in the excited state of public feeling by flight, but was subsequently apprehended, convicted and executed on a charge of murder, of which he was unquestionably guiltless."¹

In the case of *Rakhal Nikari v. R.*,² the accused was charged with adultery and abetment of kidnapping and convicted of both these offences by the Deputy Magistrate. The Sessions Judge set aside the conviction of adultery, because the husband did not make a complaint, so that the conviction for abetment of kidnapping only remained. The case coming up before the High Court in revision, Trevelyan, J., said (p. 87): "It is perfectly true that evidence of running away is evidence of guilt. I attach very little importance to evidence of that kind in this case. Very frequently people run away with the object of avoiding a charge being brought against them. There is no doubt that this young man committed the offence of adultery with which he was liable to be charged, if the husband took proper steps in that direction, and his running away may very well be put down to his anxiety to avoid the consequences of what he had done. I can see no connection between the running away and the kidnapping of the girl. There is a connection, it is true, between the running away and what he had been doing with the girl for three or four days. But his doing this is not the offence for which he is now being tried, and therefore it is not fair at all to say that the running away, as

25. Bemis's Rep. 466, 115().

1. *R. v. Coleman*, Kingston Spring Ass. 1947, 4 Celebrated Trials, 344, and see the case of *R. v. Green and others*, 14 St. Tr. 1199, where several persons, one, of whom volun-

tarily surrendered, were convicted in a Scotland and executed, at a period of great excitement against Englishmen, upon a groundless charge of piracy and murder.

2. (1897) 2 C.W.N. 81.

there was no offence which would incline him to run away, shows the fear of being charged with a different offence altogether. If there had not been a subsequent offence for which he had no answer at all, possibly some effect would have to be given to his running away."

In this connection illustration (c) to Sec. 9 of the Evidence Act which runs as follows may be referred to:

"A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Sec. 8 as conduct subsequent to and affected by facts in issue.³

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business for which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent."⁴

When the question is whether the occurrence caused by the accused was accidental, his running away from the scene of occurrence just after the occurrence is, generally speaking, hardly consistent with the theory of accident.⁵

(39) *Bloodstains on the person and clothes of accused.* In a trial for murder of a man found with his throat cut in the house of the accused, the four accused were seen bespattered with blood on their persons and clothes, and the female accused had a fresh cut on her finger, and what was more, this cut was so slight that the quantity of blood on her saree could not have issued from the cut alone—the Judges held that there were ample corroborations of the witness who was examined as Queen's evidence in that case.⁶

In the case of *Kesar Singh v. State*,⁷ the approver's evidence was held to be corroborated by bloodstains of human origin on the shirt of Kesar Singh which shirt was recovered on the information given by Kesar Singh.

(40) *Wound.* Wound received at or about the time of the dacoity has been considered a direct corroboration as to the presence of the accused.⁸

In *R. v. Jaffir Ali*,⁹ Glover, J., was of opinion, that the statement of the approver regarding the wound received by the prisoner Meherali during the dacoity was corroborated indirectly by the fact that, immediately after that affair, Meherali was found with a wound in his side as described by the approver.

(41) *Association.* It has been held that association of the accused persons under extraordinary circumstances and at a place where they are not likely to be, unless there was concert, is some corroboration.¹⁰

3. See illus. (h) and (1) to S. 8.

4. See *Baharuddin Mandal v. R.*, (1913) 15 Cr. L.J. 43 : 22 I.C. 187 : 18 Cr. L.J. 578.

5. *R. v. Dwijendra Chandra Mukerjee*, (1915) 19 C.W.N. 1043.

6. *R. v. Fattechand*, (1868) 5 Bom.

H.C.R. 85.

7. 1954 Punj. 286.

8. *R. v. Durbaree*, (1870) 13 W.R. Cr. 14.

9. (1875) 19 W.R. Cr. 57, 60.

10. *R. v. Farler*, 8 C. & P. 106.

The case is otherwise if the association is a normal one. In *R. v. Ram Saran*,¹¹ it was observed: "If that is corroboration of the kind that is necessary, it does corroborate the statements of Piru and Sukhai, both of whom say that shortly before sunset the persons were sitting with the boy Gur Prasad in Shamshera's dalan. But, is it sufficient corroboration? It is conceded that the prisoners were in the habit of going about together. There is nothing remarkable in this: it was an occurrence which might have been observed any day; and I may remark that it renders the witness's evidence liable to some suspicion; for if the prisoners were so continually together, why should he have noticed their being together on this particular occasion?"

In *R. v. Sagal Samba Sajao*,¹² there was some evidence that some of the prisoners were seen together in consultation before the offence. The High Court held that such evidence was of very little importance and afforded no real corroboration, for the men were Manipuris, and their being together might have been for a lawful and proper purpose.

In *R. v. Dwarka*,¹³ the directions given by the Judge in remanding the case will show that the association of the prisoner with the accomplices, absence from his house about the time of the commission of the crime without legitimate cause, his presence at the place where the deceased was poisoned or where the poison was brought were confirmatory facts and circumstances proving the truth of the statement of the approver.

In *Lalan Malick v. R.*,¹⁴ the evidence that some of the dacoits were seen together in company shortly before the dacoity and that they were absent from their homes shortly after it, was taken with other evidence as corroboration of the approver.

In *R. v. Khotub. and others*,¹⁵ Norman and Campbell, JJ., observed: "As regards the prisoners Sreemonto Sirdar, Tinoo Chaung, and Nobin Sirdar, it is proved that they were absent from their houses, which are in the village of Chuprah, on the night of the dacoity. On the following morning at day-break they were met by three independent witnesses at Assumnugger, a place about four kos to the south-east of Chuprah, to which village they were apparently returning. By reference to the map, and from the evidence, Assumnugger appears to be about 3½ or 3 kos to the north-west of Bazeedpore. As traces of robbers and of the plundered property were found in the place in which if the story of the accomplices is true, they would naturally have passed on their return from the scene of the dacoity to their own houses. Their presence at Assumnugger is unaccounted for except on the supposition that the story of the accomplices is true.

It has been held in *Sahai Singh v. R.*,¹⁶ that being found in the company of the approver shortly after a dacoity is very strong indication of fellowship in the crime. In the same case the High Court held that the absence of one of the prisoners from home on the night of the dacoity affords some slight corroboration of the story of the accomplice.

In a case of burglary, if an accomplice gives evidence that a person charged was present when it was effected, if that person was seen hovering about

11. 1885 A.W.N. 311, 313.

12. 1893 I.L.R. 21 Cal. 642.

13. (1866) 5 W.R. Cr. 18.

14. (1911) 16 C.W.N. 660.

15. (1866) 6 W.R. Cr. 17.

16. (1917) 18 Cr. L.J. 852 (Punj.).

the premises, some time before, or was seen in possession of some of the stolen properties shortly after, that is reasonable confirmation of the statement that the prisoner helped to commit the crime.¹⁷

In *Hazara Singh v. R.*,¹⁸ the evidence showed that the approver's companions were constantly changing, the Court remarked that "even if the accused were with him a few days before the dacoity, it does not follow that they remained with him and along with him committed the dacoity in question."

In *R. v. Bepin Biswas*,¹⁹ the High Court remarked: "We next find that the Sessions Judge commented on the fact that one of the appellants was absent from home on the night of the dacoity, and that he has adduced no evidence to contradict this or to show that he was innocently engaged. This is an observation which should not have been made and cannot but have seriously prejudiced the prisoner Bidesi, for his own absence from home would be no legal corroboration of the evidence of the approver, unless there was *prima facie* sufficient legal evidence to convict him of the offences, he would not be bound to account for his movement."

In a case of conspiracy to commit murder, the fact, that shortly after the alleged date of the conspiracy, the accused helped the approver in obtaining murderous weapon, is corroborative.²⁰

A good Indian illustration of circumstantial evidence corroborative of the confessions of a co-accused is to be found in the judgment of Phear, J., in *R. v. Naga*.²¹ In this case, two prisoners Sevaluck and Demaree out of twelve prisoners confessed about their complicity in a dacoity. As against the ten accused persons the evidence was of circumstantial character. The dacoits were all or almost all of them upcountry men and the witnesses could perceive at the time of the dacoity that they were so and in the pursuit of these men which was commenced the next morning they deliberately set themselves to discover the dacoits by this particular characteristic and the men who were almost immediately arrested were in the first instance apprehended because they bore the character of upcountry men (Hindustani) and were unmistakably distinguishable from the inhabitants of that part of the country, Eastern Bengal. The pursuers formed themselves into two parties and Hindustanis were found by them travelling along the highway which led from the prosecutor's house and a small quantity of the plundered property was found in the possession of some of them. These men were kept in custody for some hours and all except Sevaluck and Demaree escaped from their captors, and absconded. About two months afterwards on the strength of the information which was afforded by Sevaluck and Demaree the prisoners other than these two, were apprehended in Zillah Arrah and on being taken to the place of the dacoity were recognised by the witnesses as being the men who were originally arrested on the day after the dacoity. The original capture of the Hindustanis had been effected in two parties and Sevaluck had been taken in one of the parties and Demaree in the other.

17. *R. v. Mullins*, 3 Cox C.C. 526 ;
R. v. Issen Mundle and others,
 (1865) 3 W.R. Cr. 8.
 18. (1924) 25 Cr. L.J. 1347:82 I.C.
 707; A.I.R. 1924 L. 727.
 19. (1884) I.L.R. 10 Cal. 970 ; (see

Lala v. R., 23 Cr. L.J. 158:65 I.
 C. 622; A.I.R. 1921 L. 215).
 20. *Tata Singh v. R.*, (1922) 23 Cr. L.
 J. 784.
 21. (1875) 23 W.R.Cr. 24.

Phear, J., said: "We have on the foundation of all these circumstances taken together, a very strong *prima facie* case against the prisoners, which is confirmed by so much of the confessions of Sevaluck and Demaree as we are entitled to take into consideration against the different prisoners respectively."

(42) *Letters.* In the case of *Swaminathan v. State of Madras*,²² corroboration was found in the letters which the Court held proved the connection of the appellant with the conspiracy spoken to by the approver.

(43) *Knowledge of place of concealment.* The mere knowledge of the place of concealment does not show that the person having such knowledge actually received the stolen articles or participated in the act of concealment.²³

(44) *Pointing out.* In *R. v. Dosa Jiva*,²⁴ Birdwood and Jardine, JJ., held that the confession of the other prisoner admitted under Sec. 30 of the Indian Evidence Act was not sufficiently corroborated by the circumstance that Dosa some months after the commission of the offence, pointed out the stolen property (which had been buried underground in front of his house), this fact being in itself ambiguous, and not conclusive with the theory of innocence.

It has been held over and over again that the mere fact that a person pointed out a place where stolen property is concealed, if that place is not his own, does not justify the Court in drawing the conclusion that the person who pointed out the stolen article had received or retained it. "There must be, to support a conviction in such a case, some evidence which suggests that the accused himself concealed the article in the place where it was found. It is not sufficient for a conviction that the accused pointed out the stolen article, if it is left doubtful whether the accused or some other person concealed the stolen property where it was found".²⁵

(45) *Pointing out by several accused.* In the case of *Adam Khan v. R.*¹ the Sessions Judge relied upon the alleged discovery of stolen property made in pursuance of the information supplied by the accused Shabru and Niazak as evidence corroborative of the testimony of the approver as against these appellants. This property was buried in a *khad* in a place which was first pointed out by Said-ul-Uman (an appellant whose conviction was upheld by the High Court as this fact corroborated the evidence of the approver) in the absence of Shabru and Naizak; these two appellants were then brought separately and they pointed out the same place which was dug out and the property recovered. The High Court following *R. v. Churn Change*,² *Ram Singh v. R.*,³ and *Budha v. R.*,⁴ held that, where a fact is discovered in consequence of information received from one of several persons charged with an offence and when others give like information, the fact should not be

22. 1957 S.C. 340; 1957 Cr.L.J. 422.

23. *Emperor v. Buta Singh* (1917) 18 Cr. L.J. 490 (Punj.); 39 I.C. 330; A.I.R. 1917 L. 48.

24. 1885 I.L.R. 10 Bom. 231.

25. *R. v. Gobinda*, (1895) I.L.R. 17 All. 576; *Hakeman v. R.*, (1905) 2 Cr. L.J. 230 (Punj.); *Emperor v. Buta Singh*, (1917) 18 Cr. L.J. 490 (Punj.); 39 I.C. 330; A.I.R.

1917 L. 48; *Rulliam v. R.*, (1923) 26 Cr. L.J. 257; 84 I.C. 321; A.I.R. 1923 L. 438 (2).

1. (1927) 28 Cr. L.J. 456.

2. 21 W.R. Cr. 36.

3. (1916) 17 Cr.L.J. 273; 34 I.C. 993; A.I.R. 1916 L. 433 (2).

4. (1922) 23 Cr. L.J. 22; 64 I.C. 502; A.I.R. 1922 L. 315.

treated as discovered from the information of all, but from the information of the first. The High Court was, therefore, of opinion that the evidence relating to the alleged recovery of stolen property as a result of information given by Shabru and Niazak was not admissible against them.

In *Bhai Khan v. R.*,⁵ the accused was charged with murder of Hatam, the husband of Musammat Sattan who had criminal intimacy with the accused. Bhai Khan made a statement and took the police party to a thick *karir* clump hundred yards away from his hut where he pointed out the body of the deceased Hatam.

Musammat Sattan on her own showing was an accomplice and the High Court held that her statement required corroboration.

It was contended before the High Court that if Bhai Khan pointed out the body thereby indicating that he knew where the body lay, he was not in actual exclusive possession of the *corpus delicto* and therefore his action did not raise the presumption of his guilt. The High Court observed: "We do not say that the mere pointing out of the body would be by itself sufficient evidence for sustaining a conviction for murder; but the appellant has never explained how he came by his knowledge of the place where the body lay the statement of Sattan was corroborated in a material point and most strongly by the conduct of the appellant himself in revealing to the police the place where the corpse lay."

(46) *Possession of stolen goods.* In *R. v. Khotub Sheikh and others*,⁶ the Court (Norman and Campbell, JJ.) observed: "As regards Khotub, a large quantity of property, belonging to prosecutor was found in his possession. This fact raises a presumption of his guilt, and exactly tallies with what might have been expected if the evidence of the accomplices were true, and abundantly corroborates the statement that Khotub was concerned in the dacoity."⁷ The following observations by Mr. Best on his work on Evidence,⁸ were quoted with approval in *R. v. Madhuri*,⁹ and are worthy of consideration in a case where presumption of guilt is made from recent possession: "But in order to raise this presumption legitimately, the possession of the stolen property should be exclusive as well as recent. The finding of it on the person of the accused, for instance, or in a lockedup house or room, or in a box of which he kept the key, would be a fair ground for calling on him for his defence: but if the articles stolen were only lying in a house or room in which he lived jointly with others, equally capable with himself of having committed the theft or in an open box to which others had access, no definite presumption of his guilt could be made. An exception has been said to exist, where the accused is the occupier of the house in which the stolen property is found, who, it is argued, must be presumed to have such control over it as to prevent anything coming in or being taken out without his sanction. As a foundation for civil responsibility, the reasoning may be correct; but to conclude the master of a house guilty of felony, on the double

5. 23 Cr. L. J. 617; 68 I. C. 841; A. I. R. 1922 L. 189.

6. (1886) 6 W. R. Cr. 17.

7. Ordinarily, it is presumed that a man who is possessed of stolen property soon after the theft is either the thief or has received the goods

knowing them to be stolen unless he can account for his possession. [See Sec. 114, Illus. (a) of the Evidence Act].

8. Section 212, p. 294 (5th Edn.).

9. I. L. R. 6 Bom 781.

presumption, first, that the stolen goods found in the house were placed there by him or with his connivance; and secondly, supposing they even were, that he was the thief who stole them, there being no corroborating circumstances, is certainly treading on the very verge of artificial conviction." As to the raising of the presumption and the onus to prove the falsity of explanation, when one is given, see *Surendranath Ghose v. R.*,¹⁰ and *Daud Sheikh v. R.*¹¹ In so far as the corroboration of an approver is concerned, it is not necessary to prove exclusive possession of the prisoner, although proof of exclusive possession would be stronger corroboration and, as such, more satisfactory evidence. The question often is not whether an independent presumption under Sec. 114, Ill. (c) of the Evidence Act should be raised from recent unexplained possession of stolen goods, but the question is, whether the approver is corroborated by the finding of the stolen articles in the house of the accused, which may or may not be in the exclusive possession of the accused, i.e. whether the finding of the properties tends to connect the prisoner with the crime.

In *R. v. Baldeo*,¹² the appellants Baldeo, Rambaksh, Mir Singh, Amir Baksh and Amman were convicted under Sec. 460, I. P. C., of house-breaking by night, in the course of the commission of which offence one Bahal Singh was murdered by some of them. One Ghariba turned Queen's evidence in this case. He deposed, that, after murdering Bahal Singh, the properties, which were in a room close to where Bahal Singh was sleeping, were quickly removed and carried off to Baldeo's house and divided.

The corroborative evidence against Baldeo was that he pointed out certain articles to the police on the Jumna bank. This was also the evidence against his son Rambaksh. They both went together to point these things out. Amir Baksh produced some articles from a ruined house. Mir Singh named five articles, as having been kept with another man in a different village, and some of the articles were found with the person so named, and they were recovered from him. Straight, C. J., said: "In the present case upon careful consideration of all the facts as to Baldeo, Mir Singh and Amir Baksh, I am not prepared to say that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of Ghariba's evidence of their participation in the dacoity as entitled the learned Judge to act upon his story in regard to those particular persons. But as to Rambaksh, although he was present when his father Baldeo pointed out the place where some of the property was dug up, he does not appear to have said anything or given any directions about it; and there is, in my opinion, no sufficient material to warrant the inference of guilty knowledge on his part. So with regard to Amman, no property was found with him or produced through his instrumentality, and under those circumstances, I think that both he and Rambaksh ought to have been acquitted."

In *R. v. Wilkes*,¹³ Baron Alderson said: "With respect to the prisoner Edwards, it is proved that meat of a similar kind was found in his house; that is therefore, some confirmation of the accomplice more than any one else. It is also proved that the skin was found in a whorled hole; that is no confirmation because it does not affect the prisoners more than it affects any other person." Where the corroboration consisted principally of statements of witnesses as to seeing the accused, or some of them, together on the

10. (1935) 40 C.W.N. 1090.

11. (1935) 40 C.W.N. 159.

12. (1866) I.L.R. 8 All. 509.

13. (1836) 7 C. and P. 272.

night of the occurrence and against one of the accused as to the identification of certain ornaments which had sometime or other been pledged with the deceased woman, it was held that these statements, though giving rise to suspicion, were consistent with the innocence of those accused and did not afford corroboration of the confession of co-accused.¹⁴

The recovery of articles which are very common, and which are not capable of definite identification, is no corroboration, but the recovery of identifiable ornaments will be sufficient.¹⁵

In *Kader Sundar v. R.*,¹⁶ it was held, that corroboration of the testimony of an approver in a trial under Sec. 400, I. P. C., must connect the accused with the offence, that is, the association of a gang of persons for the business of habitually committing dacoity.

In *R. v. Kallu Chand Dass*,¹⁷ Norman, J., remarked: "If, in a case, where the prisoners are charged on the evidence of approvers with belonging to a gang of dacoits, the corroborative evidence goes to show that a prisoner is a dacoit, has been actually present at or associated with the alleged gang at any one of the dacoities spoken of by the approvers, or is found to be in possession of property taken at any one of such dacoities, without being able to satisfactorily explain such possession, it is, in our opinion, as a matter of law, an amply sufficient corroboration of evidence charging person with being a member of a gang of dacoits."

The possession of stolen goods recently after the loss of them, may be indicative, not merely of the offence of larceny or of receiving with guilty knowledge but also of any other more aggravated crime, which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in possession of the prisoner, was held to raise a presumption that he was present at, and concerned in, the offence.¹⁸ This particular fact of presumption commonly forms also a material element of evidence in cases of murder, in which special application of it has been emphatically recognised.¹⁹

In *R. v. Neamatullah*,²⁰ the Calcutta High Court quoted with approval above passage from Wills, and prefaced that Sec. 114 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and private and public business, in their relation to the facts of the particular case. By way of illustration to that section, it is said that the Court may presume that a man, who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The matter does not rest there, because it is a matter of common procedure to utilise evidence of this kind and the presumption such as this, in connection not only with theft and receipt of stolen goods but also in cases of more aggravated offences. Applying this principle, the High Court in this case, which was a case of murder, and in which the accused was found to have been in recent possession of articles belonging to the deceased and traces of human

14. *R. v. Babarali Gasi*, (1914) 61 C.L.J. 492.

15. *Kartara v. R.*, 1934 Lah. 525: 35 P.L.R. 436.

16. (1911) 16 C.W.N. 69.

17. (1869) 11 W.R. Cr. 21.

18. *R. v. Rickman*, 2 East P.C. 1035; see *R. v. Fuller*, R. and R. 308.

19. Wills's Circumstantial Evidence, pp. 92 and 93, 6th Edn.

20. 14 Cr.L.J. 556.

blood were found on these articles as also on articles of clothing, one of which was actually being worn by the accused when he was arrested by the police, it was held, that the possession was a fact from which the Court might presume not merely theft or receipt of stolen property but murder also.

In *R. v. Sami and another*,²¹ in which the accused persons were tried for murder and robbery, committed in the same transaction, it was held that recent and unexplained possession of stolen property, which would be presumptive evidence against the prisoners on the charge of robbery, was similarly evidence against them on the charge of murder.

In *R. v. Ram Saran*,²² the Judges said: "The only other circumstance affecting Ram Ghulam is that he produced the jewel from a corner of his house on the afternoon of Saturday, the 20th June. I have given much anxious consideration and reflection to the question, whether this can be regarded as corroboration showing that Ram Ghulam participated in the murder. It would no doubt be corroboration or the evidence of an accomplice that the prisoner participated in a robbery, or that he has dishonestly received stolen property, but, in my opinion, it can be carried no farther. It is quite within the bounds of possibility that a murderer might hand over the proceeds of his crime to a person who might be found in possession of them and be in guilty possession of them to the extent of knowing they were stolen, but it requires a very long and dangerous leap to arrive at the conclusion that possession of the property taken from a murdered person is adequate corroboration of the evidence of an accomplice, charging such person in possession with participation in a murder. Under these circumstances, I have come to the conclusion, though not without much doubt and hesitation, that there is no proper corroboration of the statements of the accomplice, Sukhai or of the co-confessing prisoner, Piru, sufficient to satisfy the requirements of the law...."

In the case of *R. v. Baskerville*,²³ the only direct evidence of the commission of the acts charged was that of the boys themselves, who, on their own statements, were accomplices. The only corroboration of the boys' statements was contained in the contents of the letter sent by the prisoner to one of the boys enclosing a Treasury note for ten shillings. The words of the letter were capable of an innocent construction. This letter was, however, considered sufficient corroboration, as it tended to corroborate the statements of the accomplices.²⁴

To sum up: The law relating to accomplices, and the corroboration or confirmation of their evidence in material particulars, is the same both in England and India.

In India, the provisions covering accomplices are to be found in Sec. 133 and ill. (b) to Sec. 114 of the Indian Evidence Act. Section 133 states that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated

21. (1890) 1 L.R. 13 Mad. 426; see also *Public Prosecutor v. Chinareddi Munayya*, 12 Cr. L.J. 564; *Sher Singh v. R.*, (1932) 1 L.R. 14 Lah. 111; 140 I.C. 19; 34 C.L.J. 916; A.I.R. 1932 L. 621.

22. 1885 A.W.N. 311, 313.

23. (1916) 2 K.B. 658.86 L.J.K.B. 28.

24. Chaudhuri: *Confession and Evidence of Accomplices*, 6th Ed. 1967, Law Book Company, Allahabad.

testimony of an accomplice. Illustration (b) to Sec. 114 states that the court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

The law in England is the same, viz. the jury has an unfettered right to convict upon unconfirmed evidence and at the same time it has been considered the imperative duty of the Judge to warn the jury of the danger of convicting on the uncorroborated testimony of an accomplice.

The House of Lords in *Davies v. D. P. P.*²⁵ have laid down that: Henceforth accomplices who are participants of crime are to be classified under two categories which for purposes of distinction may be described as "accomplice in actual crime" and "accomplice in the general criminal transaction". Thus, an "accomplice in the actual crime" covers any person who is *particeps criminis* in respect of the actual crime charged either as a principal or as an accessory before or after the fact. On the other hand, "an accomplice in the general criminal transaction" describes any person who is not *particeps criminis* in respect of the actual crime charged but who was criminally implicated in the transaction which gave rise to the actual crime charged. According to the decision in *Davies v. D. P. P.*,¹ only in the case of evidence given by an "accomplice in the actual crime", there is an imperative duty upon the trial Judge to warn the jury as to the danger of convicting without corroboration. Whilst the House of Lords said nothing as to the position of "accomplices in the criminal transaction", it may be presumed that, in such a case, the judge is not obliged to give any warning, but may do so in the exercise of his discretionary power.

The law in India is similar and stands thus: Even before the passing of the Indian Evidence Act, 1872, it had been held by a Full Bench of the Calcutta High Court in *R. v. Elahi Buksh*² that the law relating to accomplice evidence was the same in India as in England. Then came the Indian Evidence Act. Reading Sec. 133 and ill. (b) to Sec. 114 together, the courts in India have held that, whilst it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further ordinarily that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. But an exception can arise. The Supreme Court has held that if several accomplices, simultaneously and without previous concert, give a consistent account of the crime implicating the accused, the court may accept the several statements as corroborating each other.³ The law in India, therefore, is substantially the same on the subject as the law in England, though the rules of prudence may be said to be based upon the interpretation placed by the courts on the phrase "corroborated in material particulars" in ill. (b) to Sec. 114.⁴ It is a well settled rule of law that the evidence of an accom-

25. (1954) 2 W.L.R. 343; (1954) 1 All E.R. 507.

1. Ibid.

2. (1866) 5 W.R. Cr. 80.

3. Mohd. Hussain Umar v. K.S. Dalipsinghji, (1970) 1 S.C.R. 130; 1970 S.C.D. 58; 1970 S.C.W.R. 76; (1970) 1 S.C.J. 149; 72 Bom. L.R. 774; 1970 Cr. L.J. 9; 1970

M.L.J. (Cr.) 68; A.I.R. 1970 S.C. 45 (46) following Haroon Haji Abdulla v. State of Maharashtra, 70 Bom. L.R. 540 (545); A.I.R. 1968 S.C. 832 (837).

4. Bhuboni Sahu v. The King, 1949 M.W.N. 444; 76 I.A. 147.50 Cr. L.J. 872; A.I.R. 1949 P.C. 257.

plice, or an accessory, must be corroborated in some material particulars, not only bearing upon the facts of the crime but, upon the accused's implication in it and further that the evidence of one accomplice is not available as corroboration of another. This rule, as to corroboration, long a rule of practice, is now virtually a rule of law, and is a rule of the greatest importance, especially where an accomplice gives evidence exculpating himself and fastening the guilt upon the other.⁵ Both in England and in India, it has become a rule of practice, and it is now virtually a rule of law, that corroboration is required to base a conviction on the evidence of an accomplice.⁶ Both in England and India, under the old as well as the new definition of 'accomplice', receivers have been held to be accomplices of the thief from whom they received the goods on trial of the latter for larceny or theft. In two cases, *R. v. Jennings*⁷ and *R. v. Dixon*,⁸ receivers were held to be accomplices of the thieves from whom they received the goods. According to Lord Simonds, in *Davis v. D. P. P.*,⁹ there are special circumstances to justify the extension of the primary meaning of the term 'accomplices' to cover the case of receivers. As the Lord Chancellor pointed out a receiver is not only committing a crime intimately allied in character with that of theft, he could not commit the crime of receiving at all without the crime of theft having preceded it. The two crimes are in a relationship of 'one-sided dependence'. Stated in a different form, it may be said that although the thief or the receiver, as the case may be, is not necessarily an accomplice in the actual crime charged, both are accomplices in the criminal transaction out of which arises the charge of larceny or theft and the charge of receiving, and it is on this account that their respective testimony must be treated with caution and requires corroboration. Similarly, under our own Codes, no doubt the disposal of stolen goods is not necessarily a part of the same transaction as theft, and, except when there is evidence of a community of purpose or a prearrangement, the receiver is not an abettor of theft. But ill. (b) to Sec. 114 of the Evidence Act and Sec. 239, cl. (e) of the Criminal Procedure Code create such relationship between the theft and receipt of stolen property with knowledge that the thief and the receiver may be tried jointly for their separate offences or for both in the alternative. Where they are not tried together, each is a competent witness against the other. Where either of them figures as a witness against the other, there can be no doubt that he must be treated as an accomplice witness.

The next question that arises for consideration is of the extent to which the evidence should be corroborated. The accepted rule in India is as stated in *R. v. Baskerville*,¹⁰ reaffirmed in *Mahadeo v. The King*¹¹ and accepted as correct law by the Supreme Court. In *R. v. Baskerville*,¹² it was laid down as follows:

"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which con-

5. *Mahadeo v. The King*, 1936 M.W.N. 889; 163 I.C. 681; 37 Cr. L.J. 914; A.I.R. 1936 P.C. 242.

6. *M. K. Thiagaraja Bhagavathar v. Emperor*, 1946 M.W.N. 49; I.L.R. (1946) M. 889; 225 I.C. 593; A.I.R. 1946 M. 271.

7. (1912) 7 Cr. App. R. 242.

8. (1925) 19 Cr. App. R. 36.

9. (1954) 2 W.L.R. 343.

10. (1916) 2 K.B. 658, 663; 86 L.J. K.B. 28.

11. 163 I.C. 681; A.I.R. 1936 P.C. 242.

12. (1916) 2 K.B. 658; 86 L.J. K.B. 28; *Samunder Singh v. State*, 1965 (2) Cr. L.J. 713; A.I.R. 1965 Cal. 598 (610).

firms in some material particulars not only the evidence that the crime has been committed but also that the prisoner committed it..... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused..... The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg. v. Birket*.¹³ Were the law otherwise, many crimes which are usually committed between accomplices in secret.....could never be brought to justice."

The evidence of concert is certainly a corroboration because as pointed out in *R. v. Farler*¹⁴ by Lord Abinger, C. B.: "If they were seen together under circumstances that were extraordinary and where prisoner was not likely to be unless there was concert, it might be something."¹⁵

28. Sexual offences, corroboration in. "In sexual crimes, the other person—usually the woman—may or may not be an accomplice, according as she is, by the nature of the crime, a victim of it or a voluntary partner in it. Thus, in adultery, the other party may well be deemed an accomplice; and so also, perhaps, in incest, and in pandering or pimping. But the woman is not an accomplice in rape, rape under age, seduction, or abortion, nor the participant in sodomy."¹⁶ A girl who is a victim of an outrageous act is, generally speaking, not an accomplice, though the rule of prudence requires that the evidence of a prosecutrix should be corroborated before a conviction can be based upon it.¹⁷ Generally stated, an abducted woman is not an accomplice and her evidence does not require corroboration. But the rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, before a conviction without corroboration can be sustained.¹⁸ A woman who has been raped is not an accomplice. If she was ravished, she is the victim of an outrage. If she consented, there is no offence unless she is a married woman, in which case question of adultery may arise. But adultery presupposes consent and so is not on the same footing as rape. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented, her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. But, in all these cases, a large volume of case-law has grown up, which treats the evidence of the complainant somewhat along the same lines as accomplice evidence, though often for widely differing reasons, and the position now

13. (1839) 8 C. & P. 732.

14. (1837) 8 C. & P. 106.

15. *Krishnan v. The State*, 1954 M.W. N. (Cr.) 257 (Ramaswami, J.).

16. *Wignore, Ev.*, S. 2060.

17. *Sidheswar Ganguly v. State of West Bengal*, A.I.R. 1958 S.C. 143; 1958 Cr. L.J. 273. *Bhudhanlal Sharma v. State*, (1961) 1 Cr. L.

J. 689 (Orissa).

18. *Dhaneshwar Thakur v. State*, 1958 Cr. L.J. 929; A.I.R. 1958 Pat. 412; *Sidheswar Ganguly v. State of W. Bengal*, A.I.R. 1958 S.C. 143; 1958 Cr. L.J. 273 (case of rape); *State Government of Manipur v. K. G. Sharma*, 1966 Cr. L.J. 1390.

reached is that the rule about corroboration has hardened into one of law.¹⁹ An accomplice is a person who voluntarily participates in the commission of the crime along with others. In fact, he is as much an offender as the accused in the dock except that he is taken as a witness against the others. In the case of prosecutrix for rape, she is a victim of the offence and not an offender. If she is a consenting party, it ceases to be an offence except in the case of those who are below a certain age, and, in such cases, the falsity is not so common as in the other cases. The case of an accomplice, therefore, materially differs from that of a prosecutrix for rape, and the evidence of both cannot be placed on the same footing.²⁰ There is no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in the case of any other offence. There can be no assumption, in the absence of evidence, that she is an accomplice.²¹ Questioning the rule requiring corroboration in such cases, Harries, C. J., of the Calcutta High Court observed: "The so-called English rule of caution, requiring corroboration of the statements of a complainant in sexual cases has been imported into Indian law and practice. Whether this rule is really necessary or not in India is a debatable question. Personally, I think there is very little danger of a false charge of rape being made by parents of any little girl. The consequences of such a charge are disastrous. In many cases, the little girl becomes outcast and her chances of ultimate marriage are either completely ruined or very seriously affected. I must confess that after sitting on the Bench for nearly fifteen years in five provinces, I have yet to come across a case where a false charge of this nature was made, and the falsity thereof clearly established. However, the rule has been imported into Indian practice and procedure and it must be followed."²² A Full Bench of the Bombay High Court took the view that the rule of practice requiring corroboration is restricted to cases of rape only and should not be extended to cases of other sexual offences.²³ The rule does not apply to cases of abduction.²⁴ In law, the evidence of a prosecutrix for rape does not require corroboration like that of an accomplice.²⁵⁻¹ No doubt, in cases of rape it has almost become an accepted proposition that a person shall not be convicted of the offence of rape solely on the evidence of the prosecutrix. Yet Courts have held, again and again, that, even in such cases, it is open to them to base the conviction solely on the evidence of the prosecutrix if they are satisfied that

19. *Rameshwar v. State of Rajasthan*, 1952 S.C. 54 at 57; *Vithappa Bhimappa Koli v. State*, 1972 (2) Mys. L.J. 59 (61); *State of Kerala v. Kundumkara Govindan*, 1968 K.L.J. 485 (489).
20. *In re Boya Chinnappa*, 1951 Mad. 760; I.L.R. 1951 Mad. 973; (1951) 1 M.L.J. 110; 64 L.W. 265; 1951 M.W.N. 60 (case-law exhaustively discussed); see also *Emperor v. Kaku Mashghul*, 1944 Sind 33; I.L.R. 1944 Kar. 123; 212 I.C. 467.
21. *Harendra Prasad v. Emperor*, 1940 Cal. 461; I.L.R. (1940) 2 Cal. 180; 190 I.C. 48; 44 C.W.N. 830, per Bartley, J.
22. *Bechu v. The King*, 1949 Cal. 613 at 616; 51 Cr.L.J. 153. But see *Ajay-*

endra Sen v. State, I.L.R. (1955) 1 Cal. 330.

23. *Emperor v. Banubai Ardesbir*, 1943 Bom. 150; 206 I.C. 592; 45 Bom. L.R. 281 (F.B.), followed in *Ramji Lal v. State*, 1951 Raj. 53; 52 Cr.L.J. 217; see also *Motiram v. State of M. P.*, 1955 Nag. 121; I.L.R. 1954 Nag. 922.
24. *Emperor v. Kasamalli Mirzalli*, 1942 Bom. 71; I.L.R. 1942 Bom. 384; 43 Cr. L.J. 529; 199 I.C. 202; 44 Bom. L.R. 27; *Ramji Lal v. State*, 1951 Raj. 33; 52 Cr. L.J. 217; *State of Orissa v. Rahasa Naik*, (1978) 45 C.L.T. 317.
- 25-1. *In re Boya Chinnappa*, 1951 Mad. 760; I.L.R. 1951 M. 973.

the evidence is worthy of credence.² But, it is a very well settled rule of practice in this country, following the English rule, that in rape cases the evidence of the complainant must be corroborated. It has been pointed out many times that a charge of rape is a very easy charge to make and a very difficult one to refute, and in common fairness to accused persons, the Courts insist on corroboration of the complainant's story.³ In one case, the view has been taken that when a young girl of immature years and tender age has been raped and she has made a disclosure of it at the earliest time to her mother and another, the Court should not insist upon corroboration by independent testimony.⁴ In another case, in which a girl of seven years of age was raped, the Court remarked: "In a case of this kind one would not insist on the same amount of corroboration as in a case, in which a grown up woman is alleged to have been raped."⁵ In yet a third case, it has been held that the rule that it is dangerous to convict an accused in a sexual case on the uncorroborated evidence of the prosecutrix would necessarily apply whether the prosecutrix were an adult or a girl only of seven years of age.⁶ Their Lordships of the Privy Council have, however, laid down the rule as follows: "In England where provision has been made for the reception of unsworn evidence from a child, it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act, there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child whether sworn or unsworn, but this is a rule of prudence and not of law."⁷ The Judge may, as a rule of prudence, warn the jury that such a rule of prudence required corroboration of the testimony of the prosecutrix, but that it was open to the jury to convict even on the uncorroborated testimony of the prosecutrix if the jury, in the particular circumstances of the case before it, came to the conclusion that corroboration was not essential for conviction. It is for the jury to decide whether or not it will convict on the uncorroborated testimony of a prosecutrix in the particular circumstances of the case before it. In other words, *insistence on corroboration is advisable but is not compulsory in the eye of law.*⁸ It is well established that *the nature and extent of corroboration, necessary, vary with the circumstances of each case. The nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely*

2. *Motiram v. State of M.P.*, 1955 Nag. 121; *Rameshwar v. State of Rajasthan*, 1952 S.C. 54; *Koli Tapu Dharamshi v. State*, 1955 Sau. 96; 56 Cr. L.J. 1525; *Vidya Prakash v. State*, 1954 Pepsu 72; I.L.R. 1953 Pepsu 328; 55 Cr. L.J. 599; *Emperor v. Kaku Mashghul*, 1944 Sind 33; I.L.R. 1944 Kar. 123; 212 I.C. 467; *Muhammad Afzal v. The Crown*, 1950 Lah. 151; 51 Cr. L.J. 968; *Pak. L.R.* 1950 Lah. 294; *Pak. Cas.* 1950 Lah. 450; *Raghubir Singh v. State*, 63 Punj. L.R. 573; *Lalchand Katri v. State*, I.L.R. 38 Pat. 1251.
3. *Emperor v. Mahadeo Tatya*, 1942 Bom. 621; 200 I.C. 261; 43 Cr. L.

- J. 621; 44 Bom. L.R. 216.
4. *In re Boya Chinnappa*, 1951 Mad. 760; I.L.R. 1951 M. 973; (1951) 1 M.L.J. 1101. But see *Ajavedra Sen v. State*, I.L.R. (1953) 1 Cal. 380.
5. *Nathu v. State*, 1951 Ajmer 60 at 61; 52 Cr.L.J. 584.
6. *Gangaram v. The Crown*, 1950 Nag. 9; 51 Cr. L.J. 244; 1949 N.L.J. 520.
7. *Mohamed Sugal Esa Mamasan Rer Alalah v. The King*, 1946 P.C. 3 at 5; 222 I.C. 304; 1946 A.L.J. 100; 1946 A.W.R. 7 (P.C.).
8. *Sidheswar Ganguly v. State of West Bengal*, 1958 S.C. 143; *Bhudhanlal Sharma v. State*, (1961) 1 Cr. L.J. 689 (Orissa).

acted upon.⁹ Sometimes rape is clearly proved or admitted, and the only question is whether the accused committed the offence. At other times, the association of the accused and the complainant is admitted, and the question is whether rape was committed. Where rape is denied, the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other parts of her body, which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused, or on the places where the offence is alleged to have been committed; and, in all cases, importance is attached to the subsequent conduct of the complainant. Whether she makes a charge promptly or not, is always relevant.¹⁰ In England, statements made by a little girl who has been ravished, even if made immediately after the offence and upon the first possible occasion, cannot amount to corroboration. At the most, it is evidence of conduct consistent with the girl's story. Evidence of previous statements concerning a fact at or about the time the fact occurred cannot amount in English law to corroboration. The position, however, is entirely different in Indian law, because Sec. 157, Evidence Act, expressly makes these statements as corroborative.¹¹ It has been said that statements admitted under Sec. 157 are not substantive evidence and cannot be made the basis of a finding as to the existence of the facts mentioned in the statements. They are repetitions of her statement and can be either true or false.¹² However, the weight to be attached to them is another matter, and though they may emanate from the same source their evidentiary value may be nil, if the source itself is tainted.¹³ In assessing the value of the evidence of the prosecutrix, her conduct immediately after the offence is committed is of great value. Such a conduct is relevant under Sec. 8. The clause itself makes a distinction as to what is relevant under Sec. 8 and what may be relevant under Sec. 157. A complaint relating to the crime in circumstances under which it was made and the terms of it are relevant whereas a mere statement that she was ravished is not relevant under Sec. 8 though it may be under Sec. 157 or Sec. 32(1).¹⁴ Such a complaint has been held to be admissible even under the English law. In *Reg. v. Lillyman*,¹⁵ Hawkins, J., pointed out that not only the fact that the complaint was made by the prosecutrix shortly after the alleged occurrence but also the particulars of such a complaint may be given in evidence, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of a prosecutrix with the story told by her in the witness-box. Corroboration may be had from the testimony of the mother of the prosecutrix. It may be that all mothers may not be sufficiently independent to fulfil the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of sources which are likely to be tainted.

9. *Sidheswar Ganguly v. State of West Bengal*, 1958 S.C. 143.

10. *Emperor v. Mahadeo Tatya*, 1942 Bom. 121 (F.B.): 200 I.C. 261 : 43 Cr.L.J. 621.

11. *Bechu v. The King*, 1949 Cal. 613 : 51 Cr. L.J. 153; *Santa Bala Dasi v. Sashi Bhushan Das*, 1953 Cal. 332 : 54 Cr.L.J. 748; *Mohammad Afzal v. The Crown*, 1950 Lah. 151:51 Cr.L.J. 968; but see *Chamuddin Sardar v. Emperor*, 1936 Cal. 18: 160 I.C. 1028 : 37 Cr. L.J. 859; *Taser Pramanik v. Emperor*, 1940 Cal. 391 : 190 I.C. 150:

41 Cr.L.J. 841 : 71 C.L.J. 590, both of which were explained away in the first case cited in this note.

12. *Mohammad Afzal v. The Crown*, 1950 Lah. 151.

13. *Koli Tapu Dharamshi v. State*, 1955 Sau. 96:56 Cr. L.J. 1525; *Sailendra v. State of Tripura*, A.I.R. 1959 Tripura 11 : 1959 Cr. L.J. 237.

14. *In re Boya Chinnappa*, 1951 Mad. 760: I.L.R. 1951 M. 973: (1951) 1 M.L.J. 110.

15. (1896) 2 Q.B. 167 : 65 L.J.M.C. 195.

In the absence of enmity against the accused there is no reason why she should implicate him falsely.¹⁶ In a Lahore case, it has been held that where the only corroborating evidence is that of the approver's son, who repeats parrot like what he is tutored to say, it is not safe to convict a person.¹⁷

In the case of an offence under Section 366, I. P. C., there should be corroboration of some material particular from some independent source and the bare statement of the prosecutrix is not sufficient to sustain the conviction of the accused.¹⁸ Where the statement of the raped girl can be relied upon, no corroboration is necessary.¹⁹

For the establishment of the accusation of adultery, it is not necessary that someone who has seen the adulterous act must give evidence about it. Evidence of prior or subsequent acts of undue familiarity and opportunities for adultery in the context of other evidence of a circumstantial nature is sufficient.²⁰ In *Loveden v. Loveden*,²¹ Sir William Scott said, that it is not necessary to prove the direct fact of adultery. In every case almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; unless this was so held no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decision upon the particular case. The only general rule that can be laid down is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. In *Preston Jones v. Preston Jones*,²² the House of Lords laid down that the evidence must be clear and satisfactory, beyond a mere balance of probabilities and conclusive in the sense that it will satisfy the guarded discretion of a reasonable and just man. In *Bipinchandra v. Prabhavati*,²³ the Supreme Court enunciated the rule in the same way. It was pointed out that a spouse, accusing the other of any matrimonial offence, must prove the offence beyond reasonable doubt, and that where the evidence is that of the spouse, it is a rule of caution and prudence that that evidence should receive corroboration. If a person who is a party to an adulterous act were to make a confession that there was such adultery, that confession would be evidence against the other party to the act only, if the party making the confession gives evidence about it.²⁴

In sum, a girl who is a victim of an outrageous act is, generally speaking, not an accomplice, though the rule of prudence requires that the evidence of a prosecutrix should be corroborated before a conviction can be based

16. *Rameshwar Kalyan Singh v. State of Rajasthan*, 1962 S.C. 54.
17. *Mehr Singh v. Emperor*, 1929 Lah. 527; 122 I.C. 91.
18. *Ram Murti v. State of Haryana*, 1970 S.C. Cr. R. 510; 1970 S.C.D. 663; (1970) 1 S.C.W.R. 767; 1970 Cr. L.J. 991; 1970 Cur. L.J. 528; 72 P.L.R. 1000; A.I.R. 1970 S. C. 1029 (1032); *Gur Charan Singh v. State of Haryana*, A.I.R. 1972 S. C. 2661; 1973 Cri. L.J. 179.
19. *Dharam Pal v. State*, 1971 Cr. L. J. 1750; A.I.R. 1971 H.P. 17

- (19). See *Bhagwat Prakash v. The State*, A.I.R. 1956 All. 22 (her evidence weightier than that of ordinary witness). Also see *Jarnail Singh v. State of Rajasthan*, 1972 Cr. L.J. 824 (Raj.).
20. *Vedavalli v. Ramaswami*, A.I.R. 1964 Mys. 280.
21. 161 E.R. 648.
22. (1951) 1 All E.R. 124.
23. 1956 S.C.R. 838; A.I.R. 1957 S. C. 176.
24. *Vedavalli v. Ramaswami*, A.I.R. 1964 Mys. 280.

upon it.²⁵ The Supreme Court has approved of the charge to the Jury, namely, that, in a sexual offence, like rape, corroboration of the victim is not essential before conviction but being a matter of prudence, the Jury must consider advisability of corroboration. Although the law does not require corroboration of the victim in order to substantiate the charge of rape, one should not readily accept her testimony, for it is not wise to do so in the absence of some corroboration of her testimony. In *Rameshwar v. State of Rajasthan*,¹ it was said that the nature and extent of the corroboration must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. *It is not necessary that there should be independent confirmation of every material circumstance, that is, the independent testimony should not, itself, be sufficient to sustain conviction. All that is required is, that there must be some additional evidence, direct or indirect rendering it probable that the story is true and that it is reasonably safe to act upon it.* In *A. W. Khan v. State*,² it was said that, in a case of rape, independent confirmation of every material circumstance is not required and the corroboration need not be direct evidence that the accused committed the crime, but, it is sufficient if it is merely circumstantial evidence of his connection with the crime. The two decisions of the Supreme Court, namely, *Rameshwar v. State of Rajasthan*,³ and *Sidheshwar Ganguly v. State of West Bengal*,⁴ make it clear that—

- (1) the prosecutrix in a case of rape cannot be treated as an accomplice, and consequently, the principle requiring corroboration in respect of an accomplice witness cannot have application in considering the evidence of a prosecutrix in a rape case ;
- (2) this Act does not provide that the evidence of a prosecutrix in a rape case requires corroboration ; and
- (3) as a matter of caution and prudence, Courts insist on the need of corroboration of the evidence of the prosecutrix.

The only rule of law is that this rule of caution and prudence must be present to the mind of the Judge or the jury and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration, before a conviction can be allowed to stand. The independent evidence must not only make it safe to believe that the crime was committed, but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the victim. There cannot be any hard and fast rule as to the nature and extent of the evidence required to corroborate the case. The corroboration should be such as to render the prosecution story reliable and safe to act

25. *Sidheshwar Ganguly v. State of West Bengal*, 1958 S.C.R. 749, 759 : A.I.R. 1958 S.C. 143, 147.

1. 1952 S.C.R. 377 : A.I.R. 1952 S.C. 54 ; *In re Boya Chinnappa*, A.I.R. 1951 Mad. 760 ; State Government, *M. P. v. Sheodhayal Gurudayal*, A.I.R. 1956 Nag. 8 ; *Sidheshwar Ganguly v. State of West Ben-*

gal, 1958 S.C.R. 749 : A.I.R. 1958 S.C. 143 ; *Kshetrimayum v. The Union Territory of Manipur*, 1968 Cr. L.J. 690 (2) (698).

2. A.I.R. 1962 C. 641.

3. 1952 S.C.R. 377 : A.I.R. 1952 S.C. 54.

4. 1958 S.C.R. 749 : A.I.R. 1958 S.C. 143, 147.

upon.⁵ The test as to where corroboration is necessary lies in the naturalness of the story deposed to by the victim. If there be any doubt as regards its genuineness, there is the need of caution and, therefore, of corroboration. For this purpose, it is not necessary that the entire story should appear doubtful, it is sufficient if any part of the narration has the semblance of exaggeration or artificiality.⁶ The questions whether the statement of the victim requires corroboration, and in what particulars, and what kind of corroboration should be considered sufficient, are, in the ultimate analysis, questions relating to the correct and proper appreciation of evidence, and must be answered with reference to the facts and the circumstances of individual cases and the principles, laid down in the cases, should be looked upon as merely guiding principles and not as inflexible rule of law.⁷⁻⁸

29. Effect of corroboration. (1) *General.* Where it is established that there are good grounds for believing the accomplice, by reason of the existence of the corroboration on material points implicating any of the accused, the Court can safely come to a conclusion as to the truth of the whole story on uncorroborated points, so far as they implicate the same accused person.⁹

In *R. v. Kunjan Menon*,¹⁰ B, the giver of a bribe, stated that he visited and spoke to K, the accused, twice in connection with the bribe and paid a sum of money to S to be paid to K, at the instigation of K. A witness gave evidence that B went to K's house with the intention of seeing K on two occasions spoken by B. It was also proved, that B borrowed money about the date of the alleged payment to S; it was held, that the evidence of B was materially corroborated and his evidence, regarding the interview with K and what passed between him and K at the interview, could be believed, though there was no corroborative evidence of those facts; it was observed, that on uncorroborated points, the accomplice can be believed, if the Jury think it reasonable.

In *Ledu Molla v. R.*,¹¹ it was contended that the Sessions Judge was wrong in telling the Jury that, if the approver was corroborated on some points, they might believe him on other points in respect of which he was not corroborated. The contention was repelled, since (1) the Jury were told that the condition of believing him on those points was if they thought it reasonable, and (2) it was not necessary that the approver should be corroborated as regards every simple statement that he makes. It was held that the Jury were rightly directed.

(2) *Direct evidence of complicity as to a part of the occurrence.* In the case of *R. v. Mohiuddin*,¹² in which the prisoners were tried for the murder of one Nabi, the confessional statement of one of them and the evidence of an approver showed that the accused first attacked Nabi at a spot described

5. *Rameshwar v. State of Rajasthan*, 1952 S. C.R. 377: A.I.R. 1952 S.C. 54; *Gopi Shanker v. State of Rajasthan*, 1967 Raj. 159; *State of Kerala v. Kundumkara Govindan*, I.L.R. (1968) 2 Ker 605; 1968 K. L.J. 485; 1969 Cr.L.J. 818.

6. *State Government, M.P. v. Sheodayal Gurudayal*, A.I.R. 1956 Nag. 8.

7-8. *Gopi Shanker v. State of Rajasthan*, 1967 Raj. 159.

9. *Gafoor v. R.*, (1936) 37 Cr.L.J. 992; 164 I.C. 677; A.I.R. 1936 Rang. 373.

10. (1888) 1 M.L.J. 397 (F.B.).

11. (1925) 42 C.L.J. 501; I.L.R. 52 C. 595; 87 I.C. 925; 26 Cr. L.J. 1037; A.I.R. 1925 C. 872.

12. I.L.R. (1901) 25 Mad. 143.

as D; that they then carried him from D to a spot described as F; and that from E they carried him to a spot described as F, where he was killed. The body was found close to F. Of the witnesses called for the prosecution, the third gave evidence as an approver. He implicated the first accused as having taken a prominent part in the attack on the deceased. He also deposed that accused Nos. 2, 3 and 4 were present at the attack at D; and that they assisted in carrying the deceased from D to E, and also from E to F, and that, whilst going from E to F, they committed serious injuries on him. His evidence was corroborated in the following manner: the fourth prosecution witness implicated these three accused persons as having taken part in the attack at D. The fifth and seventh witnesses also deposed as to the presence of accused Nos. 2, 3 and 4 at D, and that they had taken some part in the attack there committed. The first accused made a confessional statement which was recorded under Sec. 164,¹³ Cr. P. C., and it was repeated before the Committing Magistrate but repudiated at the Sessions Court. Accused Nos. 2, 3 and 4 admitted before the Committing Magistrate that they had been present at D, but their case was that they did not accompany the murderer to F. The Sessions Judge convicted accused Nos. 1, 2, 3 and 4 of murder. On appeal before the High Court, it was held that the evidence of the approver was sufficiently corroborated to justify a conviction. Moore, J. (with whom Davies, J., concurred), in dealing with the evidence of the case as against accused Nos. 2, 3 and 4 said: "It appears to me that the evidence of the fourth, fifth and seventh witnesses affords such corroboration of the statements of the approver as is required by law to uphold a conviction. That evidence shows that not only were the prisoners Nos. 2, 3 and 4 present when the murderous attack on Nabi commenced, but also that they joined actively in the attack. Such evidence must, as it appears to me, be held to afford a confirmation of the accomplice in important facts which go to fix the guilt on these particular persons."

The question whether the evidence of an approver or accomplice has been sufficiently corroborated is, however, largely a matter for the trying Court.¹⁴ Whether the evidence brought forward to confirm the accomplice is a satisfactory and sufficient corroboration is a question for the Jury.

Where the evidence of the approver is false in part, and is eliminated as against one of the accused whose name has been falsely substituted by the approver, it has been held that the whole fabric must fall to the ground, and it should not be accepted even against the other accused, though to some extent it is corroborated by independent testimony.¹⁵ So also, it has been held in *Balakram v. R.*,¹⁶ that if the Court believes the approver's evidence in part and disbelieves it in part, the Court has no alternative but to reject the evidence altogether.

(3) *Where the approver is partly disbelieved:* It has been held that the question as to whether or not a statement of an approver should be taken into consideration, or should be totally rejected, is one which must depend on the circumstances of each case. Beyond reiterating the law on the subject,

13. Now see Section 164 of the Code of 1973.

14. *Moti Lal Roy v. R.*, (1935) 39 C. W.N. 754.

15. *R. v. Rai Singh*, 1933 Lah. 371 :

146 I.C. 665: 35 Cr.L.J. 137. (1910) 11 Cr. L.J. 441 [cf *Ledu Molla v. R.*, (1925) 42 C.L.J. 501].

which is to the effect that the statement of the approver must be very thoroughly scrutinized and should not be accepted, unless it is corroborated by other independent evidence in the case, no hard and fast rule can be enunciated to govern all cases. There may be cases in which an approver has made positively a false statement in respect of a particular point, and yet the evidence produced might go to prove, beyond any doubt, that, in other respects, the evidence of the approver is trustworthy and is fully corroborated by the very best evidence produced. It would be wrong in such cases to suggest that because the approver has made a wrong statement on a particular point, his whole evidence should be rejected.¹⁷

(4) *Sequence of proof.* It is objectionable to allow a witness to be corroborated, under Sec. 157 of the Act, before he himself is examined. It is very doubtful, whether Sec. 136 of the Act gives the Court any discretion to allow such a course. It can only be very rarely and for very special reasons, if at all, that such a course should be allowed; and when such special reasons exist, they must be recorded by the Judge.¹⁸

(5) *Charge as to whether the witness is an accomplice.* In *Amanat Sardar v. Nagendra Biswas*,¹⁹ it was contended by the defence that two important witnesses were as a matter of fact accomplices, the Court held that a mere statement, at the end of the Sessions Judge's judgment that "some of the witnesses may be suspected of being accomplices", is not sufficient; the Judge was bound to find either that they were or were not accomplices, and to weigh their evidence accordingly. The case was sent back for the rehearing of the appeal.

When it is more than possible that, if the Judge had clearly called the attention of the Jury to the fact that there was no corroboration of certain prosecution witnesses, they might have returned a different verdict, the summing up amounts to a misdirection.²⁰

(6) *Jury trial.* When the trial takes place before a Judge and a Jury, the Judge, in discharging his duty to sum up the evidence to the Jury, should point out such circumstances, as may occur in any particular case, which go against the credit of the accomplice witness; failure to do so would seriously prejudice the accused. The surrounding circumstances in the case should accordingly be brought to the notice of the Jury. The character of the accomplice, the degree of his complicity, the nature of his evidence and the circumstances under which the statement was made should all be placed before the Jury. In cases where the material, supporting the charge against the prisoner, is afforded by the evidence of an approver, the Judge is bound to call the attention of the Jury to the circumstance, if it be in fact the case, that the approver is speaking under the influence of a conditional pardon, that is, a pardon conditional upon his telling the truth to the satisfaction of the Crown, who is the prosecutor.²¹

If an accomplice had been previously convicted of dacoity, had been pardoned for the purpose of giving evidence against the other dacoits, was

17. *Bhola Nath v. R.*, (1939) 40 Cr. L.J. 856; 1939 All 567; 184 I.C. 191; I.L.R. 1939 A. 736; *Asar Ali v. Shah*, 1954 Assam 27.
18. *Mi Myin v. R.*, (1908) 9 Cr.L.J. 576, following *Shew Kin v. R.* (1906) 5 Cr.L.J. 411.

19. I.L.R. (1910) 38 Cal. 307.
20. *Sitaram v. R.*, (1932) 33 Cr. L.J. 167; 135 I.C. 392; A.I.R. 1932 Oudh 25.
21. *R. v. Bykunt Nath*, (1868) 10 W. R. Cr. 17.

kept in the pay of Government and under surveillance, abetted the dacoity in question and then accused others as associates,²² or, if the approver was once pardoned but his statement being considered unsatisfactory his pardon was withdrawn, was again readmitted to pardon and his statements on different occasions were not altogether consistent,²³ or, if the approver had given different versions of the occurrence in his previous statements,²⁴ or, if the approver witness had been hunted up after the case had been committed to the Sessions, and while the other prisoner, his master, was in *hajat* awaiting his trial,²⁵ or if there are two approvers and their statements were full of discrepancies,¹ such circumstances should be brought to the notice of the Jury.

When a co-prisoner's confession in a joint trial forms the statement of an accomplice, and the Judge only warns that it is of little weight against the other prisoner instead of telling them that it is not evidence against him at all, the other accused is seriously prejudiced and his conviction ought not to stand, although, in view of the other evidence against him, it may be difficult to say whether a miscarriage of justice has occurred. A retrial was ordered in such a case.² When some admission (not amounting to confession) is used against the accused who makes it, the Jury must be told that the admission is no evidence against the other accused. Omission to direct the Jury, as above, is a misdirection.³

When the only evidence against an accused person is a retracted confession and the evidence of another accomplice, omission in the charge to the Jury to point out, that the corroboration must come from independent witnesses and not from the evidence of accomplices, is a non-direction.⁴

(7) *Duty to point out the law of evidence.* As it is the function of the Jury to find the facts upon the evidence laid before them, and, for that purpose, to be guided by the law which is applicable, it is, in all cases, the duty of the Judge to point out to them that law.⁵ The law of evidence is a part of the law, which it is necessary for the Judge to lay down in order to guide the Jury. Accordingly, it is the duty of the Judge to explain the provisions of Secs. 133 and 114 of the Evidence Act with the relevant part of Sec. 4 of the Act.⁶

In effect, this seems to amount to a direction, viz., that the Jury ought to draw the presumption that an accomplice's evidence is unworthy of credit, unless there are some exceptional circumstances in the case which rebut that presumption.⁷ And the Judge must clearly state the circumstances negating the presumption under Sec. 114 (b).⁸

22. *Elahee Buksh v. R.*, (1866) 5 W. R. Cr. 80, 90 (F.B.).

23. *R. v. Nanhoo*, (1868) 9 W.R. Cr. 28.

24. *R. v. Ramsody*, (1873) 20 W.R. Cr. 19.

25. *R. v. Nawab Jan*, (1867) 8 W.R. Cr. 19.

1. *R. v. Jafar Ali*, (1875) 19 W.R. Cr. 57, 58.

2. *Naresh Chandra v. R.*, (1938) 42 C.W.N. 814.

3. *Teju Pramanik v. R.*, (1898) 2 C. W.N. 369.

4. *Kashemali v. R.*, 36 C.W.N. 874 : L.E.—428

140 I.C. 379; 34 Cr. L.J. 23 : A. I.R. 1933 C. 6.

5. *R. v. Sadhu Mandal*, (1874) 21 W. R. Cr. 69; see *Rebati Mohan Chakravarti v. R.*, (1928) 32 C. W.N. 945 : I.L.R. 56 C 150 : 115 I.C. 258; A.I.R. 1929 C. 57.

6. *Nanhak Ahir v. R.*, (1934) 35 Cr. L.J. 1104.

7. Per Lord-Williams, J., in *Rebati Mohan Chakravarty v. R.* (1928) 32 C.W.N. 945; A.I.R. 1929 Cal. 57.

8. *Muthu Kumaraswami v. R.* I.L.R. (1912) 35 Mad. 397, 454 (F.B.)

Thus, in all cases, whether the evidence of the accomplice is corroborated or not, the Judge should tell the Jury that they can legally convict on the uncorroborated testimony of an accomplice, if, on all the facts and circumstances of the case and after careful scrutiny, they believe it to be true (Sec. 133).⁹

(8) *Warning to be given.* But though the Jury may convict on the uncorroborated testimony of an accomplice, the Judge ought not to leave the case without warning them that such evidence must be regarded always with grave suspicion. Hence, although there is nothing to prevent a man of low morality being believed by the Jury, yet the fact, that a person is an accomplice, makes it unsafe to convict one on his uncorroborated testimony. should be stated, and it casts upon the Judge the duty of warning the Jury against acting on such testimony.¹⁰

It is in all cases incumbent on the Judge to inform the Jury of the results of the law bearing on this point of accomplice's evidence substantially, as explained in the case of *Elaheebuksh v. R.*¹¹

If a Judge, instead of advising a Jury not to convict upon the mere uncorroborated evidence of an accomplice, were to advise them to convict upon such evidence, or were to tell them that the uncorroborated evidence of an accomplice given under a tender of pardon was admissible, and that it was for them alone, to form their opinion upon it, that a conviction founded upon such evidence would be legal, and that such evidence without corroboration might be acted upon with as much safety as that of any other witness, the error in the direction would form a good ground of appeal.¹²

To let the evidence of the approver go to the Jury, without giving them proper warning, is a misdirection. On the other hand, to withdraw from the Jury the consideration of the guilt or innocence of the accused by telling them that a conviction cannot be based on the uncorroborated testimony of an approver would be no less misdirection. The Judge is bound to caution the Jury and also to advise the Jury that, generally speaking, the natural presumption for them to make is that the evidence of an approver is unreliable, though they are not compelled to act on that presumption.¹³

The Judge would be wrong, if he puts the evidence of an approver and the statements of accused persons before the Magistrate on the same footing as the evidence given by an ordinary witness. The Judge must not overlook the fact that the invariable practice is to regard such statements as tainted.¹⁴ Omission to caution the Jury against accepting an approver's evidence unless corroborated amounts to a misdirection.¹⁵

In *R. v. Basherville*,¹⁶ the Lord Chief Justice said: "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But

9. *Ramaswami v. R.*, (1903) 27 Mad. 271; *R. v. Nilakanta*, (1912) 35 Mad. 247; *Muthu Kumaraswami v. R.*, I.L.R. (1912) 35 Mad. 397 (F.B.); *Gobardhan v. R.*, I.L.R. (1889) 9 All. 528.
10. *Surya Kant v. R.*, (1919) 31 Cr. L.J. 20.
11. (1866) 5 W.R. Cr. 80.
12. See also *R. v. Nawab Jan*, 8 W. R. Cr. 19, and *R. v. Ashootosh*

- Chuckerbutty*, I.L.R. (1874) 4 Cal. 493, 490 (F.B.).
13. *R. v. Wazid Sheik*, 1933 Pat. 500 : 147 I.C. 1160.
14. *R. v. Bepin Biswas*, I.L.R. (1884) 10 Cal. 970, 975.
15. *R. v. Arumuga*, I.L.R. (1888) 12 Mad. 196; *R. v. Khotub*, (1866) 6 W.R. Cr. 17.
16. (1916) 2 K.B. 658, 663; 86 L.J.K. B. 28.

It has long been a rule of practice at the Common Law for the Judge to warn the Jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the Judge to advise them not to convict upon such evidence; but the Judge should point out to the Jury that it is within their legal province to convict upon such unconfirmed evidence. It should be equally incumbent upon the Judge to give the warning to the Jury when the prisoner is tried with another against whom there is corroboration of the accomplice's story. If the Judge failed to give the warning, the appellate Court would be bound to set aside the conviction.¹⁷

The Judge's summing up must be emphatic on the danger of accepting the uncorroborated evidence of an accomplice and care must be taken that the suggested corroboration is, in fact, adequate.¹⁸ The slighter the corroboration, the more emphatic should be the warning to the Jury.¹⁹ It is not his duty, however, and it is not proper for him to tell the Jury, as a matter of law, that they 'must not convict' unless the evidence is corroborated in material particulars.²⁰

In *R. v. Baskerville*,²¹ the Recorder directed the Jury that they 'must not convict' upon the testimony of the accomplices, unless they were satisfied that there was corroboration in some material particular affecting the accused. The Lord Chief Justice said: "We were of opinion that, in any event, his direction gave no cause of complaint to the appellant. The warning by the Recorder to the Jury was sufficient, if indeed not more than sufficient."

The Judge must not say that the Jury 'ought to' convict in a case where they believe the accomplice without corroboration.

(9) *Direction to Jury.* In an English case,²² the Judge directed the Jury to the effect that, if in fact they were satisfied with the evidence and believed the same to be true, they ought to convict, notwithstanding the absence of corroboration and added that it was generally dangerous to act on such evidence alone. The Court of Criminal Appeal quashed the conviction and the Lord Chief Justice summarised the main points on which the Jury must be directed by the trial Judge in cases where the only evidence is the uncorroborated testimony of an accomplice or accomplices. "There is a distinction drawn", the Lord Chief Justice said, "between the three things which the Jury are to be told: (a) that it is within their legal province to convict; (b) that in all cases it is dangerous to convict; and (c) that they may be advised not to convict. It is quite clear when one looks at the examination of the various cases, that nowhere is there to be found, directly or indirectly, any reference to a case in which it may be the duty of the learned Judge to advise the Jury in such a case that they ought to convict."

In warning the Jury, they should be cautioned that it is unsafe to act upon (i.e., to believe) the uncorroborated evidence of an accomplice.²³ The

17. *R. v. Baskerville*, (1916) 2 K.B. 658; *R. v. Stubbs*, (1855) 25 L.J. M.C. 16; *R. v. Imamdad Baban*, (1867) 3 Bom. H.C.R. 57.

18. *R. v. Clive*, (1930) 22 Cr. A.R. 19.

19. *R. v. Warren*, (1909) 25 T.L.R.

653.

20. *Nambhak Abir v. R.*, (1934) 35 Cr. L.J. 1104.

21. (1916) 2 K.B. 658.

22. *R. v. Becher*, 19 Cr. A.R. 22.

23. *Motilal Roy v. R.*, (1935) 39 Cr. W.N. 754.

Judge is to point out that it is not safe to accept the testimony of an accomplice without corroboration although the law permitted it.²⁴

(10) *Expression of the Judge's view of the accomplice evidence.* The Judge may, if he thinks fit, advise the Jury not to act upon the evidence without corroboration but he should tell the Jury that his opinion is not final and that it is within the legal competence of the Jury to convict without corroboration, if they think it proper.

The Judge may express his own opinion that the accomplice is unworthy of credit, telling the Jury that they may accept or reject his view.²⁵

If the evidence of the accomplice is in itself unworthy of credit, it must be rejected and no question of corroboration arises.¹

(11), *Existence of corroborative evidence is for the Judge to decide.* As Sec. 296, Cr. P. C.,² in elaborating the duties of the Judge, includes among such duties the duty of deciding all questions of law arising in the course of trial, it would come within the duty of the Judge to decide, in the first instance, whether any evidence had been given on which the Jury could properly find the question for the party on whom the onus of proof lies, for that is a question of law.³

In other words, it would be the duty of the Judge to decide, whether or not there is any corroborative evidence to support the accomplice, so far as the complicity of the accused is concerned. The existence of any evidence of requisite kind has been described as a preliminary question which is one of law for the Judge to decide.⁴ Though this case⁵ is a civil case, it has been held in *R. v. Upendranath Das Biswas*⁶ that its principle is of universal application.

It has been held in *Rebati Mohan Chakravarti v. R.*⁷ by Lord-Williams, J., that like the question whether there is any evidence in law to go to the jury, the question as to what is, or is not evidence, that is to say, what amounts or does not amount in law to evidence is a question of law, to be decided by the Judge. Similarly, the question, as to what is or is not, what amounts or does not amount to corroborative evidence in law, is a question of law to be decided by the Judge.

24. *R. v. Jamaldi*, (1933) 26 C.W.N. 536 [relying on *R. v. Baskerville*, (1916) 2 K.B. 658]; *Madhu v. R.*, 37 C.W.N. 934; *Chittray Ranjan v. R.*, (1932) 37 C.W.N. 290; *R. v. Maganlal*, (1889) 14 Bom. 115; *R. v. Chagan*, (1889) 14 Bom. 331; *Narain Das v. R.*, I.L.R. (1922) 3 Lah. 144; 23 Cr. L.J. 513; A.I.R. 1922 L. 1; *Kamala v. Sital*, I.L.R. (1901) 28 Cal. 339, 346; 5 C.W.N. 517; *Madan Guru v. R.*, (1918) 24 Cr. L.J. 723; 23 I.C. 964; *Suiya Kanta v. R.*, (1919) 24 C.W.N. 119; 31 Cr. L.J. 20; 21 Cr.L.J. 802; 58 I.C. 674; A.I. R. 1920 C. 980; *Kalwa v. R.*, (1926) 48 All. 409; 27 Cr. L.J. 746; A.I.R. 1926 All. 377; 95 I.C.

74; *R. v. Nilakanta*, (1912) 35 Mad. 247 (S.B.); 13 Cr. M.J. 305; 14 I.C. 849 (per Sankaran Nair, J.); *Abdul Wanab v. R.*, 47 All. 39, 43; A.I.R. 1925 All. 223; 95 I.C. 756.

25. *Nanhak Ahir v. R.*, (1934) 35 Cr. L.J. 1104.

1. *Sarwan Singh v. State*, 1957 S.C. 637; 1957 S.C.J. 699.

2. Now see Section 429 of the Code of 1973.

3. *R. v. Upendranath Das Biswas*, (1914) 19 C.W.N. 653, 663 (F.B.).

4. *Ryder v. Wombwell*, (1868) 4 Exch. 32 at p. 38.

5. *Ibid.*

6. 19 C.W.N. 653.

7. (1928) 32 C.W.N. 945.

The Judge in dealing with corroborative evidence must state what in his opinion are material particulars.⁸

The Judge should tell the Jury that an approver's evidence requires corroboration in material particulars tending to connect each of the accused with the offence. But it is not necessary to direct them on the matter in precise language, if the Jury were well aware of the corroboration required.⁹

In a case before the Supreme Court it was held that there was enough evidence to corroborate the approver's version, even though omission of the names of certain accused in the approver's statement to the police was erroneously not brought on record.¹⁰

(12) *Material particulars.* If the Judge wholly omits to guide the Jury as to what amounts to legal corroboration, viz., that the testimony of the approver ought to be corroborated in some material circumstances such circumstances, connecting and identifying (or tending to connect) the prisoner with the offence, the omission amounts to a misdirection vitiating the trial.¹¹

It is not all evidence, corroborating the accomplice's story, which comes within the rule requiring corroboration but only such evidence that tends to show that the accused was implicated in the crime. Consequently, just as it is the duty of the Judge to direct the Jury to reject any evidence which may have been given, but which does not amount to evidence in accordance with law, similarly it is the duty of the Judge to direct the attention of the Jury to those portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfil the requirements referred to before.¹² And though an omission to direct the attention of the Jury to those portions of the corroborative evidence which amount to corroborative evidence in law would amount to non-direction—it is a misdirection if the Judge points out to the Jury certain portions of the evidence as fulfilling the requirements already stated, when in fact they do not do so.¹³

It would be an error in summing up, if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the Jury that the evidence of the accomplice was corroborated by evidence of a fact which did not amount to any corroboration at all.¹⁴ If the so-called corroborative evidence does not show the connection of the prisoner with the offence, but tends to show that certain points of the accomplice's evidence are true, the accused may be discharged.¹⁵

If a Judge erroneously treats an accomplice as an ordinary witness, or fails to point out to the Jury the danger of relying upon the uncorroborated testimony of an accomplice, or erroneously treats some facts as material corroboration, he fails to discharge his duty as a Judge and the conviction is liable to be set aside on appeal.

8. Nanhak Ahir v. R., (1934) 35 Cr. L.J. 1104.
9. Hashani v. R., (1930) 34 C.W.N. 390; A.I.R. 1930 Cal. 481.
10. Madan Mohan Lal v. State of Punjab, 1970 S.C. Cr.R. 573; 1970 Cr. L.J. 9; A.I.R. 1970 S.C. 1006 (1010).
11. R. v. Nawab Jan, (1867) 8 W.R. Cr. 19, 23.

12. Per Lord-Williams, J., in *Rebati Mohan Chakravarty v. R.*, (1928), 32 C.W.N. 945; A.I.R. 1929 Cal. 57; see Hashani v. R., *supra*.
13. R. v. Upendranath Das Biswas, (1914) 19 C.W.N. 653 (F.B.).
14. *Elahce Buksh v. P.*, (1866) 5 W.R. Cr. 80.
15. R. v. Nawab Jan, *supra*.

In *Jamiruddi Masalli v. R.*,¹⁶ the Sessions Judge told the Jury: "If you believe that the approver's story is worthy of credit in itself you have to consider whether it has been corroborated in material particulars." He then described what in his opinion were "the points of corroboration", and he told the Jury that "the above are points on which the evidence has been corroborated and that corroboration is full and complete if you believe it; you have to consider these points and decide, whether the approver is corroborated in material particulars; and if you find that to be so, then you have in his story sufficient evidence to connect all three with the crime"; it was held that this was not a proper charge. The Sessions Judge should have told the Jury, that, although the law permits them to convict on the uncorroborated evidence of the accomplice, it is not the practice of our Courts, which have consistently held that it is not safe or proper to convict on such evidence without corroboration sufficient to connect each of the accused with the offence committed. With this caution, the Sessions Judge should have laid before the Jury the evidence corroborating the statement of the accomplice.

If there is no corroborative evidence, the Judge should tell the Jury so.¹⁷

Where there is no corroboration worth the name of the approver and the Judge fails to direct the Jury accordingly, his omission to do so amounts to a misdirection.¹⁸

Even where there is no corroborative evidence the evidence of the accomplice must still be laid before the Jury, and the Judge cannot withdraw the case from them, as a case of no evidence, or direct the Jury to acquit.¹⁹

(13) *Practice where there is no corroborative evidence.* In *R. v. Ganubin Dharoji*,²⁰ it was held that where the evidence of an accomplice is uncorroborated, the correct practice requires Sessions Judges not merely to tell the Jury that it is unusual to convict on such evidence, but that they should also tell them (i.e. advise), that it is unsafe and contrary both to prudence and practice to do so.

(14) *How corroborative evidence should be dealt with.* In dealing with corroborative evidence, if they exist, the direction of the Judge should be plain and clear. "To tell a body of seven native Jurymen, that it was for them to consider whether the evidence of the accomplice was strongly corroborated as to the prisoners was simply to ask them to consider a question which it was perfectly certain that native Jurymen in the mufussil would not understand."

It would be necessary for the Judge to go through the history of the crime as detailed by the accomplice (see in this connection how the evidence was dealt with in *Jamiruddi Masalli v. R.*²¹), to point out any independent evidence proving facts showing that the prisoners were or must have been present or cognizant of the offence. If such facts are proved, they would corroborate the story of the accomplice. But it would not be enough that the evidence disclosed a state of facts consistent with the possibility of the accomplice's story. If the state of facts proved is equally consistent with and

16. I.L.R. (1902) 29 Cal. 782.

17. *R. v. Frigenbaum*, (1919) 1 K.B. 431.

18. *R. v. Amarnath*, (1930) 52 Cr.L.J. 1049.

19. *Elabee Bukah v. R.*, (1906) 5 W. R. Cr. 80; *Mohammad Usaf Khan*

v. R., (1928) 30 Cr.L.J. 311; see *R. v. Nilakanta*, (1911) 35 Mad. 247; *Muthu Kumaraswami v. R.*, I.L.R. 35 Mad. 397 (F.B.).

20. (1884) 6 Bom. H.C.R. 57.

21. I.L.R. (1902) 29 Cal. 782.

capable of receiving a reasonable and natural explanation on the hypothesis of the prisoner's innocence, those facts, standing alone, would be no evidence of the truth of the accomplice's story.²²

(15) *Judge must leave to the Jury to say if witnesses corroborate.* The Judge must not tell the Jury that such or such witness does in fact corroborate the accused. That is the function of the Jury and depends upon whether they believe the witness or not.²³

(16) *How the evidence affects each accused should be told.* When several accused are on trial, it is a wrong method of placing before the Jury only the facts which corroborate the accomplice without discriminating as to which of those facts corroborate the accomplice against each individual accused. This method of directing the Jury is apt to mislead them as to the corroborating evidence against each and to suggest that evidence which exists against each is evidence against all.²⁴

(17) *Necessity of independent evidence should be stated.* The Judge ought, in his charge, to direct that the corroboration of an accomplice or accomplices ought to be that which is derived from unimpeachable or independent evidence, as distinguished from the earlier statements of the same accomplice or the statements of other accomplices; and to point out the danger of convicting any one of the several prisoners charged at the trial, about whose identity, as one of the persons committing the crime, the accomplice testimony is not corroborated.²⁵

A co-accused's statement, taken with the pardoned accomplice's statement, is not sufficient by itself to warrant the conviction of those who never confessed. The value of such sworn testimony of the approver can hardly be appreciated unless it is shown that the circumstances under which the pardoned approvers had first made their statements were such as to render previous concert highly improbable. It would, therefore, be a misdirection to tell the Jury that the statements of some of the prisoners when committed by the Magistrate were corroboration.¹

When such statements are made in another trial in the absence of prisoners whom it is intended to implicate thereby, the Sessions Judge should caution the Jury against attaching any weight to them at all, except as against those who made them.²

Where the only evidence against the prisoner is the statement of the co-accused taken into consideration under Sec. 30 of the Evidence Act, the Judge ought to direct the Jury to acquit the prisoner.³ If, however, the co-

22. *R. v. Karoo and others*, (1866) 6 W.R. Cr. 44, 45.

23. *Rebati Mohan Chakravarty v. R.*, 1929 Cal. 57; I.L.R. 56 Cal. 150; 115 I.C. 258.

24. *Ibid.*

25. *R. v. Genu Gopal*, Unrep. Bom. 840; *R. v. Bepin Biswas*, I.L.R. (1884) 10 Cal. 970; *R. v. Bykunt*, (1869) 10 W.R. Cr. 17; *R. v. Mahesh*, (1873) 19 W.R. Cr. 16; *Reg v. Malapa*, (1874) 11 Bom. H.C.R. 196; contra: *Muthu*

Kumaraswami v. R., (1912) 35 Mad. 397 (F.B.); *Rattan Dhanuk v. R.*, (1928) 30 Cr. L.J. 137.

1. *Bhagya v. R.*, Rat. unreported cases 750; *Narain Das v. R.*, I.L.R. 2 Jah. 144; 68 I.C. 113; A.I.R. 1922 Lah. 1.

2. *W. v. Bepin Biswas*, *supra*; *Kalwa v. R.*, I.L.R. 48 All. 409; 95 I. C. 74; A.I.R. 1926 A. 377.

3. *R. v. Ashootosh*, I.L.R. (1878) 4 Cal. 483 (F.B.).

accused is convicted and sentenced on his own plea of guilt and then is examined as a witness in a subsequent trial of his co-prisoner, a Judge is not wrong in law in directing the Jury in a trial of the other prisoner, that they can look to the evidence of the convicted prisoner for confirmation of the story told by the approver as the former is not an approver or unconvicted accomplice.⁴

It is not a misdirection to tell the Jury that if the approver was corroborated on some points they might believe him on other points in respect of which he was not corroborated, provided the Jury think it reasonable to do so.⁵

Care must be taken that the suggested corroboration is in fact adequate.⁶ It would not be enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplice's story. Such proof would be insufficient as corroborative evidence, though of course such evidence may be of great importance as a link in the chain of proof against a prisoner.⁷

In *R. v. Feigenbaum*,⁸ a case where there was no corroborative evidence, Justice Darling observed as follows: "The boys were undoubtedly accomplices of the appellant. It is a rule of law that Jury may convict on the uncorroborated testimony of an accomplice, and, therefore, a Judge is not justified in directing a Jury, at the close of the case for the prosecution, that they must acquit the prisoner because in his opinion the only evidence against him is the uncorroborated evidence of an accomplice. But it has been laid down in many cases, that the Judge ought not to leave the case to the Jury without warning them firmly that evidence of an accomplice must always be regarded with grave suspicion, and they ought not to convict unless the evidence of accomplice is corroborated; further, he ought to point out to the Jury what corroborative evidence there is, if any, or if in his opinion, there is no corroborative evidence, he should tell the Jury so. Practically this differs little from saying that the Judge may direct an acquittal, if indeed there is no corroboration of the accomplice's evidence but a difference does exist, though it be very slight."

It is open to the Jury to disregard the warning if they think fit.

Where a prisoner had been found guilty by the Jury on the uncorroborated evidence of an approver, after the Judge in his summing up had pointed out the desirability, under the circumstances, of such corroboration, the High Court on appeal refused to set aside the conviction.⁹

In *In re Meunier*,¹⁰ Cave, J., said: "It is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence; for the evidence must be laid before the Jury in each case. No doubt it is the practice to warn the Jury that they ought not to convict unless they think that the

4. *In re Marudalmuthu*, (1892) 2 Weir 520.

5. *Ieda Molla v. R.*, (1925) 42 C.L. J. 501.

6. *R. v. Clive*, (1930) 22 Cr. A.R. 19.

7. *R. v. Karoo*, (1866) 6 W.R. Cr. 44.

8. (1919) 1 K.B. 481.

9. *R. v. Mohima Chunder Das* (1871) 6 Beng. L.R. App. 108; 15 W.R. Cr. 37; see *R. v. O'Hara* I.L.R. (1890) 17 Cal. 642, 665, per Pethe-ram, C.J.; *R. v. Ramaswami Padayachi*, I.L.R. (1878) 1 Mad. 394.

10. (1894) 2 Q.B. 415.

evidence of the accomplice is corroborated; but I know of no power to set aside a verdict of guilty on that ground."

In *R. v. Baskerville*,¹¹ Lord Reading, C. J., after pointing out the rule of practice in such cases, said: "If after the proper caution by the Judge the Jury nevertheless convict the prisoner this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the Jury would convict in such circumstances. In considering whether the conviction should stand or not, the Court will review all the facts of the case and will bear in mind that the Jury had the opportunity of hearing and seeing the witnesses when giving their testimony."

(18) *Statement of a dead or absent accomplice.* We have already discussed the admissibility of the statement of a dead or absent accomplice, as a statement of a conspirator, and of an accomplice's statement as a dying declaration under Sec. 32, Evidence Act. See in this connection the Privy Council case of *Pakala Narayanaswami v. R.*,¹² as to whether it is necessary under Sec. 32 that the statement should be made after the transaction had taken place, whether the person making it must be near death and what are meant by the words 'circumstances of the transaction which resulted in death'.

When after deposing before the inquiring Magistrate the approver dies or cannot be found or is incapable of giving evidence, or, is kept out of the way by the adverse party, or, if his presence cannot be obtained without an amount of delay or expenses which under the circumstances of the case the Court of Session or the High Court which tries the accused, considers unreasonable, then the deposition of the approver before the inquiring Magistrate is admissible for the purpose of proving the truth of the facts which it states, provided the accused had the right and opportunity to cross-examine him. (Sec. 33 of the Evidence Act).

If the case is that the witness cannot be found, it is necessary to prove that reasonable attempt had been made to find the witness.¹³

It must be shown that by ordinary care and use of ordinary means the witness could not have been produced.¹⁴ It should be found by the Court that reasonable exertion has been made to find him. A mere report of the process-server that the witness cannot be traced is insufficient for such finding.¹⁵

The identity of a person deposing in a previous judicial proceeding should also be proved.¹⁶

In the case of *Ibrahim v. R.*,¹⁷ which was a case tried with assessors, the evidence of the deceased approver Rahmat was put in under Sec. 33 of the Evidence Act and laid before the assessors. The assessors with great force said that they could not give any opinion whatever as to the value of that evidence, inasmuch as there has been no cross-examination of the witness and

11. (1916) 2 K.B. 658.

12. (1939) 69 C.L.J. 273 (281); A.C. R. 1939 P.C. 47.

13. *R. v. Lucky Narain Nagory*, (1875) 24 W.R. Cr. 18, 19.

14. *R. v. Nowjan*, (1873) 20 W.R.

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15. *Malia v. Sarkar*, 1939 Marwar L.R. Cr. 12.

16. *Barajaballoo v. Akhoy*, (1925) 30 C.W.N. 254.

17. (1912) 17 C.W.N. 230.

they had neither seen him nor heard him in the witness-box. Now, this is a position which can fairly be taken by a jury as judges of fact, and if the Jury took such a position, it is difficult to see how it could be escaped from. The High Court added: "Although it may be admissible technically under the terms of Sec. 33 even this in our opinion seems doubtful—its evidentiary value is small indeed. The doubt which we express as to its admissibility is because Sec. 33 says that the adverse party in the first proceeding must have the right and opportunity to cross-examine. Now the practice in Sessions enquiries is not to cross-examine the prosecution witnesses unless, at the conclusion of the case when the charge is drawn up, the accused thinks it worthwhile to defend himself in the first Court, and under the new provisions of the amended Code of Criminal Procedure get the charge cancelled by cross-examining the witnesses and by entering into his defence. But if from the first he takes no such action, although it is clear he has the right to do so, it can hardly be said that he had the opportunity to cross-examine. We are borne out in this view by the fact that on the record it is stated that a lengthy examination-in-chief of the approver was read over to him and admitted to be correct, and it does not appear that the accused persons were asked then and there to cross-examine if they wished to. We think in the case of approvers having regard to the difficulty which has arisen in this case, that it would be a sound principle for the committing Court to clearly bring to the notice of the defence that it is their duty to cross-examine the approver if they desire to do so directly his evidence is given. The fact that some of the witnesses were cross-examined would make the inference from the record itself and from the fact that the approver was not cross-examined even stronger. We can attach no importance to this evidence."

Having regard to the facts and circumstances of the case, the High Court in this case doubted whether the accused had opportunities of cross-examining the approver. The mere fact, however, that in Sessions inquiries the practice is generally not to cross-examine the prosecution witnesses in the committal Court as observed by the High Court, is no ground for thinking that the accused had not the opportunity to cross-examine the witness.

Whether the cross-examination is 'declined' or is 'reserved' by the accused, should distinctly appear in the record.

Evidence inadmissible under Sec. 33 cannot be used as corroborative evidence.¹⁸

134. *Number of witnesses.* No particular number of witnesses shall in any case be required for the proof of any fact.

s. 133 (Accomplice.)

s. 3 ("Proof.")

ss. 68-71 (Attesting witness.)

s. 3 ("Fact.")

Wharton, Ev., Sec. 414 and Cr. Ev., Sec. 386, et. seq.; Best, Ev., 597-622; Taylor, Ev., Secs. 952-966; Indian Penal Code, Chap. XI (false evidence); Chap. VI, ib. (offences against the State analogous to "Treason"); Starkie, Ev., 827; Cr. P. C., Chap. XXXVI (maintenance); Stewart Rapalje's Law of Witnesses, Sec. 225.

SYNOPSIS

1. Principle.
2. Scope.
3. Quantity of evidence.
4. Corroboration, necessity of.
5. Criminal cases :
—Murder cases.
6. Matrimonial cases.

1. Principle. This section deals with the question of the quantity of legitimate evidence required for judicial decision. Cases now and then, though seldom, occur, in which injustice is done by giving credence to the story of a single witness. On the other hand, however, as requiring a plurality of witnesses, clearly imposes an obstacle to the administration of justice, specially where the act to be proved is of a casual nature, above all, where, being in violation of law, as much clandestinity as possible would be observed—it ought not to be required without strong and just reason.¹⁹ Our Legislature has given statutory recognition to the fact, that administration of justice may be hampered, if a particular number of witnesses were to be insisted upon. It is not seldom, that a crime has been committed in the presence of only one witness leaving aside those cases, which are not of uncommon occurrence, where the determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases, where the testimony of a single witness only could be available in proof of the crime, would go unpunished. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses.²⁰ Adherence to any rigid rule by way of an exception to this general rule is bound to result in a miscarriage of justice in offences which are from their very nature secretive.²¹

2. Scope. In England, as a general rule, Courts may act on the testimony of a single witness, even though uncorroborated; or upon duly proved documentary evidence without such testimony at all.²² But, on this general rule, certain exceptions have been engrafted, either by statute or by rule of practice, there being this distinction, that, when corroboration is required by statute and is not forthcoming, the case must be withdrawn from the jury, whereas when it is merely required by the rule of practice, the case must be left to the jury.²³ The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Sec. 134 quoted above. The section enshrines the well-recognized maxim that "Evidence has to be weighed and not counted".²⁴

19. *Best, Ev.*, ss. 597, 598; as to the merits and demerits of the *unus nullus* rule, see *ib.*, S. 598, and generally ss. 596–622, 65–70 *passim*; see *Kulum Mundul v. Bhowani Prosad*, (1874) 22 W.R. Cr. 32; *Taylor, Ev.*, ss. 952–966; *Starkie, Ev.*, 827; see also *Bates v. Graves*, (1793) 2 Ves. 287; *Wharton, Ev.*, S. 414.

20. *Vadivelu Thevar v. State of Madras*, 1957 S.C. 614; 1957 S.C.A. 790; 1957 S.C.J. 527; 1957 A.L.J. 898.

21. *Raj Lal Data v. State*, 1952 H.P. 1: 53 Cr. L.J. 107.

22. *Phipson, Ev.*, 11th Ed., p. 674.

23. *R. v. Baskerville*, (1916) 2 K.B. 658. Confusion of these two points may lead to a mistrial. *Baverstock v. Baverstock*, 1951 W.N. 104.

24. *Vadivelu Thevar v. State of Madras*, 1957 S.C. 614, *supra*; *State v. Karan Singh*, 1960 Madh. Pra. 31; 1959 M.P.L.J. 98; 1958 Jab L.J. 699; *Kochan Velayudham v. State of Kerala*, I.L.R. 1960 Ker. 916; *Ban-kim v. State of Bihar*, A.I.R. 1956 Pat. 384; *Nebi Dusadh v. State*, A.I.R. 1956 Pat. 39; 1955 B.L.J.R. 428.

3. Quantity of evidence. Section 28 of the repealed Act, II of 1855, which was more directly and in terms in accord with the present English law on the subject than the present section was as follows: "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule of practice of any Court that requires corroborative evidence in support of the testimony of an accomplice,²⁶ or of a single witness in the case of perjury." No particular number of witnesses are required under this section to prove any fact in any case, which may be established by the testimony of a single witness, if believed; since the section says "no particular number of witnesses, shall in any case, be required for the proof of any fact". It is not the number of witnesses who matter but the quality of the evidence led.¹ One credible witness outweighs any number of other witnesses.² The effect of the present section is, that, in any case, the testimony of a single witness (if believed by the Court or jury) is sufficient for the proof of any fact. Thus a conviction upon the statement of a complainant alone is lawful.³ The evidence of one witness, if believed, is sufficient, according to the law of this country, to establish any fact to which the witness speaks directly.⁴ It is not necessary to prove a fact that a number of witnesses should assert it. Proof of a fact would depend upon the character of the witnesses, their competency to speak to that fact and the opportunities that they had to know about the fact.⁵ The section merely follows the maxim that "Evidence has to be weighed and not counted."⁶ A magistrate is fully justified in believing one witness in preference to three others, if he sees reason to do so, and it is not legally necessary that he should detail his reasons.⁷ In a civil case, it is open to the Judge to rest his finding on the solitary testimony of a single witness whom he finds to be credible, even if he has a personal interest in the litigation.⁸

The Mahomedan Law of Evidence has been superseded by the Evidence Act, and no particular number of witnesses are now required for the proof of the fact, that at the time of *talabe istishhad* (second demand in a case of pre-emption) there were at least two witnesses present.⁹ The fact, that no particular number of witnesses are required for the proof of a fact, does not mean that a party has a right to summon any number of witnesses he likes. Every Court has inherent power to refuse to summon witnesses, when the applica-

²⁶ v. ante, S. 133.

1. *Nemal v. State of West Bengal*, A. I.R. 1966 C. 194; *Babu alias Bulbul v. State of M.P.*, 1968 J.L.J. 737 (740).

2. *Phipson, Ev.*, 11th Edn., p. 674, citing *Wega*, (1895) p. 156, 159.

3. *Kulum Mundul v. Bhowani Prosad*, (1874) 22 W.R. Cr. 32 at p. 33.

4. *Raja Prosonno v. Romonee Dasse*, (1868) 10 W.R. Cr. 236; *Vadivelu Thevar v. State of Madras* 1957 S. C. 614, *supra*; *The Bombay Agarwal Co. Akola v. Ram Chand Diwan Chand*, 1953 Nag. 154; *Ram Nath v. Extra Assistant Commissioner, Jabalpur*, 1952 Nag. 913; I.L.R. 1953 Nag. 361; 1952 N.L.J. 417; *Haralal Das v. Pasupati Charan Bis-*

was, 1955 Cal. 226; 58 C.W.N. 696.

5. *Madhabananda v. Rabindra Nath*, 1954 Orissa 40; 19 C.L.T. 316.

6. *Nebi Dusadh v. State*, 1956 Pat. 39; 1956 Cr. L.J. 95; 1955 B.L.J.R. 428.

7. *Gobind Swain v. Narain Raoot*, (1875) 24 W.R. Cr. 18, *ponderantur teste non-numeratur*; see *Best, Ev.*, Sec. 596.

8. *Shiv Singh Rakha Das v. Jiwan Das*, 1950 Punj. 164; 60 B.L.R. 40; I.L.R. (1950) Punj. 187.

9. *Imamuddin v. Mohd. Raisul Islam Hashmi*, 1931 All. 736; I.L.R. 52 All. 1005; 133 I.C. 304; 1931 A.L.J. 82.

tion for it is made with a view to vexation or delay, or with any other sinister or improper motive.¹⁰

4. Corroboration, necessity of. There is no rule of law that the uncorroborated testimony of one witness cannot be accepted. If there is any such rule, it is a rule of prudence, and whether that rule should be adopted or not will depend on the circumstances of each case.¹¹ As a general rule a Court can and may act on the testimony of a single witness though uncorroborated. Unless corroboration is insisted upon by statute, the Court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires corroboration.¹² In an appropriate case, conviction can be founded on the solitary testimony of a witness but the Court must be satisfied that the evidence of the witness, which it is asked to accept, is wholly true.¹³ Generally speaking, oral testimony may be classified into three categories, namely—

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way—it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.¹⁴

The Act contains no provision, corresponding to the English rule, requiring corroboration in breach of promise of marriage¹⁵ and affiliation cases,¹⁶

10. See *Best, Ev.*, S. 47; *Phipson, Ev.*, 11th Ed., p. 674; *Wigmore, Ev.*, S. 1906; *Code of Civil Procedure*, 1908, S. 151; *Code of Criminal Procedure*, 1973, Sec. 243 (2); *Ramdhar v. Rajballab*, (1870) 6 *Beng. L.R. App.* 10; *Jaswant v. Jet Singjee*, (1841) 2 *M.I.A.* 424.

11. *Bankim Chandra v. State of Bihar*, 1956 *Pat.* 384.

12. *Vadivelu Thevar v. State of Madras*, 1957 *S.C.A.* 793; 1957 *S.C.J.* 527 (533); 1957 *A.L.J.* 898; (1957) 2 *Andh. W.R. (S.C.)* 69; 1957 *A.W.R. (H.C.)* 640; 1957 *Cr. L. J.* 1000; 1956 *M.P.C.* 711; (1957) 1 *M.L.J. (Cr.)* 775; (1957) 2 *M.L.J. (S.C.)* 69; *A.I.R.* 1957 *S.C.* 614 (618); *Dinkar Bandhu Deshmukh v. State*, 72 *Bom. L.R.* 405; 1970 *Mah. L.J.* 634; *A.I.R.* 1970 *Bom.* 438 (442); *Narayana Pillai Vasudevan Pillai v. State of Kerala*, *I.L.R.* (1968) 2 *Ker.* 303;

1968 *Cr. L.J.* 1362 (single witness—ordinary man with convictions for petty offences—testimony not rejected).

13. *Kirpal Das v. The State*, 1967 *D.L.T.* 446 (447).

14. *Vadivelu Thevar v. State of Madras*, *A.I.R.* 1957 *S.C.* 614; 1957 *Cr. L.J.* 1000; (1957) 2 *M.L.J. (S.C.)* 69; *Rupa Saura v. State*, 1969 *C.L.T.* 175 (176).

15. 32 & 33 *Vict.*, c. 68, s. 2; *Widemann v. Walpole*, (1891) 2 *Q.B.* 534.

16. 8 & 9 *Vict.*, c. 10, s. 8; 35 & 36 *Vict.*, c. 95, s. 4; *Taylor, Ev.*, S. 964; *Cole v. Manning*, (1877) 2 *Q.B.D.* 611; *Lawrence v. Ingmire*, (1869) 20 *L.T. Rep. N.S.* 391; *cf. Cr. P. C.*, Chap. XXXVI (of the maintenance of wives and children); the evidence of the mother must be corroborated in some material particulars.

or in claims on the estates of deceased persons,¹⁷ or in prosecutions for perjury.¹⁸ In regard to the giving of false evidence, it was held by a Full Bench of the Calcutta High Court (following the English rule) under Sec. 28 of Act II of 1855, that a person cannot be convicted of giving false evidence upon the uncorroborated evidence of a single witness.¹⁹ In a case, it has been held that the *unus nullus* rule that one is equal to none has been done away with by this section, but despite the universal nature of the provisions of this section, there are certain classes of cases in which, from the very nature of these cases, Courts in India have followed the said English rule, as a rule of caution and prudence, e.g., in cases of perjury and in sexual cases.²⁰ Though the present Act does not, in terms, require corroboration in any of the above-mentioned cases,²¹ leaving the Judge unfettered to determine, in each case, whether the evidence is sufficient; yet it is conceived that the Courts will, in coming to such a determination, follow, as a general rule but with such modifications as the law may here require,²² the practice in England, where it is

17. *Finch v. Finch*, (1883) 23 Ch. D. 267; *In re Garnett*, (1885) 31 Ch. D. 1; *Hill v. Wilson*, L.R. (1873) 8 Ch. 888; *In re Hodgson*, (1885) 31 Ch. D. 177; *Vavasseur v. Vavasseur*, (1909) 27 Times L.R. 250; *Steph. Dig.*, Art. 121A; *Taylor, Ev.*, s. 965; *Williams on Executors*, 10th Ed., 1400, 1410 (the rule has been acted upon in India); *Webb v. Smallwood*, Calcutta High Court, Suit No. 810 of 1896, heard on 4th Feb., 1898; see also *Kalka Singh v. Jagwant Kunwar*, 1926 Oudh 69; 89 I.C. 722; *Surendra Krishna Mundal v. Ranee Dassee*, 1921 Cal. 677; 59 I.C. 814; 33 Cr. L.J. 34 (it is not necessary, though it may be desirable to produce all the witnesses to a will).
18. *Arjun Singh v. Emperor*, 1931 All. 362; I.L.R. 53 All. 598; 131 I. C. 494; 32 Cr. L.J. 780; *R. v. Elliott*, (1908) C.C.C. Sess. Pa., p. 837; *Taylor Ev.*, ss. 959–963; two witnesses are also required in English law in certain treasons, *ib.*, ss. 952–958; corroboration is also required in certain cases under the Criminal Law Amendment Act, 1885, s. 4 and the Prevention of Cruelty to Children Act, 1889, s. 8; see *Stewart Rapaljie's op. cit.*, s. 225; *Wharton, Cr. Ev.*, s. 386, et. seq.
19. *R. v. Lalchand Kourah*, (Feb., 1866) B.L.R. Sup. Vol., p. 417 (F.B.); 5 W.R. Cr. 23; see also *R. v. Bakhoree Chowbey*, (1866) 5 W.R. Cr. 98; *R. v. Ross*, (1871) 6 Mad. H.C.R. 342 (kind or amount of confirmatory proof required).
20. *Rajlal Data v. State*, 1952 H.P. 1: 53 Cr. L.J. 107.
21. The Law of England, as to the

necessity of calling at least two witnesses to support an assignment of perjury is not law in India, *per Dutholt, J.*, in *R. v. Ghulet*, (1884) 7 A. 44, 50, but in English though corroboration is required, it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness, *Taylor, Ev.*, s. 959.

22. Thus the law in India, as to contradictory statements is not the same as in England, *Taylor, Ev.*, s. 962. It has been held by two Full Benches of the Calcutta High Court, that where no evidence for the prosecution is offered, corroborative of either statement, and the giving intentionally of false evidence is charged on two contradictory depositions made, the one before the committing Magistrate and the other before the Sessions Judge, a finding in the alternative is sufficient to maintain a conviction; *R. v. Zamiran*, (1866) B.L.R. 521 (F.B.); 6 W.R. (Cr.) 65; *R. v. Mohamed Hommayoon*, (1874) 13 B.L.R. 324 (F.B.); 21 W.R. Cr. 72; *Habibullah v. R.*, (1884) 10 C. 937, followed by *Madras High Court in R. v. Palany Chetty*, (1868) 4 Mad. H.C.R. 51; *R. v. Ross*, (1871) 6 Mad. H.C.R. 342; and *Allahabad High Court in R. v. Ghulet*, (1884) 7 A. 44 overruling *R. v. Niaz Ali*, (1882) 5 A. 17; *R. v. Matabadal*, (1895) 15 A. 392; and see *R. v. Khem*, (1899) 22 A. 115; *Bombay High Court*, see *R. v. Ramji Sajabarao*, (1885) 10 B. 124; *R. v. Bharna*, (1886) 11 B. 702; *R. v. Mugapa Bin Ningapa*, (1895) 18 B. 577.

not thought safe, in such cases, to accept the testimony of a single witness without some corroboration.²³ "The rule (necessity of more than oath against oath on an indictment for perjury) cannot be defended as a rule founded in all cases on reason, for it is easy to conceive cases, where the credit due to one person is so far beyond that which is due to another, as to leave no ground for reasonable doubt in acting on the testimony of a single witness, though directly in conflict with that of another. But, though the rule be unwise as an inflexible rule of law, the principle, on which it rests, is of great value in the difficult task of weighing evidence."²⁴ Where direct testimony is opposed by conflicting evidence, or by ordinary experience or by the probability supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material.²⁵ And where the witnesses and the parties are at issue on a vital point (such as the defendant's signature to an agreement of which specific performance is sought) the safe principle is to consider what story fits in with the admitted circumstances and the resulting probabilities.¹

In a case under the Prevention of Food Adulteration Act, 1954, if an attesting witness turns hostile, a conviction can be based on the evidence of the Food Inspector alone.²

To insist on a uniform rule of at least two witnesses to speak to the identity of rioters is not safe when the injured and the assailants are known to each other well.³

Though corroboration of the evidence of the mother of a child regarding its paternity cannot be expected, yet it is legitimate to expect corroboration from surrounding circumstances.⁴

If the evidence of an attester to a document, already examined, is acceptable, it cannot be discarded merely because other attestors available were not examined.⁵

5. Criminal cases. As has been observed already, it is not illegal to convict a man on the evidence of only one witness. It must depend entirely on the circumstances of each case.⁶ In law, there is no bar to the Court from convicting a person upon the testimony of a single witness. The Court may convict a person, if it implicitly believes a solitary witness. It is not the quantity of evidence but the quality that weighs with the Court. Ordinarily, the Courts have often held that the statement of one witness is not

23. *Whitely Stokes*, 92; *R. v. Bal Gangadhar*, (1904) 6 Bom. L.R. 524 (perjury); 28 B. 479.

24. Per Sir Lawrence Peel, C. J., in his charge to the jury in *R. v. Hedger*, 113 (1852); see remarks in *Best Ev.*, 3s. 605, 606.

25. *Starkie Ev.*, S. 828, cited and adopted in *R. v. Hedger*, *supra*; at p. 114.

1. *Davis v. Maung Shwe Goh*, (1911) 38 I.A. 155; I.L.R. 38 Cal. 805; 11 I.C. 801; 8 A.L.J. 1193 (P.C.).

2. *Public Prosecutor v. Subban Chettiar*, (1970) 1 M.L.J. 403 (405); also see *Surinder Kumar v. State of*

Punjab, 1973 Cur. L.J. 924.

3. *Kandaswamy Naidu, In re*, 1969 M.L.W. (Cr.) 124 (125).

4. *Kandavelu Mudaliar v. Rajamma*, 1969 M.L.W. (Cr.) 67 (68), distinguishing *Rev. C.R. Vedantachari v. Marie*, A.I.R. 1926 Mad. 1130.

5. *Sukha Dev Nabako v. Mahant Sri Gopal Das*, 1970 C.L.T. 1099 (1101, 1102).

6. *Veerappa Goundan v. Emperor*, 1928 Mad. 1196; I.L.R. 51 Mad. 956; 55 M.L.J. 591; 28 L.W. 575 (F.B.); *State v. Rajaram*, 1961 Nag. L.J. Notes 21 (charge under S. 506, I. P. C.).

enough for the conviction of a person. No hard and fast rule can be laid down as to how many witnesses would be sufficient for the purpose. In some cases, not less than three witnesses have been held to be sufficient. In others, statements of only two witnesses have been considered to be enough.⁷ The direct evidence of the witnesses must be tested and weighed in the same manner whatever the numerical strength of the witnesses may be, and the conscience of the Court must be satisfied as to the guilt of the accused persons before they can be convicted of any crime.⁸ In this connection, we may remember what a distinguished historian has said: "It can," says Lord Macaulay, "by no means be laid down, as a general maxim, that the assertion of two witnesses is more convincing to the mind than the assertion of one witness. The story told by one witness may be, in itself, probable. The story told by two witnesses may be extravagant. The story told by one witness may be uncontradicted. The story told by two witnesses may be contradicted by four witnesses. The story told by one witness may be corroborated by a crowd of circumstances. The story told by two witnesses may have no such corroboration. The one witness may be a Tillotson or Ken. The two witnesses may be Oates and Bedloe."⁹ Even in proceedings under Sec. 110, Criminal Procedure Code, it is the weight of the evidence, and not the number of witnesses which the Court has to consider. The accused is not entitled to an acquittal, in such cases, because the defence witnesses were as numerous or more numerous as or than the prosecution witnesses.¹⁰ It has been held that, in communal riot cases, it is unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence in addition.¹¹ In a dacoity case, it has been held that although the testimony of a single witness, if believed, is sufficient to establish any fact, as a rule of prudence, a Judge should seek for corroboration to fortify himself about the guilt of the accused, if there is a speck of doubt in his mind relating to the testimony of that particular witness.¹² Conviction is not dependant on the quantity but quality of evidence.¹³ If the evidence of a sole witness is wholly reliable, conviction can be based on it.¹⁴ The solitary testimony of an investigating officer cannot be safely relied upon to prove a search when search witnesses were not produced or when they do not support the story.¹⁵ It is not proper to rely upon the evidence of a sole witness who is not wholly reliable when there is evidence to show that many other independent witnesses had seen the occurrence.¹⁶

A witness may be neither an accomplice nor anything analogous to an accomplice; he may be an ordinary witness, who was undoubtedly present at the time the incident took place. As a general rule, a Court may act on the testimony of a single witness, though uncorroborated. Unless corroboration

7. *State v. Ram Ball* 1953 All. 163 : 34 Cr. L.J. 428 : 1952 A.L.J. 214 : 1952 A.W.R. (H.C.) 180.
8. *Brahmadeo Singha v. Emperor* 1920 Pat. 366 : 54 I.C. 241 : 21 Cr. L.J. 33 : 1 P.L.T. 161.
9. *Macaulay, History of England*, (1855 Ed.), Chap. XXII, Vol. IV, p. 746, cited in *Wills on Circumstantial Evidence*, 6th Ed., pp. 34-35.
10. *Kewal Kishore v. Emperor*, 1925 Oudh 473 : 89 I.C. 147 : 26 Cr. L.J. 1283 followed in *Sahdeo Singh v. Emperor*, 1942 Oudh 356 : 196 I.C. 547 : 48 Cr. L.J. 392 : 1942

- A.W.R. (C.C.) 51.
11. *Ujagar v. Emperor*, 1933 All. 834 : I.L.R. 55 All. 639 : 146 I.C. 957 : 1933 A.L.J. 1597.
12. *Nebi Dusadh v. State*, 1956 Pat. 39 : 1956 Cr. L.J. 95 : 1955 B.L.J.R. 428.
13. I.L.R. 1972 1 Ker 476.
14. 1973 Cr. L.J. 481 (Raj.) ; *Secretary, M.M. Committee v. Sankaran* 1975 K.L.T. 98.
15. *Islaruddin v. State*, 1975 Cr. L.J. 841 (Delhi).
16. *Manik Malakar v. State of Assam* 1976 Cr. L.J. 1921.

is insisted upon by statute, Court should not insist on corroboration, except in cases where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon, and that the question, whether corroboration of the testimony of a single witness was or was not necessary, must depend upon the facts and circumstances of each case.¹⁷ Under the Act, trustworthy evidence given by a single witness is enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy is not enough to sustain the conviction. But, where a criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offences and a large number of victims, it is usual to adopt the test that the conviction can be sustained only if it is supported by witnesses, two or more, who give a consistent account of the incident.¹⁸ When a frightening dacoity was committed by a large number of persons, it is unsafe to convict on testimony of a single witness. The power of observation of witness in such difficult circumstances in the dead of night would be impaired to some extent and the court should convict only that person whose complicity is proved by the consistent evidence of two or three witnesses.¹⁹

Murder cases. It is generally held that it is not safe to convict the accused on the testimony of a single witness, even though she may not have been demonstrated to have been a lying witness. In a Lahore case, it has been held that, in a murder case, where the rest of the evidence has to be rejected, it would be the more prudent course to give the appellants the benefit of the doubt.²⁰ In a Mysore case, it has been held, that although it is permissible to base a conviction on the testimony of a solitary witness, and there are instances of such convictions even for capital offences, such instances are rare and found to be of exceptional circumstances.²¹ Their Lordships of the Privy Council, in the case of *Mohamed Sugul Esa Mamasan Rer Alalah v. The King*,²² looked for corroboration of the testimony of a single witness in a murder case. So also, their Lordships of the Supreme Court, in *Vemireddy Satyanarayana Reddi v. State of Hyderabad*²³ insisted on the corroboration of the testimony of a single witness in a murder case on the ground that although the witness was not an accomplice, his evidence was analogous to that of an accomplice in the peculiar circumstances of that case. In a case, their Lordships of the Supreme Court have explained that in these and other decisions of the different High Courts in India, the Court insisted on corroboration of the testimony of a single witness, not as a proposition of law but in view of the circumstances of these cases. On a consideration of the relevant

17. *Vadivelu Thevar v. State of Madras*, 1957 3 S.C.R. 981 : A.I.R. 1957 S.C. 614 ; *Ramratan v. The State of Rajasthan*, (1962) 3 S.C.R. 590 : (1962) 1 S.C.J. 371 : A.I.R. 1962 S.C. 424.

18. *Masali v. State of U. P.*, A.I.R. 1965 S.C. 202 : (1964) 8 S.C.R. 133 : I.L.R. (1964) 2 A. 694 : (1965) 1 S.C.J. 605.

19. *In re Ramakrishnan Reddy*, I.L.R. (1974) Andh. Pra. 312 : (1974) 1 Andh. W.R. 358 : 1974 Mad. L.J. (Cri.) 273.

20. *Nura v. Emperor*, 1936 Lah. 778 : I.L.F.—430

164 I.C. 1056 : 37 Cr. L.J. 1029 : 38 P.L.R. 274.

21. *Bayyappanavara Muniawamy v. State*, 1954 Mys. 81 : I.L.R. 1955 Mys. 625 : 55 Cr. L.J. 905.

22. 1946 P.C. 3 : 222 I.C. 304 : 50 C. W.N. 96.

23. 1956 S.O. 379 : 1956 S.C.A. 584 : I.L.R. 1956 Hyd. 386 : 1956 S.C.C. 227 : 1956 S.C.J. 382 : 1956 S.C.R. 347 ; *Ram Ratan v. State of Rajasthan*, (1962) 1 S.C.J. 371 : 1962 S.C. 424 ; *State v. Kachara*, 1961 Guj. 20.

authorities and the provisions of the Evidence Act, their Lordships stated the following propositions as firmly established: "(1) As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character. (2) Unless corroboration is insisted on by statute, Courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted on, for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character. (3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon fact and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes." It is the quality and not the quantity of evidence that matters. There is no legal bar in convicting if the Court can be reasonably satisfied with the evidence of a sole witness, but when the Court finds that the witness can or has modulated his evidence to get the accused convicted, conviction cannot be based on the testimony of such a sole witness.²⁴ A sole witness declared hostile in the Court of Committing Magistrate, and called not by prosecution but as a Court witness in the Court of Session, may not be said to be trustworthy particularly when he did not disclose the offence for six months to any one without any valid reason.²⁴⁻¹ It is possible to convict in a murder case on the sole testimony of a single witness; provided he is completely reliable.²⁵ The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution.¹ Although it is not necessary that independent witnesses must be examined where there is evidence that a large number of independent witnesses could have deposed about the incident, their absence from the list of witnesses and the presence of only partisan witnesses does create a doubt whether the version which is being given by them, is to be believed.²

In regard to conviction, on the evidence of a single witness, the factors to be considered are stated in *State v. Karan Singh*.³

Bhutt. J.: A person can legally be convicted on the evidence of a solitary witness. But the question is, whether, in the particular circumstances of the case, it is safe to do so.

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24. *Badri v. State of Rajasthan*, 1975 Cri. L.R. (S.C.) 678 : 1975 U. J. (S.C.) 940 : 1975 W.L.N. 724 : 1976 S.C.C. (Cri.) 60 : 1976 S.C. Cri. R. 17 : (1976) 1 S.C.C. 442 : 1976 Cri. App. R. (S.C.) 52 : A. I.R. 1976 S.C. 560.
- 24-1. *Mahadeo v. State of Maharashtra*, A.I.R. 1980 S.C. 102.
25. *State v. Dadrath Lahannu*, (1973) 75 Bom. L.R. 450 (D.B.)

- Mahto v. State of M. P.*, 1978 C.L.J. 1949 (M.P.).
1. *Vadivelu Thevar v. State of Madras*, A.I.R. 1957 S.C. 614. See also *Ramratan v. State of Rajasthan*, A. I.R. 1962 S.C. 424.
2. *Thakur v. State*, 1955 All. 189 : 50 Cr. L.J. 473.
3. A.I.R. 1960 M.P. 31 : 1959 M.P. L.J. 96.

Krishnan, J.: The law in India does not prescribe the minimum number of witnesses for the conviction of any person; the uncorroborated evidence of a single witness is not, on that ground alone, insufficient to sustain a conviction; that would depend on the facts and the circumstances of each case. Certainly, the spontaneous and independent observations of two or more honest witnesses to the same effect, would carry more conviction than the observation of an equally honest single witness in good faith, because the factors of honest error partly cancel out. Surely, the criteria for the assessment of evidence are just the same, whether the offence is a slight one, or one that would call for a capital sentence; but in practice courts considering a capital case feel a heavier load on their conscience and automatically begin to apply the same principles with more caution than in less serious ones. (Tests indicated).

Considering all the factors, it was held in that case that it was unsafe to convict on the testimony of a single witness.

In criminal cases it is the weight of the evidence and not the number of witnesses which the Court has to consider, and one credible witness outweighs the testimony of a number of witnesses of indifferent character, and, unless corroboration is insisted upon by statute, Courts should not insist on corroboration, except in cases where the nature of the testimony of a single witness itself requires it as a rule of prudence.⁴

It can, by no means, be laid down as a general maxim that the assertion of two witnesses is more convincing to the mind than the assertion of one witness. An accused can be convicted even on the basis of the evidence of a single eye-witness; but such a witness must be a man or woman of worth. (Case-law referred).

There is no law which requires the Sub-Inspector's evidence like that of an accomplice, to be corroborated in material particulars before it can be acted upon. The evidence of the Sub-Inspector will succeed or fail exactly like that of any other material witness.⁵

6. Matrimonial cases. It has been held, in some divorce cases, that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances. But although it is the general practice in matrimonial cases not to act and give relief upon uncorroborated confessions of adultery, there is no absolute rule of practice and no rule of law precluding the Court from acting upon such uncorroborated evidence. The true test seems to be whether the Court is satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true. If so satisfied, it is open to the

4. *Vadivelu Thevar v. The State of Madras*, (1957) 1 M.L.J. (Cr.) 775 : A.I.R. 1957 S.C. 614 : (1957) 2 Andh. W.R. (S.C.) 69 : (1957) 2 M.L.J. (S.C.) 69 : 1957 S.C.J. 527 ref.
5. *Anji v. State*, 70 Mad. L.W. 1012 (Ramaswami, J.).
6. *P. Joseph v. P. Ramaswami*, 1923

Mad. 9 : I.L.R. 45 Mad. 982 : 68 I.C. 931 : 43 M.L.J. 441 : 16 L.W. 689 (F.B.) ; *Prem Chand Hina v. Bai Galal*, 1927 Bom. 594 : I.L.R. 51 Bom. 1026 : 105 I.C. 871 : 29 Bom. L.R. 1336 ; *Antoniswamy v. Anna Manikam*, (1967) 2 M.L.J. 457 : 82 M.L.W. 459 : A.I.R. 1970 Mad. 91.

Court to grant relief, notwithstanding the absence of independent corroborative testimony.⁷

No rule of law requires that in a petition by a wife for nullity of marriage on the ground of the husband's impotence, the evidence of the spouse must receive independent corroboration before a decree for nullity of marriage can be passed. If such evidence is reliable and there is no collusion, it can be safely acted upon.⁸

7. *Getty v. Getty*, (1907) P. 334 : 76 L.J.P. 158 : 98 L.T. 60 ; *John Over v. Muriel A. I. Over*, 1925 Bom. 231 : I.L.R. 49 Bom. 368 : 91 I.C. 20 : 27 Bom. L.R. 251 (F.B.) ; see also *T. P. Smith v. Ma Pwa Shin*, 1919 L.B. 105 : 49 I.C. 305 : 11 Bur. L.T. 197.

8. *Suvarnabehn v. Rashmikanth Chibubhai*, 10 Guj. L.R. 661 : A.I.R. 1970 Guj. 43 [Hindu Marriage Act, 1955, Section 12 (1) (a)] ; see *Kishore Sahu v. Snehaprabha*, I.L.R. 1943 Nag. 474 : A.I.R. 1943 Nag. 185 ; *Wilson v. Wilson*, 32 P.L.R. 159 : A.I.R. 1931 Lah. 245 ; *T. Rangaswamy v. T. Aravindam-mal*, A.I.R. 1957 Mad. 243.

CHAPTER X

OF THE EXAMINATION OF WITNESSES

GENERAL

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Attendance of witnesses and production of documents. 2. Liability of witnesses for action for damages or for prosecution for defamation :
—Liability for civil action for damages for defamation.
—Liability to criminal prosecution for defamation. 3. Examination of witnesses :
—In civil proceedings. | <ol style="list-style-type: none"> —In Criminal proceedings. 4. <i>De novo</i> examination of witnesses. 5. Duty of Court to examine all witnesses produced. 6. Exclusion of witnesses from Court-room while other witnesses are being examined. 7. Order of production and examination. 8. Examination of witnesses. 9. Prosecutor's duties. |
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The last Chapter dealt with the competency and compellability of witnesses. The present Chapter deals with the examination in Court of such witnesses as are tendered, by the provisions of the last Chapter, competent and compellable to give evidence. This Chapter consists of a reduction, to express terms, propositions of law as to the examination of witnesses, which are well established and understood in English law. The only provision which requires special notice being that contained in Sec. 165, giving to the Judge power to put questions or to order the production of documents.⁹ The sections of this Chapter assume that the witness is already before the Court. Process to compel attendance of witnesses or production of documents is provided by the Procedure Codes. A short note is, however, here given with reference to this process and other kindred matters relating to witnesses.

1. Attendance of witnesses and production of documents. The duty of citizens to appear and testify to such facts, within their knowledge, as may be necessary for the due administration of justice, is one which has been recognised and enforced by the common law from an early period.¹⁰ The right to compel the attendance of witnesses was an incident to the jurisdiction of the common law Court, and statutes have extended the power to other officers, such as arbitrators. Every Court having power to hear and determine any suit, has, by the common law, inherent power to call for all adequate proof of the facts in controversy and to that end to summon and compel the attendance of witnesses before it.¹¹ By an early English statute witnesses were entitled to their "reasonable costs and charges."¹²

9. Previous to examination the witnesses should be affirmed or sworn; see the Indian Oaths Act.

10. *Amey v. Long*, (1808) 9 East 473; *Burr. Jones, Ex.*, 8. 797; the process by which attendance is enforced is the *sub poena testificandum* called a

subpoena which commands the witness to appear at the trial and give his testimony, *Phil. and Arnold, Ex.*, ii, 424, et seq.; *Taylor Ex.*, S. 1232, et seq.

11. *Greenleaf Ex.*, S. 309.

12. 5 Eliz., Ch. 9.

The willful neglect to attend or to testify after proper and reasonable service of the subpoena¹⁸ and, in civil cases, after payment or tender of the witness's fee¹⁴ or waiver of payment,¹⁵ is a contempt of Court.¹⁶ When it is necessary not only to secure the oral testimony of the witness, but also the production of documents in his possession, the subpoena contains, in addition to the ordinary command to appear, a requirement that the witness brings with him such document or documents designating the same. Such a subpoena is called a subpoena *duces tecum*.¹⁷ It is an order of compulsory obligation which the witness must obey like other subpoena. He has no more right to determine whether the documents shall be produced than whether he shall appear as a witness. It is his duty to attend and to bring with him the documents according to the exigency of the writ. It is for the Court to determine whether the documents are admissible, or whether they should be produced and exhibited.¹⁸ A witness clearly cannot be compelled to produce documents by the subpoena, unless they are under his control or possession. But a person having the actual custody of the document may be compelled to produce it, though it be owned by others.¹⁹ For public convenience sake, when documents are in the custody or control of public officers, they are provable by certified copies. When the documents are produced in obedience to the subpoena, the person calling the witness is under no obligation to have the witness sworn.²⁰ From a very early period the common law recognised the privileges of parties and witnesses in judicial proceedings to go to the place of trial, to remain so long as necessary, and to return home free from arrest on civil process; this being an immunity considered to be a necessity in the administration of justice.²¹

All the matters above mentioned are in this country provided for by the Civil and Criminal Procedure Codes and the Penal Code, viz., procedure for

13. See *Scholes v. Hilton*, (1842) 10 M. & M. 15; *Hill v. Dolt*, (1857) 7 De C.M. & G. 397.
14. *Brocas v. Lloyd*, (1856) 23 Beav. 129; *Newton v. Harland*, (1840) 1 M. & G. 956; *Bettele v. McLeod*, (1837) 3 Bing N.C. 405.
15. *Goff v. Mills*, (1844) 2 Dowl & L. 23.
16. *Phil & Arn., Ev.*, 432.
17. 2 *Phil and Arn. Ev.*, 425; 3 Bl Comm 382; *Amey v. Long*, (1808) 9 East 473. In the High Court following the English practice a subpoena *duces tecum* is only issued when the person in possession of the documents is a party to the suit, when the writings are in possession of the adverse party or his attorney, notice to produce is given; see 2 *Phil and Arn., Ev.*, 425.
18. S. 162, post; 2 *Phil and Arn. Ev.*, 425; *Burr Jones, Ev.* S. 801, and cases there cited; *Doe v. Kelly*, (1835) 4 Dowl. 273; *R. v. Russell*, (1839) 7 Dowl. 693; *R. v. Dixon*, (1765) 3 Burr. 1687; *Amey v. Long*, *supra*. The subpoena or notice should describe the papers to be produced with certainty and clearness. *Civ. P. C.*, S. 162.
19. *Amey v. Long*, (1807) 1 Camp. 14; *Corsen v. Dubois*, (1816) 1 Holt. 239; *R. v. Daye*, (1908) 2 K.B. 533.
20. *Peny v. Gibson*, (1834) 1 A. & E. 48; *Summers v. Mosley*, (1834) 2 Cr. & M. 477.
21. *Civ. P. C.*, S. 135; *Burr Jones Ev.*, Ss. 805, 806; *Bacon Abr. tit. Privileges*, 4, 17, 55; *Meekins v. Smith*, 1 Hy. Bl 636; the privilege extends to cases where the attendance is voluntary. *Walpole v. Alexander*, (1732) 3 Doug 45; *Arding v. Flower*, 5 T.R. 534; *Spence v. Stuart*, (1802) 3 East 89 *Ex parte Byne*, (1813) 1 Ves. & B. 316. A person who violates the privilege is guilty of contempt. *Code v. Hawkins*, (1738) Andr. 275; *Strange*, 1094; *Childerton v. Barrett*, 11 East 459. The summons extends until the witness can return home; *Strong v. Bucken*, (1896) 1 M. & W. 488; *Selby v. Hills*, (1892) 8 Bing 166; *Put v. Forbes*, (1884) 5 B & Ad. 1078; *Leggater v. Cameron*, (1776) 2 W. Black 1113; *Rickets v. Gurney*, (1823) 7 Price 669; *Sidgier v. Burch*, (1803) 9 Ves Jr. 69.

summoning and compelling the attendance of witnesses;²² the production of documents and other things;²³ the expenses of witnesses;²⁴ the freedom of complainants and witnesses in criminal cases from police restraint;²⁵ recognizance for the attendance of complainants and witnesses in criminal proceedings;¹ exemption from attendance in person by reason of non-residence within certain limits;² or of the witness being a *purdanashin* lady or person of rank;³ the exemption of witnesses from arrest under civil process.⁴

2. Liability of witnesses for action for damages or for prosecution for defamation. Non-attendance may further render a witness liable to a civil action for damages,⁵ otherwise witnesses cannot be sued in a civil Court for damages, nor prosecuted in criminal Court (except for perjury) in respect of evidence given by them in a judicial proceeding.⁶

Liability for civil action for damages for defamation. In England witnesses are absolutely privileged both against criminal prosecution and against

22. Civ. P. C., Ss. 31, 32, Order XVI; Cr. P. C., 1973, Ss. 61 to 69 (summons); 70—81 (warrants of arrest); 82—83 (proclamation and attachment); 87—92 (other rules regarding processes); 349 (imprisonment or committal of a person refusing to answer or produce document); 217 (recall of witness); 254 (2) (issue of process in summons cases); 246, 247 (warrant cases); 311 (power to summon material witness or examine person present); Penal Code, Ss. 174, 175. As to the attendance of witness before Coroners, see Act IV of 1871; and the Bengal and Bombay Councils Acts III (BC) of 1866, XIII (Bom. C.) of 1866.

23. Civ. P. C., Order XVI; see as to discovery, admission, inspection, production, impounding and return of documents, Civ. P. C., Order XI; Cr. P. C., 1973, Ss. 91, 92 (summons to produce document or other thing); 93, 94 (search warrants); 349 (consequences of refusal to produce); see S. 162, post.

24. Civ. P. C., Order XVI, rr. 2—4, op. cit.

25. Cr. P. C., S. 171.

1. Cr. P. C., S. 170.

2. Civ. P. C., Order XVI, r. 19.

3. *ib.*, Ss. 131—133. There is no similar exemption from attendance before the Criminal Courts but a *purdanashin* lady may claim to be examined sitting in a palanquin: *Rookia Banu v. Roberts*, (1868) 1 B.L.R. (S.N.) 5; *Nusrat Banoo v. Mahomed Sayem*, (1872) 18 W.R. 230 or on commission: *In re Haroon Soondery*, (1878) 4 C. 20; *Abhayeswari v. Kishori Mohan Banerjee*,

1914 Cal. 479; I.L.R. 42 Cal. 19; 23 I.C. 700; 15 Cr. L.J. 348; 18 C.W.N. 1020; *Salash v. Emperor*, 1936 Sind 221; 166 I.C. 46; *In re Dintarini Debi*, (1888) 15 C. 775; or to have special arrangements made for an examination in private; *In re Basant Bibi*, (1889) 12 A. 69 (a witness may be examined at some place other than the court-house); *Hem Coomaree v. R.*, 24 C. 551; 1 C.W.N. 333. A *purdanashin* complainant must personally attend in Court, such arrangements being made as are necessary to secure her privacy. *In re Farid-un-nisa* (1882) 5 A. 92; see *Abhayeswari Debi v. Kishori Mohan Banerjee*, (1915) 42 C. 19 (*supra*).

4. Civ. P. C., S. 135, op. cit, see *Taylor Ev.*, Ss. 1330—1341, there is no protection given against criminal pro-

5. Under the provisions of S. 26, Act XIX of 1855, which was in force in the Bengal Presidency, or of S. 10 of Act X of 1855 which was in force in the Madras and Bombay Presidencies; see *Roy Dhunput v. Prem Bibee*, (1875) 24 W.R. 72.

6. *Bishonath Rukhit v. Ram Dhone*, (1869) 11 W.R. 42; *Gunesh Dutt v. Mungneeram Chowdhry*, (1872) 11 B.L.R. 328; *Bhikumber Singh v. Recharam Sircar*, (1888) 15 C. 264; *Chidambara v. Thirumani* (1886) 10 M. 87; *Manjaya v. Sessa Shetti*, (1888) 11 M. 477; *Dawan Singh v. Mahip Singh*, (1888) 10 A. 425; *R. v. Babaji*, (1892) 17 B. 127; *R. v. Balkrishna*, (1893) 17 B. 573; *Templeton v. Laurie*, (1900) 25 B. 230; 2 Rom. I.R. 244; but see the following paragraph.

civil suits for damages. "The authorities are clear, uniform and conclusive that no action of libel or slander lies, whether against Judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law."⁷ In *Dawkins v. Lord Rokeby*,⁸ in response to a question from the Lord Chancellor the consulted Judges through the Lord Chief Baron (Sir F. Kelly) expressed the opinion that "No action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of malice would remove the ground. But the principle is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on allegation, whether true or false, that they acted from malice." The House of Lords accepted the opinion of the Judges

In India, since we have no codified law relating to the tort of defamation, the English law prevails. In other words, so far as a civil suit for damages is concerned, the law in India is still the common law of England, viz., witnesses are absolutely privileged and the dictum in *Dawkins v. Lord Rokeby*,⁹ holds good in this country.¹⁰ In the Full Bench case, *Satish Chandra Chakravarti v. Ram Doyal De*,¹¹ Mookerjee, A.C.J., delivering the judgment of the Court observed :

"If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject, must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience, applicable in such circumstances, should be identical with the corresponding relevant rules of the common law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code."

Liability to criminal prosecution for defamation. As to a prosecution for defamation, there was a conflict of decisions as to whether witnesses are absolutely privileged as to anything they may say as witnesses having reference to the enquiry on which they are called as witnesses.¹² The ground of absolute protection was said to be this, "that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by a suit for damages, but that the only penalty they should incur, if they give evidence falsely, should be an indictment for perjury,¹³ and that if public policy requires that witnesses shall not be harassed by the fear of suits for damages, it must be conceded that it is equally undesirable that they should be liable to

7. Per Kelly, C.B. in *Dawkins v. Lord Rokeby*, (1873) 8 Q.B. 255.

8. (1875) 7 H.L.C. 744, 752, 755.

9. (1875) 7 H.C. 744.

10. *Narayana Ayyar v. G. Veerappa Pillai*, 1951 Mad. 34: I.L.R. 1951 Mad. 661: 52 Cr. L.J. 1270: (1950) 2 M.L.J. 686 (F.B.).

11. 1921 Cal. 1: I.L.R. 48 Cal. 388. 59 I.C. 143: 22 Cr. L.J. 31 (F.B.).

12. *Seema v. Netherclift* L.R. 2 C.P.D. 53; *Bhikumber Singh v. Becharam Sircar*, I.L.R. (1888) 15 Cal. 264.

13. *Ganesh Dutt v. Mungneeram Chowdhry*, (1872) 11 B.L.R. 328.

be prosecuted.¹⁴ The Madras¹⁵ and Bombay¹⁶ High Courts adopt this view; but the trend of the decisions in the Calcutta¹⁷ and Allahabad¹⁸ High Courts is against it. In the case cited, a Full Bench of the Madras High Court held that the law of defamation is not exhaustively laid down in Sec. 499 of the Indian Penal Code, and that the English doctrine of absolute privilege, though not expressly recognized in that section, is applicable in India.¹⁹ But, in another later case, the Calcutta High Court has held that Sec. 499 of the Penal Code is exhaustive and that a statement which does not fall within its exceptions is not privileged.²⁰ In this case it was said that the English common law doctrine of absolute privilege does not obtain in the mofussil and that a defamatory statement made in bad faith by a witness is punishable. A defamatory statement on oath or otherwise by a party to a judicial proceeding falls within Sec. 499 of the Penal Code and is not absolutely privileged.²¹ And this is the view that all the High Courts in India have adopted now.²²

14. *R. v. Balkrishna*, (1893) 17 B. 573, 579.

15. *Manjaya v. Seaha Shetti*, (1888) 11 Mad. 477; 1 Weir 586; In the matter of Alraja Naidu, 30 Mad 222; 6 Cr.L.J. 130; *In re Venkata Reddy*, I.L.R. 36 Mad. 216; 14 I.C. 659; *In re Muthuswami Naidu*, 1914 Mad. 472; I.L.R. 37 Mad. 110; 14 I.C. 757; 13 Cr.L.J. 293 overruled in *Tiruvengada Mudali v. Tripurasundri Ammal*, 1926 Mad. 906; I. L.R. 49 Mad. 728; 96 I.C. 978; 27 Cr. L.J. 1026 (F.B.); see also *Gopal Naidu v. Emperor*, 1923 Mad. 523. (2); I.L.R. 46 Mad. 605; 73 I.C. 343; 24 Cr. L.J. 599 (F.B.); *Narayana Ayyar v. G. Veerappa Pillai*, 1951 Mad. 34; I. L.R. 1951 Mad. 661; 52 Cr. L.J. 1270; (1950) 2 M.L.J. 686 (F.B.).

16. *Queen-Empress v. Babaji*, (1892) 17 Bom. 127; *Queen-Empress v. Bal Krishna Vithal*, (1895) 17 Bom. 573 overruled in *Bai Shanta v. Umrao Amir Malek*, 1926 Bom. 141; I.L.R. 50 Bom. 162; 27 Cr.L.J. 423; 93 I.C. 151; 26 Bom. L.R. 1 (F.B.).

17. *Satish Chandra Chakravarti v. Ram Doyal De*, 1921 Cal. 1; I.L.R. 48 Cal. 388; 59 I.C. 143; 22 Cr. L.J. 31 (S.B.); see also the cases cited therein.

18. *R. v. Ganga Prasad*, I.L.R. 29 All. 685; 4 A.L.J. 605; 1907 A.W.N. 235; *Isuri Prasad v. Umrao Singh*, I.L.R. (1900) 22 All 234; (1900) 20 A.W.N. 46.

19. *Venkata Reddy* (In re), (1911) 36 M. 216 (F.B.); 14 I.C. 659; see *Alraja Naidu* (In re), (1906) 30 M. 222; *Pachaiperumal Chettiar v. Dasi Thangam*, (1908) 31 M. 400; 13 M.

L. E.—431

L.J. 353; 4 M.L.T. 222; *Adapala v. Rabala*, 1910 M.W. N. 155; 21 M.L.J. 85; 6 I. C. 309; 8 M.L.T. 55; *Nathji Muleshvar v. Lalbhai Ravidat*, (1889) 14 B. 97; *Nagarji* (In re), (1895) 19 B. 310.

20. *Kari Singh v. R.*, (1912) 40 C. 433; 18 I.C. 660; 17 C.W.N. 297; see *Gulab Jan v. Bholanath*, (1911) 38 C. 880; 11 I.C. 311; 15 C.W.N. 917; *Augada Ram v. Nemai Chand*, (1896) 23 C. 867; *Kali Nath Gupta v. Gobinda Chandra*, (1900) 5 C. W.N. 293; *Haidar Ali v. Abru Mia*, (1905) 32 C. 756; 2 C.L.J. 105; 9 C.W.N. 911; *R. v. Ganga Prasad*, (1907) 29 A 685; 4 A.L.J. 605; 1907 A.W.N. 235; *Isuri Prasad v. Umrao Singh*, (1900) 22 A. 234; (1900) 20 A.W.N. 46.

21. *Satish Chandra Chakravarti v. Ram Doyal De*, 1921 Cal. 1; I.L.R. 48 Cal. 388; 59 I.C. 143 (S.B.). A complainant does not enjoy the protection given on principles of public policy to an ordinary witness; *Dinshaji Edulji v. Jehangir Cowasji*, 1922 Bom 381; I.L.R. 47 Bom. 15; 69 I.C. 94; 23 Cr.L.J. 654; 24 Bom. L.R. 400.

22. *Gopal Naidu v. Emperor*, 1923 Mad. 523 (2); I.L.R. 46 Mad. 605; 73 I.C. 343; 24 Cr.L.J. 596 (F.B.); *Tiruvengada Mudali v. Tripurasundri Ammal*, 1926 Mad. 906; I.L.R. 49 Mad. 728; 96 I.C. 978 (F.B.); *Elavarthi Pedappa Reddi v. Varada Reddi*, 1929 Mad. 236; I.L.R. 52 Mad. 452; 116 I.C. 337; 30 Cr. L.J. 613; *Narayana Ayyar v. G. Veerappa Pillai*, 1951 Mad. 34; I.L.R. Mad. 661; 52 Cr.L.J. 1270; (F.B.); *Bai Shanta v.*

An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court even though such words are alleged to be false, malicious, and without reasonable cause.²³ And a party receiving a notice is entitled to reply to it and state his reasons, and such reply is privileged as long as it is confined to the matter in hand and is relevant, provided the reply is not published by the party making it.²⁴ In England it has been held that the report of the Official Receiver dealing with a company in liquidation, is absolutely privileged,²⁵ and that "the real doctrine of absolute privilege is, that in the public interest it is not desirable to enquire whether the words or acts of certain persons are malicious or not. The privilege is to be exempt from all enquiry as to malice".¹

3. Examination of witnesses. *In civil proceedings.* Assuming that the witnesses are in attendance before the Court, certain other provisions are laid down for their examination and the general conduct of the suit or trial. In civil proceedings the witnesses must be examined orally and in open Court.² This general rule is qualified by the provisions which relate to (a) evidence given on commission;³ (b) evidence given by direction of the Court on affidavit;⁴ (c) examination before trial of witnesses about to leave the jurisdiction.⁵ Evidence recorded in a previous proceeding between the same parties is made admissible in a subsequent proceeding by the consent of both parties.⁶

In criminal proceedings. In criminal proceedings, except as otherwise expressly provided, evidence must be taken in the presence of the accused, or when his personal attendance is dispensed with,⁷ in the presence of his pleader.⁸

Umrao Amir Malek, 1926 Bom. 141: I.L.R. 50 B. 162; 93 I.C. 151 (F.B.), *supra*; Chotey Lal Bhurey Lal v. Phulchand Ramchand, 1967 Nag 138; I.L.R. 1937 Nag 425: 169 I.C. 429; 38 Cr. L.J. 775; 20 N.L.J. 33; Surajmal v. Ramnath, 1928 Nag. 58; 105 I.C. 820; 28 Cr. L.J. 996; Rasool Bhai v. The King, 1939 Rang 371; 184 I.C. 566; 41 Cr. L.J. 48; Jagannath v. Emperor, 1934 Oudh 386; 151 I.C. 435; 35 Cr. L.J. 1316; Ghansham Das Gianchand v. Nenumal, 1934 Sind 114; 152 I.C. 346; 36 Cr. L.J. 78; Ma Mya Shwe v. Maung Maung, 1925 Rang. 15; I.L.R. 2 Rang. 333; 84 I.C. 977.

23. Raman Nayar v. Subramanya Ayyar, (1893) 17 M. 87.
24. Pachaiperumal Chettiar v. Dasil Thangam, (1906) 31 M. 400; 18 M.L.J. 353; 4 M.L.T. 222.
25. Burr v. Smith, (1909) 2 K.B. 306; 25 Times L.R. 542.

1. Bottomly v. Brushman (1906) 1 K.B. 584 following Munster v. Lamb. (1883) 11 Q.B.D. 589.
2. Civ. P.C., Order XVIII. r. 4.
3. ib. Order XXVI, rr. 1—8, *op. cit.*, see S. 33, *ante*.
4. ib. Order XIX and see Edwards v. Muller, (1870) 5 B.L.R. 252.
5. ib., Order XVIII, r. 18, *op. cit.*,

see S. 1, *ante*.

6. Jainab Bibi v. Hyderally Saheb, 1920 Mad. 547; I.L.R. 43 Mad. 609; 56 I.C. 957; 38 M.L.J. 532: 12 M.L.W. 64 (F.B.).
7. See Cr. P.C., 1973, Ss. 115, 205, 317 and In the matter of Rahim Bibi, (1883) 6 A. 59 (pardanashin). In a warrant case, the accused being a pardanashin, the Magistrate can dispense with her attendance, if he issues a summons in the first instance. Basumoti Adhikarini v. Budram Kalita, (1893) 21 C. 588; see also Sultan Singh Jain v. State, 1951 All 864; I.L.R. (1952) 2 All 941; 52 Cr. L.J. 66; 1951 A.L.J. 622; 1951 A.W.R. 548 (F.B.); Anand Martand v. Anant Pandurang, 1956 M.B. 13; I.L.R. 1956 M.B. 157: 1956 Cr. L.J. 64; 1956 M.B.L.J. 387; 1956 M.B.L.R. (Cr.) 201.
8. Cr. P.C., 1973, Sec. 273; see R. v. Kanye Sheikh, 1864 W.R. Cr. 38; R. v. Sheikh Kyamut, 1864 W.R. (Cr.) 1; R. v. Asnazzudeen 1864 W.R. Cr. 15; R. v. Mohun Ranfor (1874) 22 W.R. Cr. 38; R. v. Rajkrishna (1868) 1 B.L.R.O. Cr. 37; Ali Meah v. Magistrate of Chittagong, (1876) 25 W.R. Cr. 14; Subba v. R., (1885) 9 M. 83; R. v. Nand Ram, (1887) 9 A. 609.

This general rule is qualified by the provisions relating to (a) the examination of witnesses on commission,⁹ (b) the case of an absconding accused,¹⁰ (c) the direction by an Appellate Court that additional evidence be taken by the lower Court, and that such evidence be taken without the accused person or his pleader being present.¹¹ The order of production and examination of witnesses is regulated in the case of trials before High Courts and Sessions Courts by Chapter XVIII of Cr. P. C. 1973. The procedure by which two cross-cases, tried separately, are heard by the same set of assessors and decided by the same judgments is not illegal; but the danger is that, by adopting this method, the Courts are liable to mix up the evidence in the two records. If they do so, the procedure is irregular, the conclusions in each case must be founded on, and only on the evidence in each case.¹²

In civil proceedings, it is in the discretion of a Court of first instance, after the plaintiff's case is closed, to allow him to call further witnesses, and there is no right of special appeal upon that point.¹³ The Judge has a discretionary power of recalling witnesses at any stage of the trial.¹⁴ He will seldom, however, except under special circumstances, permit a plaintiff after his case is closed to recall a witness to prove a material fact. A witness after cross-examination may also be recalled to be further cross-examined; and a question omitted in examination-in-chief may with permission (which is usually given) be put to the witness in re-examination either by the Judge or Counsel.¹⁵ Cross-examination ordinarily gives notice to the other side of the line of defence. So where the defendant's counsel cross-examined as to certain misrepresentations made towards the defendant and deceptions practised on him, this was held to be notice to the plaintiff's Counsel of the line of defence; and, therefore, if he had letters of the defendant tending to show that he knew the real state of the facts, the plaintiff's Counsel ought to have given them in evidence before the plaintiff's case was closed, and he will not be allowed to put them in as evidence in reply.¹⁶

4. De novo examination of witnesses. Whenever a prisoner is put upon his trial, he is entitled to have the witnesses examined *de novo*, if they have previously given evidence on the trial of another prisoner; and it is not sufficient to require the witnesses to identify the prisoner and to read over

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9. Cr. P.C., 1973, Ss. 284–288; v. S. 33, ante.
10. Cr. P.C., 1973, Sec. 290; v. S. 33, ante; *Rustom v. R.*, 1915 All. 411; I.L.R. 38 All 29; 31 I.C. 817; 16 Cr. L.J. 801; 13 A.L.J. 1043 (proof of absconding).
11. Cr. P.C., 1973, Sec. 391, see also Ss. 292, 293.
12. *Khair Mohammad Pir Wali Mohammed v. Emperor*, 1940 Lah. 466; I.L.R. 1941 Lah. 66; 191 I.C. 332; 42 Cr.L.J. 151; 42 P.L.R. 809; see also *In re Moonagunswami Naiker*, 1933 Mad. 367 (S); I.L.R. 56 Mad. 159; 141 I.C. 539; 34 Cr. L.J. 175 (F.B.).
13. *Rakhial Dass v. Protap Chunder*, (1870) 12 W.R. 455 as to recall of witnesses in criminal cases, see Cr. P.C., 1973, Ss. 217, 249 (1), 246, 247.
14. Order XVIII, r. 17, C.P.C.
15. *Taylor, Ev.*, S. 1477, and cases there cited; see S. 138, post. The practice should not be encouraged of allowing either party after stating his case, to amend and add to his proof until by repeated experiments he conforms to the view of the Court; *Burr Jones, Ev.*, S. 809; see as to evidence in reply and fresh evidence after close of case, *R. v. Hilditch*, (1832) 5 C. & P. 299; *Giles v. Powell*, 9 C. & P. 259; *Watts v. Atcheson*, (1826) 2 C. & P. 268.
16. *Wharton v. Lewis*, (1824) 1 C. & P. 529; see *Bank of Bombay v. Nandlal Thackersey Das*, 10 I.A. 1; I.L.R. 37 Bom. 122; 17 I.C. 663; 15 Bom. L.R. 1; 17 C.L.J. 146; 17 C.W.N. 358 (P.C.).

to them their former examination, and require them to attest it.¹⁷ It has been held that though to omit to do this is illegal yet if it has not occasioned a failure of justice, a new trial need not be ordered.¹⁸

5. Duty of Court to examine all witnesses produced. It is not generally competent to the Court to refuse to examine any of the witnesses produced by the parties. The Judge is bound to receive all the evidence tendered, unless the object of summoning a large number of witnesses clearly appear to be to impede the adjudication of the case or otherwise to obstruct the ends of justice. Thus, it was held not right for the lower Court to select five out of twenty witnesses tendered for examination.¹⁹ It appears from the case first cited that a civil Court has inherent power to refuse to examine any excessive number of witnesses, if satisfied that the object of the persons calling them is clearly to impede the adjudication of the case. The Code of Civil Procedure, however, contains no provision analogous to that contained in Sec. 216 of the Criminal Procedure Code (omitted from the Criminal Procedure Code, 1973) which gives a Magistrate discretion to exclude from the list of witnesses to be summoned for the defence, the names of persons whose evidence is not really relevant.²⁰ The fact of a witness not having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced.²¹ In the undermentioned case, the plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court, being satisfied with the documentary evidence produced by the plaintiff declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the Lower Appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the

17. *R. v. Kanye Sheikh*, 1864 W.R. Cr. 38 ; *R. v. Sheikh Kyamut*, 1864 W. R. (Cr.) 1 ; *R. v. Affazuddeen*, 1864 W.R. Cr. 13 ; *R. v. Mohun Banfor*, (1874) 22 W.R. Cr. 38 ; *R. v. Rajkrishna*, (1886) 1 B.L.R.O. Cr. 87 ; *Attorney-General, N.S. Wales v. Bertrand*, (1867) L.R. 1 P.C. 520 ; *R. v. Bishonath*, (1869) 12 W.R. Cr. 3 ; *Ali Meah v. The Magistrate of Chittagong*, (1876) 25 W.R. Cr. 14.
18. *Subba v. R.*, (1885) 9 M. 83 ; *R. v. Nand Ram*, (1887) 9 A. 609.
19. *Ramdhan Mandal v. Rajballab Paramanik*, (1870) 6 B.L.R. App. 10 ; and to the same effect, see *Watson & Co. v. Nukee Mundul*, (1866) 6 W.R. (Act X) 83 ; *Jeswunt Singjee v. Jet Singjee*, 3 M. I.A. 245 ; *R. v. Ishan Dutt*, (1871) 6 B.L.R. App. 88 ; *R. v. Bhoobun Isher*, (1865) 2 W.R. Cr. 36 ; *R. v. Abdool Setar*, (1865) 5 W.R. Cr. 6 ; *Rance Oojulla v. Gholam Mostafa*, (1866) 6 W.R. Civ. R. 60 ; *Nilkanth Surmah v. Soosela Debia*, 6 W.R. 324 (objection taken in special appeal) ; *Looloo Singh v. Rajender Laha*, (1867) 8 W.R. 364 (a party is entitled to have all his witnesses examined,

whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given) ; *Mst. Shunemokee v. Ishanchander*, (1863) Marsh Rep. 266 (The Court cannot put a party to elect which of several witnesses he will call, where all are material and their evidence bears upon different points in the case. Conviction quashed, the witnesses not having been summoned) ; *R. v. Kallee Thakoor*, (1866) 5 W.R. Cr. 65 ; *Ram Shahai v. Shankar Bahadur*, (1871) 6 B.L.R. App. 65 ; *Lal Mohan Saha v. Tazimuddin*, 1919 Cal. 217 ; 49 I.C. 756 (refusal to examine witnesses and receive document) ; *Firm Amar Singh Dhoomi Mal v. Firm Jai Dial Kapur & Sons*, 1926 Lah. 450 ; 94 I.C. 21.

20. When the Magistrate does not proceed under the section the accused is entitled to have the witnesses named in the list examined before the Court of Session ; *Chowdhry Khoorgo Roy v. Shib Tohil Roy*, 17 W.R. 172 ; *R. v. Prosunno Coomar*, (1875) 23 W.R. 56.
21. *Rakhai Dass v. Pratap Chunder*, (1870) 12 W.R. 455 ; as to criminal cases, see S. 291, Cr. P.C.

plaintiff's respondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court it was held that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitiæ* in setting aside all proceedings of both Courts below and in directing the Court of first instance to retry the case, admitting all admissible evidence which had previously been tendered to the Court of first instance, and which that Court had refused to record.²²

It is party's right to choose which witness he will examine. The Court may examine witness not examined by party.²³

Where a day has been fixed for hearing the witnesses, the Court is not competent to decide the case without waiting for that day, in the absence of the witnesses, on the ground that no amount of witnesses would be believed.²⁴ A plaintiff who does not care to be present to support his own case, when he knows it is to be tried, cannot be allowed to urge the plea that he had no opportunity of rebutting the defendant's evidence.²⁵

The examination of a material witness of the plaintiff in the absence of the defendant, his vakil having been removed, and no other vakil then acting for him, is such an irregularity as, if objected to at the proper time, would be fatal to the reception of such evidence. But where no objection was urged during the trial or until an appeal was interposed, the Judicial Committee held that the objection came too late, and could not be sustained, as notwithstanding such irregularity and miscarriage, the fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case.¹

By the procedure of the Courts in India, the Courts are bound to proceed according to the facts alleged in the plaint and not to refuse to try issues of fact upon the merits on the ground of the legal effect of the facts alleged in the plaint.²

6. Exclusion of witnesses from Court-room while other witnesses are being examined. The Court may in its discretion direct the exclusion of witnesses from the Court-room while the testimony of other witnesses is being given. When it appears essential for the elucidation of truth, the witnesses should be examined out of the hearing of each other, and an order for all the witnesses on both sides to withdraw, except the one under examination, should generally be made upon the motion of either party at any period of the trial.³

22. *Durga Dihal v. Anoraji*, (1894) 17 A. 29.

23. *R. P. Sastri v. Smt. Keshori Devi*, (1973) 39 C.L.T. 888.

24. *Ranee Oojulla v. Gholam Mostafa*, (1866) 6 W.R. Civ. R. 60; *In re Mohima Chundra*, (1871) 6 B. L. R. App. 78. It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence; *R. v. Sreenath Mookopadhia*, (1867) 7 W.R. Cr. 45 (a Magistrate cannot decide the case of a prosecutor without examining his witnesses); see *Sreenath Mundle*

v. Sreeram Rajput, (1875) 24 W.R. Cr. 62.

25. *Radha Jeebun v. Grees Chunder*, (1867) 8 W.R. Cr. 461.

1. *Rajah Bammarauze v. Rangasamy Mudaly*, (1855) 16 Moo. I.A. 232.

2. *Nawab Sidhee v. Oojoodhyaram Khan*, (1865) 10 Moo I.A. 322.

3. *Taylor, Ev.*, ss. 1400—1402, and cases there cited. It is usual not to exclude attorneys, vakils or mukhtars of the parties, nor the parties themselves since their presence is usually necessary for a proper management of their case. It is the practice of the High Court (and of the American Courts, *Burr, Jones, Ev.*, S. 807),

If a witness remains in Court in contravention of the order to withdraw, it is a contempt for which he renders himself in England liable to fine and imprisonment. But the Judge has no right to reject his testimony on this ground.⁴ His disobedience ought, however, to be recorded and may materially lessen the value of his evidence.⁵ In India, even in the most true cases, witnesses on the same side generally act more or less in concert. In *Chandler v. Horne*,⁶ Erskine, J., observed: "It used to be formerly supposed that it was in the discretion of the Judge whether the witness should be examined. It is now settled and acted upon by all the Judges that the Judge has no right to exclude the witness; he may commit him for the contempt, but he must be examined; and it is then matter of remark on the value of his testimony that he has wilfully disobeyed the order". A single Judge of the Allahabad High Court held in a case that the universal practice in the Courts in India is that witnesses should be called in one by one and that no witness who is to give evidence should be present when the deposition of a previous witness is being taken, and a breach of this rule may well be termed as an abuse of the process of the Court and therefore under Sec. 151, Civil Procedure Code, the Court had inherent powers to prevent that abuse and to pass an order directing that such a witness should not be examined.⁷ But in a later case a Bench of the same court overruled this and held that Sec. 135 of the Evidence Act does not authorise a Court of law to refuse the examination of any particular witness who might have done something which is not very desirable.⁸ In a case where a prosecution witness happened to be in Court when the other prosecution witnesses were being examined and the trial Court cancelled his evidence on this ground it was held: "If the witness was present in Court he should have been asked to go out when the evidence of other witnesses was being recorded. If this could not be done because his presence was not noticed, the Court should have examined him and recorded his statement with a note that he was present in Court when other witnesses were being examined. If necessary, the Court should have asked the explanation of the witnesses on this point. But there is in law no justification for cancellation of the evidence. The Court should also have considered, when the whole prosecution evidence was recorded, what value should be attached to the testimony of this witness because he happened to be present in Court when the other witnesses were being examined. But the weight to be attached to the evidence is different from its admissibility.⁹ But the rule as to the exclusion of witnesses from Court until they have been examined is not without exceptions. It does not

not to exclude an agent of the party when, upon the statement of Counsel, the presence of such agent from his familiarity with the facts is necessary for the proper management of the action of defence. The Supreme Court followed Exchequer practice; *Kissenmohun Singh v. Collyersaud Dutt*, *Clarke's Rules and Orders*, (1830) 1831, 1832, p. 32; *United Company v. Rajah Buddinath* ib; See also *Pitchaiah Sarma v. Chinna*, 1961 Andh. Pra. 420.

4. Taylor, Ev., § 1401.

5. ib. Although in practice the demand is seldom made, the reason of the rule would seem to require the exclusion of witnesses during the open-

ing argument of Counsel if requested. *R. v. Murphy*, (1837) 3 C. and P. 297.

6. (1842) 2 Moo and Rob 423; 62 R. R. 819.

7. *Lalmani v. Bejai Ram*, 1934 All 840; 152 I.C. 30; 1934 A.L.J. 750; 3 A.W.R. 790.

8. *Subh Karan Singh v. Kedar Nath Tewari*, 1941 All 814; I.L.R. 1941 All 612; 196 I.C. 124; 1941 A.L.J. 345. In this case the Bench quoted with approval the dictum of Erskine, J. in *Chandler v. Horne*, (1842) 3 Moo and Rob 423 (see above for the dictum).

9. *The State v. Sohan Singh*, 1956 M. B. 78; 56 Cr.L.J. 814.

extend to the parties themselves in civil cases so long as they conduct themselves properly, or to their solicitors whose assistance is necessary for the proper conduct of the case.¹⁰ The same rule applies in criminal cases¹¹ and it has never been suggested that the fact that in England the accused is now a competent witness justifies his exclusion from the Court during the trial. There are even stronger reasons for not applying the rule to the Counsel of the parties who have to conduct the case.¹² Formerly, when the evidence of witnesses on opposite sides was directly conflicting, the Court would often direct that such witnesses should be confronted, but in England this practice, though useful, has now fallen into disuse.¹³

In the undermentioned case¹⁴ the plaintiff's counsel called and examined witness on behalf of the plaintiff, but he was not cross-examined by counsel for the defendant. The counsel for the defendant proposed to recall him, as a matter of course, as a witness-in-chief. But the Judge refused to allow him to be recalled without leave of the Court, which, he observed, should have been asked for when the first examination was concluded.

7. Order of production and examination. The order, where there exist any provisions on the point, is regulated by the Procedure Codes, and in the absence of any such provisions by the discretion of the Court.¹⁵ This is a subject which lies chiefly in the discretion of the Judge before whom the cause is tried, it being from its nature susceptible of but few positive and stringent rules.¹⁶ In the regular order of procedure the party, asserting the affirmative, ought to introduce all the evidence necessary to support the substance of the issue; then the party, denying the affirmative allegations, should produce his proof; and finally the proof, if any, in rebuttal is received.¹⁷

The order of examinations is laid down by Sec. 138 of this Act. The rule with regard to the production of evidence in civil cases is laid down by the Civil Procedure Code.

8. Examination of witnesses. The rules for examination are contained in Secs. 136-166, and are in general conformity with the English and American law upon the subject. The rules require but little explanation. Such elucidation as has been considered necessary is given in the Notes appended to these sections, to which the reader is referred.

9. Prosecutor's duties. Courts or Judges cannot be expected to be fully conversant with the intricacies of evidential law and the criminal procedure and therefore as observed by Beaumont, C. J., in the Full Bench case,¹⁸

10. Roscoe's *Nisi Prius*, Vol. 1, p. 159, 18th Ed.

11. Roscoe's Cr. Ev., p. 114, 13th Ed.

12. In *re Vemureddi Babureddi*, 1921 Mad. 424; 62 I.C. 828; I.L.R. 44 M. 916.

13. Taylor, Ev., S. 1478. In the case of *Annesley v. Lord Anglesea*, no less than four witnesses were for this purpose put in the box.

14. *Mackintosh v. Nobinmoney Dossee*, (1867) 2 Ind. Jur. N.S. 160, 161.

15. S. 135, post.

16. Greenleaf, Ev., S. 431.

17. *v. ante*, p. 2081, et seq. The trial judge is to determine what is evi-

dence in rebuttal, and it lies within his discretion to receive or exclude such testimony. *Marshall v. Davis*, 78 N.Y. 414, 420 (Amey); as to the nature of evidence in reply, see *R. v. Hiditch*, (1832) 5 C. & P. 299; as to calling fresh evidence after close of case; see *Giles v. Powell*, 2 C. and P. 259 and as to rebutting evidence after close of case to impeach credit of witness, see *Khandijah Khanum v. Abdool Kureem*, (1889) 17 C. 344.

18. *Emperor v. Kasamalli*, A.I.R. 1942 Bom 71; I.L.R. 1942 B 381 199 I.C. 202.

Judges have a right to expect assistance from Counsel and more particularly from Counsel instructed on behalf of the Crown (State).¹⁹

Secondly, though, as was said in the Full Bench decision of *Emperor v. Nga Lun Thaung*,²⁰ it is the duty of the Public Prosecutors to prosecute and not to persecute, it is equally their duty that in the adduction of evidence they should press the case against the accused fairly and fearlessly and with a full sense of the responsibility that attaches to their position as prosecutors. The guilt or the innocence of the accused is to be determined by the Tribunals appointed by law and not according to the predilections of the Public Prosecutor or his desire to stand well with defending counsel or to acquire cheap popularity.

Thirdly, as has been repeatedly laid down by their Lordships of the Privy Council and the Supreme Court, it is not necessary that the prosecution must call all witnesses irrespective of considerations of reliability, or that the prosecution ought to discharge the functions both of prosecution and defence. Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. There is no obligation on the prosecution to call every witness who may speak to something having direct or indirect bearing on the offence. An extreme position has sometimes been taken up by some Courts that it is the duty of the prosecution to adopt an attitude of non-committal to any version of the case and to examine all witnesses alleged to have known something about the offence, whether or not they will support the prosecution case and whether or not the prosecution regards them as true or false or necessary or unnecessary or merely repetitive and futile. This position is not acceptable. It is the duty of the prosecution to put forward a definite case and to refrain from calling witnesses whom it regards false or unnecessary or repetitive and futile.²¹

Non-examination of some witnesses by prosecution will not adversely affect the prosecution case, where sufficient and reliable eye-witnesses were already examined.²² Non-examination of some witnesses by prosecution can vitiate the trial, if it is due to oblique motive.²³

135. *Order of production and examination of witnesses.* The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Taylor, Ev., ss. 1304, 1478; Burr. Jones, Ev., s. 797, et seq.; Greenleaf, Ev., s. 431; Civ. P. C., Order XVIII, rr. 1-3-A; Cr. P. C., Chaps. XVIII to XXIII, and cases and authorities cited in Introduction.

19. See also *In re K. K. Swami*, A.I.R. 1957 Mad. 379; I.L.R. 1957 M. 412.

20. A.I.R. 1935 Rang. 370; I.L.R. 13 R. 570; 158 I.C. 784.

21. *Habeesh Mohammad v. State of Hyderabad*, A.I.R. 1954 S.C. 51; *Malik Khan v. Emperor*, A.I.R. 1946 P.C. 16; *In re Vengala Reddy*, A.I.R. 1956 Andh. Pra. 26; *In re Muthaya Thevan*, A.I.R. 1927 Mad.

475; 100 I.C. 531; 28 Cr.L.J. 307; *Queen-Empress v. Durga*, 16 All 84 (F.R.).

22. *State of Assam v. Bhabananda Sarma*, 1972 Cr. L.J. 1552; *Radha Kishan v. State*, 1973 Cri. L.J. 481.

23. *Secretary, M.M. Committee v. Shankaran*, 1971 Ker. L.T. 761; I.L.R. (1971) 2 Ker. 381; 1972 Mad. L.J. (Cri.) 10; 1972 Cri. L.J. 1162.

SYNOPSIS

1. Order of production and examination of witnesses.
2. Parties as each other's witness.
3. Power of Court to order unexamined witnesses out of the Court.

1. Order of production and examination of witnesses. See the sections and chapters of Civil and Criminal Procedure Codes above cited and the Introduction, ante, dealing with the attendance of witnesses and production of documents, and the order of production and examination of witnesses in civil and criminal cases.

This section gives the Court a discretion to direct the order in which the witnesses of party shall be examined.²⁴ In the undermentioned case,²⁵ at the close of examination-in-chief of the plaintiff's attorney, counsel for the defendant asked that the cross examination of the witness be deferred until after the examination-in-chief of the plaintiff by his counsel, submitting that the word "examined" in this section included cross-examination, and referring to Sec. 138, and submitting that the plaintiff should have been first called and given his account of the transaction. The Court, however, stated that it was slow to interfere with the discretion of counsel as to the order in which witnesses should be examined, and stated that it thought that in that case the ordinary practice should regulate the order of examination and that the witness should be cross-examined at the conclusion of the examination-in-chief, which was done.

It is not necessary that a party to a civil case should examine himself or herself as a first witness. The order of examination of witness is in the discretion of Court.¹ However the C. P. C. has since been amended requiring the party to be examined before his other witnesses. Now Rule 3-A has been inserted in Order XVIII. by C. P. C. (Amendment) Act, 1976 with effect from 1-2-1977 to the effect that where a party himself wishes to appear as a witness he should appear before his other witnesses unless the Court permits him to appear at any later stage.

The rules of the Evidence Act have no application to departmental proceedings and the examination of witnesses need not be in the order as laid down in the Act.²

Where witnesses are recalled for cross-examination at the request of the defence, the Court cannot insist that the complainant should be cross-examined before the other witnesses.³ But, where the witnesses are summoned for examination in a *de novo* trial, the order in which these witnesses are to be examined-in-chief rests at the discretion of the prosecution.⁴ In a trial for a serious offence like murder, the Public Prosecutor should be required, as far as possible, to examine his witnesses so as to bring out the facts in their logical sequence, and particularly the expert witnesses, such as the medical witnesses, ought not to be examined at an early stage of the trial, when it is

24. In the goods of Gopessur Dutt, 16 C.W.N. 265; 13 I.C. 577.

25. Kedar Nath v. Bhupendra Nath, (1900) 5 C.W.N. xv.

1. 1970 All W.R. 236.

2. B. Bhimrajee v. Union of India, A.

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I.R. 1971 Cal. 336 (338).

3. Moosa Haji Abdul Shakoor v. Emperor, 1933 Cal. 189; 142 I.C. 479; 37 C.W.N. 288.

4. Sheikh Ibrahim v. Emperor 1931 Nag 209; 152 I.C. 236.

impossible to realize on what points their opinion is necessary.⁵ The Court seldom interferes in the order in which witnesses are produced by prosecutor because change of order may cause prejudice to the prosecution.⁶ A party has no right to adduce evidence after the close of the case.⁷

2. Parties as each other's witness. The practice of counsel not calling his own client, who is an essential witness, but endeavouring to force the other party to call him as his witness, as also the practice of parties calling each other as his witness has been condemned as disreputable.⁸ There is no objection whatever to an advocate seeking to prove his case out of the mouth of the opposite party, but if he puts the opposite party into the box, he takes the risk of making statements made by that witness part of his own evidence.⁹ If a party appears as a witness on behalf of the opposite party, the Court should, before proceeding to record his statement, question him or his counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness, the Court should point out to the party producing him that, ordinarily speaking the matter should be left as it is and the Court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross-examination. If the party, however, insists on examining the opposite party as his own witness, the Court should be careful not to allow him to cross-examine his own witness, because unless the witness is declared hostile, the party producing the witness has no right to cross-examine his own witness.¹⁰

3. Power of Court to order unexamined witnesses out of the Court. See also Note 6 under heading 'General' in the beginning of Chapter X. Neither this Act nor the Codes of Civil and Criminal Procedure contain any provision for ordering witnesses out of Court. However, the Court has inherent power to regulate its business in the way it thinks best or to make any order that may be necessary for the ends of justice. It may, therefore, order that no witness who has to give evidence should be present when the depositions of other witnesses are being recorded until he himself is examined as a witness.¹¹

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| <p>5. <i>Shwe Pru v. The King</i>, 1941 Rang. 209 197 I.C. 350; 1941 Rang. L. R. 346.</p> <p>6. <i>Prithvi Nath v. R. C. Kaul</i>, 1975 Kash. L.J. 56; 1974 J. & K. L.R. 549; 1975 Cri. L.J. 216 (F.B.).</p> <p>7. <i>Rashidunnissa v. Ata Rasool</i>, 1958 All 67.</p> <p>8. <i>Sardar Gurbaksh Singh v. Gurdial Singh</i>, 1927 P.C. 230 : 105 I. C. 220; 29 Bom. I. R. 1392; <i>Lal Kunwar v. Chiranji Lal</i>, I I. R. 32 All 104; 37 I.A. 1: 5 I.C. 549 : <i>Biram Das v. Mangal Singh</i>, 1929 Lah. 868 (2) : <i>Puran Singh v. Mathra-Das</i>, 1934 Lah. 126; 148 I. C. 1040; 35 P.L.R. 28.</p> <p>9. <i>K. Appalaswamy v. K. Simhadri Appadu</i>, 1926 Mad. 381; 92 I.C. 811; 23 I.W. 29.</p> | <p>10. <i>Puran Singh v. Mathra Das</i>, 1934 Lah. 126 <i>supra</i>.</p> <p>11. <i>A. Pitchaiah Sarma v. G.C. Veerayya</i>, A.I.R. 1961 A.P. 420 (civil case—defendant instructing counsel—first witness for the defendant in the box—defendant ordered to leave court hall); <i>Nathusingh v. The Crown</i>, A.I.R. 1925 Nag. 296 (police officer's presence objected to); <i>Lalmani v. Bejai Ram</i>, A.I.R. 1934 All 840 (universal practice that witnesses should be called one by one); <i>Subh Karan Singh v. Kedar Nath</i>, A.I.R. 1941 All 314; <i>Kasi Ayyar v. State of Kerala</i>, 1966 K.L.T. 452 (453) : 1966 Cr. L.J. 1445; A.I.R. 1966 Ker. 316 (317) (objection to presence of investigating officer in court while other witnesses were under examination).</p> |
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The court can order that a witness who was present while a previous witness in the case was being examined, should not be heard as a witness.¹² But later a Division Bench of the same High Court has held that neither the present section nor Sec. 151, Civil Procedure Code, could justify the refusal to examine such a witness even though the value of his testimony may be affected.¹³

The English law on the 'power to order witnesses out of court' may be stated. At any time during the course of a trial, the Judge may order the witnesses in the case to leave the court until called. Application for such an order may be made by either party.¹⁴ The power of the judge to exclude witnesses from court is discretionary, and is not a matter of right so far as the parties are concerned, although in civil case the parties themselves may not be ordered to leave the court.¹⁵

Where a party is also a witness, the Court can require him to give evidence before he examines his other witnesses. If he is not willing to do so, the Court can order him out of the Court when his witnesses are giving evidence. If the party himself is conducting the case without the aid of any counsel, he can examine himself first and then examine his other witnesses.¹⁶ But, in proper cases, this rule may be departed from.

136. *Judge to decide as to admissibility of evidence.* When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged facts, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the facts, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under Sec. 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

12. *Lalmani v. Bejai Ram*, A.I.R. 1934 All 840.

13. *Subh Karan Singh v. Kedar Nath*, A.I.R. 1941 All 314.

14. Halsbury's Laws of England, 1st ed.

Vol. 17th, para. 269.

15. Halsbury's Laws of England, 4th ed Vol. 17th, para 270.

16. *A. Pitsaiah Sarma v. G.C. Veeraya*, A.I.R. 1961 A.P. 420.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved or permit the denial of possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

S. 3 ("Evidence".)

S. 3 ("Proved".)

S. 5 ("Court".)

S. 162 (Admissibility of documents.)

S. 3 ("Fact".)

S. 3 ("Relevant").

S. 104 (Burden of proving fact to be proved to make evidence admissible.)

Greenleaf, Ev., s. 51 (a); Burr. Jones, Ev., ss. 381, 812; Norton, Ev., §19.

SYNOPSIS

1. Principle.

2. Judge to decide as to admissibility.

1. Principle. The principle underlying the section is the necessity of confining the proof to those facts, which being relevant, can alone be given in evidence under the provisions of this Act. The ground of the last clause is general convenience, v. post.

2. Judge to decide as to admissibility. Questions relating to the admissibility of evidence are questions of law and must be determined by the Judge. If such questions depend upon the determination of some preliminary question of fact, the Judge may decide that question by himself after hearing any necessary evidence upon it. This is so, even though the decision of such preliminary question involves the determination by the Judge of the same fact which the jury have ultimately to decide, but he may ask the jury to determine the fact.¹⁷ In order that the proof may be confined to relevant facts and may not stray beyond the proper limits of the issue at trial, the Judge is empowered to ask in what manner the evidence tendered is relevant. The Judge must then decide as to its admissibility. In cases tried by jury, it is the duty of the Judge to decide all questions of admissibility, and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties.¹⁸

17. Halsbury's Laws of England, 4th ed., Vol. 17(b), para 22.

18. Emperor v. Panckhikari Dutt, 1925 Cal. 587; 1 L.R. 52 Cal. 67; 86

I.C. 414; Phekan Singh v. Emperor, 1931 Pat. 345; 133 I.C. 449; 12 P.L.T. 471.

In deciding the question of admissibility the Judge has to remember that in construing a statute like the Evidence Act, where any fact intended to be established has to be, in accordance with the scheme of the Act, found to be relevant under a provision contained in the Act before it can be allowed to be proved, any argument based on plausibility can have no effect.¹⁹ A Civil Court also should, irrespective of objection made by the parties, compel observance of the provisions of this Act. In the case of documents, the Court must decide the validity of any objection there may be to their production or admissibility.²⁰ An erroneous omission to object to that which is not evidence does not make it admissible.²¹ Where a piece of evidence, not proved in the proper manner, has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted,—be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment,—does not apply.²² The Court must, at the time when the evidence is tendered, decide whether or not it is legally admissible. Questions as to the admissibility of evidence, oral or documentary should be decided as they arise, and should not be reserved until judgment in the case is given.²³ It is, no doubt, possible that the trial Judge might give an erroneous ruling. The decisions of their Lordships of the Privy Council show that it is not only Courts of first instance that fall into errors. It is in any case, the Judge's duty to exercise a careful discretion, and considering the possibility of error on his part, he may in his discretion allow evidence to be placed on the record provisionally, and subject to objection, in cases where that course would ultimately save time. But this is to be decided by the learned Judge, *albeit* after he has given the counsel an opportunity to address him on the question involved.²⁴

The second clause should be read with Sec. 104, *ante*, which enacts that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. In other words, no person should be allowed to give evidence before he has shown that he is in a legal position to do so. It often (to take an example) happens that an agent to carry a message and bring back an answer, or to do some other act is put into the box before his agency or authority is proved. Thereupon an objection is taken by the opposing Counsel that the evidence is not receivable because the agency or authority is not proved. An undertaking is usually then given that evidence to prove the agency will

19. B. N. Kashyap v. Emperor, 1945 Lah. 23 : I.L.R. 1944 Lah. 408 : 217 I.C. 824 (F.B.).

20. S. 162, post.

21. Miller v. Madho Das, 23 I.A. 106: (1890) 19 A. 76 (P.C.) ; Prakasa Rajaningaru v. Venkata Rao, 1915 Mad. 793 (2) : I.L.R. 38 Mad. 160 : 21 I.C. 319; 25 M.L.J. 360 ; Yaru v. Emperor, 1927 Lah. 79 : 99 I.C. 240; Lachhu v. Mela Ram, 1929 Lah. 593 : 119 I.C. 734.

22. Shib Chandra v. Gaur Chandra, 1922 Cal. 160: 69 I.C. 86: 27 C. W.N. 134; Harek Chand v. Kishen Chandra 8 C.W.N. 101.

23. Jadu Rai v. Bhubataran Nundy, (1889) 17 C. 173; Gorachand Sircar v. Ram Narain Chowdhary, (1868) 9 W.R. 587; Rana Karan v. Mangul Sen, (1904) 1 All L.J. 224n, and documents which are not admissible should be returned when they are presented. See also Laijiam Singh v. Emperor, 1925 All 405: 86 I.C. 817 (the matter should be dealt with summarily and instantly).
24. Bal Raja Ram Padval v. Maneklal Mansukhbhai 1932 Bom 136 at 150 151: I.L.R. 56 Bom. 36: 137 I.C. 717, per Tyabji, J.

be forthcoming at a later period, whereupon the case proceeds. If the proof of agency should break down the whole of the alleged agent's evidence is expunged from the Judge's notes. It would often be highly inconvenient to interrupt the witness in his story, and call another witness in the middle of his examination to prove agency. It is to meet such a state of things that this clause is provided.²⁵

Subject to the general rule that each party should, in his turn, produce all the testimony tending to support his claim or defence, the order of time for the introduction of evidence to support the different parts of an action or defence should be generally left to the discretion of the party or his Counsel. These cannot be expected to show ability to establish the entire claim or defence in advance, and a reasonable latitude must be allowed as to the order in which the details of evidence shall be brought forward. When evidence is offered which proves or tends to prove any relevant fact, it is to be presumed that this will be followed by such other proof as is necessary to establish the proper connection. Hence, it is of no consequence in what order the evidence is introduced, so far as its ultimate legitimacy is concerned, provided in its relation to the other evidence in the case, it is at the end pertinent to the issue.¹ It has often been declared that the relevancy of testimony need not always appear at the time when it is offered, since it is the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the Judge, any evidence which the Counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case.² "It constantly happens that an evidential fact is relevant, not with direct reference to an allegation in the pleadings but only through its connection with other subordinate facts. Without them, it is irrelevant, or immaterial, and therefore inadmissible. So far, then, as concerns the time of its introduction in evidence, one might expect a rule requiring such a fact not to be given in evidence until the connecting facts, by reason of which it becomes relevant, have first been put in evidence. No such rule, however, would be practicable; for those same connecting facts would themselves often be irrelevant apart from the fact in question; in other words, the relevancy appears only when all are considered together. Now it is obviously impossible to present all the facts at precisely the same moment or in the testimony of a single witness. Hence some of the connected facts must be allowed to be presented before the others even though the former, standing alone, are irrelevant."

Thus, the fundamental rule, universally accepted, is that, with reference to facts whose relevancy depends upon others, the order of presentation is left to the discretion of the party himself, subject of course to the general discretion of the trial Court, in controlling the order of evidence. In other words, if an evidential fact offered has an apparent connection with the case on the assumption that other facts shall also be proved, it may be admitted. No objection, therefore, can be made merely on the ground that the other facts have not yet been evidenced. The possibility that the other facts may not be made good is a necessary risk to be taken; and in case of a failure to make them good, the subsequent striking out of the evidence now offered is regarded as an adequate remedy.³ But before counsel can claim the indulgence of the Court in this manner to introduce evidence, otherwise presumably incompetent, he should state what he expects to prove, or in some other way satisfy

25. Norton, Ev., §19.

1. Burr. Jones, Ev., S. 812.

2. Greenleaf, Ev., S. 51 (a).

3. Wigmore, Ev., S. 1871.

he Court that the evidence will be made competent. If counsel fails to make the testimony relevant by other evidence, it should be withdrawn from the consideration of the Court. Having, however, regard to the influence of the proper testimony upon the minds of the jury, it is clear that the Court should exercise great caution, in criminal cases, in admitting testimony of doubtful competency, upon the promise of counsel to show its materiality by subsequent proof.⁴ The section accordingly gives the Court a wide discretion in this matter. It should be added that it is extremely desirable that, where possible, proofs should be offered in a connected sequence, whether it be chronological or logical, for the greater convenience of the Court and facility of apprehension.

A Judge, who has suggested that further evidence need not be given, should not then decide against the party on the point on which such suggestion was made, when the party has acted on such suggestion, without warning him and giving him an opportunity of calling witnesses whom he had been ready to adduce and whom he had refrained from calling at the suggestion of the Judge.⁵

137. *Examination-in-chief.* The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination. The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination. The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. *Order of examinations.* Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

SYNOPSIS

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|---|---|
| 1. Control of Court over manner and extent of examination : | 2. Order of examinations. |
| —Cross examination by Court. | 3. Object of examinations. |
| —Cross-examination of witness called by Court. | 4. The examination of witnesses. The question and answer method : |
| | —Cross-examination. |

5. Volunteering evidence.
6. Objections to admissibility.
7. Competency of witnesses.
8. Evidence in rebuttal.
9. Demeanour of witnesses.
10. Examination by senior and junior counsel.
11. Examination-in-chief:
 - Conclusions of law.
 - Of motives.
12. Documents, question relating to:
 - Leading questions.
 - Questions to corroborate evidence.
 - Questions as to previous depositions.
13. Cross-examination:
 - Functions of cross-examination.
 - Some useful pointers.
 - Origin of the art of cross-examination.
 - Cross-examination with an object.
 - Quintillian advice on preparation of cases.
 - Scope and object.
 - Relevancy and hearsay.
 - Not confined to facts testified in examination-in-chief.
 - Contradicting testimony of witness.
 - Cross-examination when no issue is framed on a point.
14. Cross-examination as to irrelevant collateral facts.
15. Cross-examiner calling witness to prove his own case, effect of.
16. Questions that may be put in cross-examination.
17. Evidence given without opportunity to cross-examine or to rebut:
 - Omission to cross-examine, effect of.
18. No cross-examination without examination-in-chief.
19. Cross-examination of witness examined by mistake.
20. Tendering prosecution witness for cross-examination.
21. Cross-examination of prosecution witnesses:
 - Effect of omission to cross-examine.
22. Cross-examination of witnesses called by Court.
23. Cross-examination of the complainant.
24. Cross-examination of accused:
 - Examination of accused and the cross-examiner.
 - Sincerity of the examiner.
 - Calmness and patience.
 - Fearlessness.
 - Knowledge of accused.
 - Antecedents of accused.
 - Psychology of guilty.
25. Cross-examination of female witnesses:
 - (i) General.
 - (ii) Mixing up facts and inferences.
 - (iii) The Law and Lady.
 - (iv) Intuition.
 - (v) Divorce Cases.
26. Cross-examination of Police witnesses:
 - Methods of cross-examination: Preparation.
27. Cross-examination of identification evidence:
 - General principles of identity evidence.
 - Identity of persons.
28. Cross-examination regarding identity
 - Distance at which persons can be recognised.
29. Cross-examination—Mistaken evidence
 - The accuracy of recall.
30. Identification in passing off action case.
31. Cross-examination of the Indian rustics and members of the criminal classes in the Madras State and in India formerly registered under the Criminal Tribes Act and Aboriginal Tribes in Scheduled areas.
32. Incidental matters relating to cross-examination.
33. Length of cross-examination.
34. Multiple examiners:
 - Cross-examination by one co-accused.
 - Right of other co-accused to further cross-examine him on his statement in such cross-examination.
35. Intimidating cross-examination.
36. Insulting and other observations on the evidence.
37. Questions which mislead or assume facts not proved.
38. Co-defendants, co-accused.
39. Re-examination.
40. Golden Rules as to examination and cross-examination of witnesses:
 - "First, as to your own witness".
 - "Cross-examination".
41. Examination of witnesses:
 - Judge Donovan's five rules.
 - An old barrister's rules.
 - Davis's rules of cross-examination.
 - Cox's suggestions.
 - Johnson's cardinal rules of cross-examination.
 - Mr. Cornelius's rules of cross-examination.
 - Conclusion: Seven steps to successful cross-examination.
42. Re-examination:
 - Necessity for re-examination: Settling obscurities and lightening evidence.
 - Clearing confusion.
 - Questions in the nature of cross-examination can be permitted at the stage of re-examination.
 - Putting new facts of cross-examination in favourable perspective.
 - Cox marks a note of caution.
43. Art of no re-examination:
 - Avoid risks of seeking explanation.
 - Do not re-examine for unimportant discrepancies.
 - Do not rescue the corrupt.
 - Contradiction and re-examination.

- Advice to cross-examiner—Do not allow re-examination on omission.
 - Do not allow second opportunity of cross-examination.
 - Art of no re-examination.
 - 44. Professional ethics and cross-examination or the prerequisites of an efficient and worthy cross-examiner
 1. Professional conduct : Nature of legal profession :
 - Self-confidence.
 - Good and bad advocacy.
 - Lawyer and clients.
 - Higher conduct.
 - Equipment.
 2. Lawyer's three L's and five C's :
 - Lawyer's duty towards five C's.
 - Three L's :
 - a profession.
 - r : His equipment :
 - duties towards country.
 - duties towards community.
 - duties towards clients.
 - s duties towards court.
45. —Lawyer's duties towards colleagues. Ten Golden Rules for Judges and Magistrates concerning the examination of witnesses :
 1. Have your eyes always on the witness.
 2. Be not regardless of the voice of the witnesses.
 3. Assure fairplay to every witness.
 4. Do not allow questioning for question's sake.
 5. Do not permit yourself to make un-called for interruptions.
 6. If the witnesses are pert or forward, repress their assurances.
 7. See that every scrap of relevant evidence is brought out in the examination of witnesses and that justice is done.
 8. See that your record of the examination of a witness is clear and in proper chronological order.
 9. Examine each witness out of the hearing of the other witness.
 10. Carefully and conscientiously observe the provisions of sections 353 to 361 of Chapter XXV, Criminal Procedure Code.

Control of Court over manner and extent of examination. The subject of the *viva voce* examination of witness in open Court⁶ is confined to a very great extent to the sound judicial discretion of the Judge presiding at the trial; and but few positive and unbending rules have been laid down with regard to it. The control of the Court, here referred to, is that which it possesses over the manner and extent of an examination of a witness. The admissibility of testimony is another question. The time and manner, however, of examining a witness is in the discretion of the Judge before whom the trial is held. This discretion extends to determine the length of time and the extent to which the witness may be examined. So, the Judge may interfere and protect the witness against irrelevant inquiries and prevent a question repeated after being several times substantially answered, and allow the witness to finish a proper answer to a proper question before permitting another to be put. The Judge has also an unlimited right, in his discretion, to interrogate the witness himself both in civil and criminal cases, even to the extent of asking leading question.⁷ But a Judge should not ordinarily interpose after the examination-in-chief has been finished, and question the witness on the points to which the cross-examination will properly be directed, as to do so may render their subsequent cross-examination ineffective.

Cross-examination by Court. It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put the material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in Sec. 138

6. It is not enough to produce documents saying that in them the witness's evidence may be found, *Lal Singh v. Emperor*, 1925 Lah. 19 : I.L.R. 5 Lah. 396: 91 I.C. 594.
7. *Stewart Rapalje's Law of Witnesses*, L. E.—433

Ss. 229, 234 ; *Greenleaf, Ev.*, S. 431; *Taylor, Ev.*, S. 1399; *Bastin v. Carew, Ryan & Moody* 127 ; as to the Judge's questions. see S. 165, post.

of this Act.⁸ If the prosecution has omitted some questions due to inadvertence, the Court can put questions to the witness under Sec. 165 before cross-examination after charge.⁹ No party has an absolute right to further cross-examine the witness with respect to examination by Court under Sec. 165 without the permission of Court.¹⁰ Advocates have ample discretion in the conduct of cases of which they are in charge, and the Court cannot fetter this discretion by insisting that their case should be put to this witness or that.¹¹ But, at the same time, the trial Judge should remember that he has the duty not only to the prosecution but to the defence. He has the police diary in front of him and should use his greater experience to cross-examine the witnesses when he sees that the defence lawyer is incompetent. He should not do this unnecessarily, but only when it is desirable in the interest of justice.¹² Although a Judge would not be acting strictly according to the rules of judicial practice, if he were to take the work of examining and cross-examining witnesses in his own hand, yet certainly it is his duty and privilege to put questions to witnesses in order to get at the truth. This is the reason powers of the Court in this respect are much wider than those of the jury. The necessity for the Court's interposition was, of course, formerly greater; at the present time, though even now cases occur to which the remarks of Sir Barnes Peacock are applicable. The Chief Justice, referring to the observations of the Privy Council upon the misfortune of litigants in that their cases often fall in the earlier stages of litigation, the hands of incompetent advisers, who by falsehood, suppression or misstatement of part of a case create impediments to its success, said: "And to add that it is another great misfortune of litigants in the mofussil in this country that the witnesses who are called to prove the facts of the case are not properly examined, through the incompetency of those who have the management of suits, and that the Judges do not make up for that incompetency by themselves examining the witnesses or exercising those powers for obtaining the truth with which they have been entrusted by the law of procedure."¹⁴

Cross-examination of witness called by Court. Though, where a witness is called by the parties and is questioned by the Court, no cross-examination upon the answer given in reply is allowed without the leave of the Court,¹⁵ yet if the witness be called by the Court, he may be cross-examined in the same manner as if he had been produced by the adverse party.¹⁶ Since a witness summoned by the Court could not be termed a witness of any particular party,

8. *Noor Bux v. R.*, (1880) 6 C. 279 : 7 C.L.R. 385 ; In re Sivasubbu Nadar, 1951 Mad. 772 (1) : 64 L.W. 508; 1951 M.W.N. 162. "It is obvious that these privileges of the Court should be so exercised as not to prejudice the rights of the parties or to unduly interfere with the presentation of the cause of action or defence". *Burr Jones, Ex.*, s. 814; *State v. Basudev*, (1957) 23 Cut. L.T. 449.
9. *Mukta Kumar v. State of West Bengal*, (1974) 1 Cal. H.C. (N) 106; 78 Cal. W.N. 973; 1975 Cri. L.J. 838 (Cal.).
10. *Dwarkan Das v. State*, 1979 Cri. L.J. 550.
11. *Mahomed Mian v. Emperor*, 1919 Pat. 515; 52 I.C. 54.

12. *Darpan Potdarin v. Emperor*, 1938 Pat. 153; 173 I.C. 883; *Dikson Mali v. Emperor*, 1942 Pat. 90 : 196 I.C. 597.
13. *Mat. Khadija Begum v. Nisar Ahmad*, 1936 Lah. 887; 39 P.L.R. 52.
14. *Ram Gutty v. Mumtaj Beebee*, (1869) 10 W.R. 280.
15. S. 165, post; *R. v. Sakarar Mukundji*, (1874) 11 Bom. H.C. R. 166.
16. *Jasini Chayan v. Saroda Sundari* (1869) 3 B.L.R. (A.C.) 145, 158; *R. v. Grish Chunder*, (1879) 5 C. 614; *Gopal Lall v. Manik Lall* (1897) 24 C. 288; but see *Makum Singh v. Mst. Chafur-un-nissa*, 1924 Oudh. 182; 74 I.C. 108.

therefore, Courts have given the right of cross-examination to both parties in respect of such a witness. A witness who is recalled under Sec. 500 (now Section 442 of 1973 Code), Criminal Procedure Code, at his own instance, cannot claim to cross-examine himself under the provisions of this Act.¹⁷

2. Order of examinations. The order of examinations laid down by this section is the same as that fixed by the common law in England. The peculiar effect of this arrangement is, on the one hand, that it secures to each party the untrammelled pursuance of his own line of proof in the handling of each witness; and, on the other hand, that it provides for the exhaustion of the entire knowledge of each witness at a single occasion by his successive examination by both parties before he leaves the stand, and thus secures the concentrated attention of the tribunal to the significance of his testimony as a whole and the bearing of his general credit on his specific statements.¹⁸ The order is as follows: When a witness has been sworn or affirmed he is first examined by the party calling him to testify¹⁹: this is called the direct examination-in-chief. When the direct examination is finished, the party is at liberty to cross-examine, after which the party calling the witness may re-examine him. This usually closes the examination of the witness, in many cases, the adverse party is permitted to re-cross-examine the witness of the re-examination; but this is no more than a further cross-examination, permitted either because new matter is brought out in the re-examination, or because the Judge in his discretion sees proper, under the circumstances, to allow it. The party beginning then calls his next witness, who is examined in like manner. When all the witnesses of the party beginning have been thus examined, his case is closed. His opponent then opens his case and calls his witnesses, who are examined in the same way, first by himself, then by his opponent and then re-examined, if necessary, by himself. The close of his case is ordinarily followed by his summing up the evidence and then by the speech in reply of the party who began. Sometimes, however, the latter at the close of his opponent's evidence claims to adduce further evidence in reply to that which has been given on the other side. As to this rebutting evidence, *v. post.* Section 292 (now Section 234 of 1973 Code) of the Criminal Procedure Code as to right to reply is to be read in conjunction with Sec. 289 [now Sections 232 and 233 (1) of 1973 Code] of that Code.²⁰

3. Object of examinations. The object of the examination-in-chief is to lay before the Court and jury the whole of the information of the witness that is relevant and material; that of the cross-examination is to search and sift, to correct and supply omissions; and that of the re-examination, to explain, to rectify, and put in order.²¹ The privilege to examine witnesses has also been extended to jurors and assessors.²² It may be noted that jurors and assessors no longer exist: see the Code of Criminal Procedure, 1973.

4. The examination of witnesses: The question and answer method. The Anglo-American practice whereby witnesses are in turn examined, cross-examined and re-examined by the advocates for the two sides, being tightly

17. *Mohammad Shafi v. State*, 1953 All 667; 54 Cr.L.J. 1503; 1953 A.L.J. 366.

18. *Wigmore, Ev.*, s. 1882.

19. As to the duty of party himself to give evidence, see *Lal v. Chiranjji*, 37 I.A. 1; I.L.R. 32 All. 104; 5 I.C. 549 (P.C.); *Sardar v. Gurdial*, 1927 P.C. 230; 105 I.C. 220; 29

Bom. L.R. 1392; 46 C.L.J. 272.
20. *R. v. Sreenath Mahapatra*, I.L.R. 43 Cal. 426; 35 I.C. 983; 20 C.W.N. 976; A.I.R. 1917 C. 524.
21. *Stewart Rapalje's op. cit.*, s. 290; *Wills' Ev.*, 2nd Ed., 314, 320-327.
22. *S. 166, post.* *Banwarilal v. The State*, A.I.R. 1956 All 385.

controlled by the questions asked, stands in contrast to that prevailing on the Continent. In France, for example, the witness is allowed to recite or ramble without interruption, though he may be interrogated afterwards by the President of the court and by counsel for both sides. The French think that for a witness the principal quality is spontaneity. Whether they get spontaneity is another matter; it is said that what actually happens, too often, is that the witness makes a prepared speech. Mr. A. C. Wright in his study of French Criminal Procedure, declares that "in all sensational trials anyone is cited who may be counted upon to make a really good speech to stir the jury's feelings, journalists, politicians, and professors of philosophy being in particular demand. We in England are prevented from adopting spontaneous witnesses, even if we wished to have them, because of our exclusionary rules of evidence, which would cease to operate if the witness were allowed to say anything that came into his head."²³ The utility of some of these rules of evidence will be considered in a later chapter.

An incidental result of the system of questioning in examination-in-chief is that if it is sympathetically done it helps the witness to tell his story. He may also save time by keeping him to the point. His evidence is brought out in a coherent and orderly way, and the confusion which observers so often find in a French trial is avoided. The danger of English method is that the evidence may be subtly falsified because the witness is not allowed to tell his full story. Counsel, by the way in which he frames his questions, is enabled to edit the evidence.²⁴ "Cross-examination is far easier than examination-in-chief. In cross-examination one cannot avoid getting answers which are not desired as one has to put leading questions and points of contradiction to hostile witnesses; but in chief a great deal depends upon the way in which witnesses are examined. This is a confession of the practice of editing the evidence."²⁵ One may hope, however, that it would be regarded as a gross breach of professional ethics for counsel intentionally to mislead the court in the evidence he elicits from his own witnesses. The importance of these customary standards of professional conduct cannot be stressed too strongly in a system which leaves so much to the discretion of advocates retained by the parties.

The ethics of cross-examination are regarded as quite different from those of examination-in-chief, for, when dealing with a witness called by the other side, it is regarded as not only proper but laudable for counsel to know what not to ask and when to stop asking. The great object is so to cut off the witness that he makes admissions damaging to his own side while being given no opportunity to introduce the qualifications he is anxious to state. This kind of professional cleverness, and the occasions when by mistake the cross-examiner ruins his effect by asking one question too many times or ways, are the subject of many stories hugely enjoyed by lawyers. From the social point of view there is almost nothing to be said for it, but perhaps little harm is caused in practice. This is because after cross-examination comes re-examination by the side calling the witness, who will almost certainly be given every opportunity by his own counsel to expand and explain any misleading statement he has made.

23. (1920) 45 Law Quarterly Review 98.

24. Lord Alverstone made an unconscious admission on this in his *Recollections of Bar and Bench* (London 1915) 284.

25. In *Drumpton*, *The Times*, April 13,

1954, the police, by omitting a vital part of a witness's typed statement, so that he was not questioned upon it in court, brought about a wrongful conviction.

Cross-examination. The English view is that cross-examination is the best method of ascertaining forensic truth, while the English lawyers are the most perfect exponents of this difficult art. The Americans think the same with the comparatively modest substitution of "Anglo-American" for "English". Hear the opinion of Wigmore, greatest of the exponents of the law of evidence in the English-speaking countries:

"Not even the abuses, the mishandlings, and the puerilities which are so often associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate its wonderful power, there has probably never been a moment's doubt upon this point in the mind of lawyer of experience. . . . He may, it is true, do more than he ought to do; he may 'make the worse appear better reason to perplex and dash maturest counsels'—may make the truth like falsehood. But this abuse of its power is able to be remedied by control. The fact of this unique and irresistible power remains, and reason for our faith in its merits. If we omit political considerations or range, then cross-examination, not trial by jury, is the great and most important contribution of the Anglo-American system of law to improved trial procedure."¹ The reader who wishes to have a very brief sketch of some of the methods of cross-examination may consult the article of J. C. Meredith.²

5. Volunteering evidence. A witness may not foist into his answer in any examination statements not in answer to questions put to him. This is called "volunteering evidence", and the pleader of the opposite party should be on his guard to check its introduction by objection.³ The trial Judge should upon motion strike out answers that are not responsive to the questions asked, that is, those answers that state facts not called for by the questions, or those which express an opinion as to the matter in question unless the question calls for an opinion as in the case of experts. But where only a part of the answer is not responsive to the question, only that part will be struck out which is objectionable for not being responsive.⁴

6. Objections to admissibility. As to objections by the Court to the admissibility of particular questions v. ante, p. 320 synp. 9 and as to objections by parties, v. ante, p. 321 synp. 10. As respects the form of objections, they should be specific rather than general, that is, should show ground or grounds of objection. Objections to questions should be made at the time they are put, or they will generally be regarded as waived.⁵ A distinction, however, must be drawn between the effect of the admission without objection of wholly irrelevant evidence and relevant evidence presented in an improper form. Only in

1. Wigmore, Evidence, 3rd Ed., S. 1367. For the abuse of cross-examination see Frank: Courts on Trial [Princeton, New Jersey (1949) 82-4].

2. (1945) 28 Canadian Bar Review 625. Glanville Williams: Proof of Guilt, p. 71 and following.

3. Norton, Ev., 321.

4. Burr, Jones, Ev., S. 814; Stewart

Rapalje's Law of Witnesses, S. 243, and cases there cited. In America it has been held that the refusal of the trial Judge to strike out an irresponsible answer is reversible error, unless it is shown that such evidence is not prejudicial to the party appealing, ib; see Taylor, Ev., S. 1475; Wigmore, Ev., S. 785.

5. Stewart Rapalje's op. cit, S. 244.

the latter case will, want of objection cure the defect. For an erroneous omission to object to that which is not relevant at all will not render it relevant.⁶ But consent or want of objection to the manner in which relevant evidence was brought on the record will preclude a party from objecting to such evidence on appeal.⁷ And it has been held that consent will make evidence otherwise relevant but recorded without jurisdiction admissible.⁸ The failure to object to one improper question to which an unsatisfactory answer was given does not preclude objection to a substantial reiteration of the same question. When several questions pertaining to the same point are asked in immediate succession, and an objection to the first one, which is merely preliminary to the others, is improperly overruled, the objection will not be limited to the first question, but will be deemed to cover the others which sprang naturally from it.⁹

When evidence is rejected at the trial, the party proposing it should formally tender it to the Judge and request him to make a note of that fact.¹⁰ The moment a witness commences giving evidence which is inadmissible should be stopped by the Court.¹¹ The Court may, of its own motion the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be a special reason for so doing.¹² If a question is disallowed on the ground of vagueness or on other grounds, the deposition should show what the question was and the reason for disallowing it.¹³

7. Competency of witnesses. The witness must be competent. Where there is any doubt upon this point the modern practice is to interrogate the witness before swearing or affirming him or to elicit the facts upon the examination-in-chief, when, if his incompetency appears, he will be rejected.¹⁴

8. Evidence in rebuttal. As to evidence in rebuttal, see the Civil Procedure Code, Order XVIII, rr. 2 and 3 (5). In addition to the case there mentioned, the plaintiff is also generally entitled to give evidence in reply, even though all the issues are upon himself, when the case made against him is one of which he has had no notice on the pleading,¹⁵ and in any case, where a defendant does not lay a foundation for his own affirmative case by such a

6. *Miller v. Madho Das*, (1896) 23 I. A. 106, 116 : 19 A. 76, ante, pp. 152-53.
7. *Prakasa Rajaningu v. Venkata Rao*, 1915 Mad. 793 (2) : I.L.R. 38 Mad. 160 : 21 I.C. 319 : 25 M.L.J. 360 : 1915 M.W.N. 800, following *Miller v. Madho Das* (supra).
8. *Sreenath Roy v. Goluk Chunder Sein*, (1871) 15 W.R. 348 ; *Ramayya v. Devappa*, I.L.R. 30 Bom. 109 : 7 Bom. L.R. 642.
9. *Stewart Rapalje's op. cit.*, S. 244 ; see generally *Taylor, Ev.*, Ss. 1881-1882-B.
10. *Taylor, Ev.*, S. 1882-A.
11. *R. v. Pitambar Sirdar*, (1867) 7 W.R. v. 25 ; v. ante, p. 320 Syn. 9, and cases there cited.
12. Civ. P.C., Order XVIII. Rule 10.
13. *Brahmayya v. The King*, 1938 Rang 442 ; *Rameshwar Dusadh v. Emperor*, 1920 Pat. 25 : 55 I.C. 593 : 21 Cr.L.J. 321.
14. v. ante, notes under S. 118. The preliminary examination as to competency is technically called examination on the *voir dire* ; see *Taylor, Ev.*, S. 1393 ; *Wigmore, Ev.*, s. 486 ; see S. 118, ante ; *Stewart Rapalje's op. cit.*, 232 ; *Warner's Law of Evidence*, 58-61. For case of child, see *Nafar Sheikh v. R.*, 1914 Cal. 276 : I.L.R. 41 Cal. 406 : 20 I.C. 741 : 14 Cr.L.J. 485 ; *Dhani Ram v. R.*, 1915 All 437 : I.L.R. 38 All 49 : 31 I.C. 1006 : 16 Cr.L.J. 829 : 13 A.L.J. 1072.
15. *Doe v. Gosley*, 2 M. and Rob. 245.

cross-examination of the plaintiff's witnesses as will give him fair notice of the points as to which they are going to be contradicted, the plaintiff will generally be allowed to give evidence in reply.¹⁶

9. Demeanour of witnesses. As the demeanour of the witness while under examination is a most important test of his credibility, the Courts are empowered by the Codes to record their remarks relative thereto.¹⁷ A witness's evidence should not be rejected merely because he has appeared nervous in the witness-box.¹⁸

10. Examination by senior and junior counsel. Leading counsel may interpose and take the examination out of a junior's hands.¹⁹ Section 138 deals not with the rights of the parties but only provides the order in which the proceedings are to be conducted.²⁰

11. Examination-in-chief. This is the first examination after the witness has been sworn or affirmed.²¹ It is the province of the party by whom the witness is called to examine him in chief for the purpose of eliciting from him all the material facts within his knowledge which tend to prove his party's case.

Now general rules can be laid down as to this topic, inasmuch as the propriety of the questions put by a party to his own witness in proof of his case depends in the nature of things depend to a very great extent upon the particular circumstances to be proved. The object of the examination is to elicit the truth to get at the facts, or such of them as bear upon the issue in favour of the party calling the witness. The issue must be kept in mind by the questioner, and only material and relevant facts, not those which are collateral and impertinent, may be inquired about. But it is not necessary that every question put to a witness shall be so broad and comprehensive that the answer shall be evidence of some issues in the case. If all the answers to a series of questions upon the same general subject, taken together, are competent, each is competent and a question tending to elicit such an answer should be allowed. Each question should call for a fact and not a conclusion of law and should not embrace the whole merits of the case. It is no objection to a question that it assumes facts which are undisputed, but a question based upon the supposition of facts not proved is improper.²² So also a compound question, one part being admissible and the remainder inadmissible, may be rightly excluded as a whole. But counsel are often allowed to ask apparently irrelevant and consequently inadmissible questions, upon their promise to follow them up at the proper time by proof of other facts, which, if true, would

16. *Bigsby v. Dickinson*, 4 Ch. D. 24; cf. *Briggs v. Aynsworth*, 2 M. and R. 1681, see *Wills, Ey.*, 3rd Ed., 322, 323.

17. Civ. P.C., Order XVIII, Rule 12; Cr. P.C., 1973, Sec. 280; see *Mouladad Khan v. Abdul Sattar*, 1917 All 35; I.L.R. 39 All 426; 39 I.C. 666; 15 A.L.J. 34; *Bombay Cotton Manufacturing Co. v. Motilal Shivalal*, 42 I.A. 110; 1915 P.C. 1; I.L.R. 39 Bom. 386; 29 I.C. 229; 17 Bom. L.R. 455; 21 C.L.J. 528; *Sitalakshmi Ammal v. Venkata Subramanian*, 1930 P.

C. 170; 123 I.C. 557; 32 Bom. L.R. 887; 34 C.W.N. 593; *Valarshak Seth v. Standard Coal Co., Ltd.*, 1943 P.C. 159; 209 I.C. 132.

18. *Santu v. Maiku*, 1940 All 175; 187 I.C. 747; 1940 A.L.J. 26; 1940 A.W.R. 67.

19. *Doe v. Roe*, 2 Camp 280.

20. *Emperor v. C.A. Mathews*, 1929 Cal. 822.

21. S. 138; as to oaths and affirmations see *Oaths Act 1969*.

22. See Synp. of this Sec. post.

make the question put legitimately operative.²³ The party examining a witness-in-chief is bound at his peril to ask all material questions in the first instance, and if he fails to do this, it cannot be done in reply. No new question can be put in reply unconnected with the subject of the cross-examination and which does not tend to explain it. If a question as to any material fact has been omitted upon the examination-in-chief, the usual course is to suggest the question to the Court, which will exercise its discretion in putting it to the witness.²⁴

Conclusions of law. On the examination-in-chief, a witness, as a general rule, can only give evidence of facts²⁵ within his own knowledge and recollection. In some cases hearsay and opinions are relevant. But in all cases the facts must be relevant,¹ and in all cases the answer must be upon a point of fact as opposed to a point of law. Ordinarily, a witness cannot be asked as to a conclusion of law. Sometimes this has been so far pressed as to involve the assumption that a witness cannot be asked as to a conclusion of fact. The error of such a contention consists in this that there are few statements of fact which are not conclusions of fact.²

Of motives. The conclusions of a witness as to the motives of others are inadmissible, motives being eminently inferences from conduct.³ When a party is examined as to his own conduct, he may be asked as to his own intention or motive, his testimony to such intention or motive being based not on inference but on consciousness. But the right of a party to testify to his intent in drawing a contract or other document, is limited by the rule that a party cannot be admitted to prove his intent so as to vary the terms of a document by which he is bound.⁴

23. Stewart Rapalje's op. cit. S. 238 (as to the order of proof, v. S. 136). "In direct examination although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare" (i. e. than in cross-examination) "For it requires mental powers of no inferior order so as to interrogate each witness whether learned or unlearned, intelligent or dull, matter-of-fact or imaginative single-minded or designing as to bring his story before the tribunal in the most natural, comprehensible and effective form," Best, Ev., S. 663.

24. Stewart Rapalje's op. cit. S. 233.

25. v. S. 3 ante.

1. S. 138; for meaning of "relevant," v. S. 119, ante; as to belief and opinion, see Taylor, Ev., S. 1414, et. seq.

2. Wharton, Ev., ss. 507, 509; Wharton, Cr. Ev., S. 7. Conclusions of law are for the Court to draw. So a witness will not be permitted to testify as to whether a party is responsible to the law; whether certain facts constitute in law an

agency and the like, ib; Stewart Rapalje's op. cit. S. 238; witnesses are not permitted to state their views on matters of moral or legal obligation or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another; Taylor, Ev., S. 1419.

3. Wharton, Ev., S. 508.

4. Wharton, Ev., ss. 482, 508; further ordinarily extrinsic evidence of intent is inadmissible in the case of the interpretation of documents; *Beti Maharani v. Collector of Etawah*, (1894) 17 A. 198, 209 v. ante, Introduction to Chap. IV, except in certain cases of ambiguity; Wharton, Ev., S. 955. As to proof of intention and motive, v. ante S. 14, and cases there cited; and Stewart Rapalje's op. cit., 391. A common instance of the admissibility of evidence of mental condition exists when a party is asked whether in entering into a contract on which the action is based, he relied upon the representations of the other party.

12. Documents, question relating to. In the case of documents, the witness may testify to their existence and identity, but not, unless secondary evidence be admissible to their contents,⁵ and he may explain but may not, in general, contradict or vary their terms.⁶ A witness may give the substance of conversations or writings, but he will not be permitted to say what is the impression left on him by a conversation unless he swears to such impressions as recollections and not inferences. And it is enough, if a witness swears to events and objects according to the best of his recollection and belief.⁷ Further, in order to save time, a witness may be permitted to state the result of numerous or voluminous documents, subject to cross-examination as to particulars.⁸ So, he may state whether a party's books showed his insolvency or the reverse;⁹ or in what manner bills have been invariably drawn;¹⁰ but he will not be allowed to give his impressions derived from unproduced documents, for these are matters of inference or construction which belong to the tribunal,¹¹ and production of the books themselves should be given if required.¹² The witness will, while under examination, be permitted to refresh his memory by reference to documents.¹³

Leading questions. Leading questions may not ordinarily be put in examination-in-chief.¹⁴ In cases where the witness proves to be hostile, he may be cross-examined by the party calling him.¹⁵

Questions to corroborate evidence. Questions tending to corroborate evidence of a relevant fact are admissible,¹⁶ and former statements of a witness may be proved to corroborate later testimony as to the same fact.¹⁷ Whenever any statement relevant under Secs. 32, 33, ante, is proved, all matters may be proved to corroborate it, or to confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness.¹⁸

Questions as to previous depositions. Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court and such witness was therefore placed in the witness-box by counsel for the defence, it was held that counsel for the defence was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous

5. v. ante, Ss. 91, 59, 65, and notes to those sections; Phipson, Ev. 11th Ed. 311; as to the interposition of questions for the purpose of ascertaining whether the matter spoken to was contained in a document, see S. 144, post.

6. v. ante, Introduction to Chap. VI and Ss. 92, 99.

7. Taylor Ev. S. 1415; Wharton, Ev. Ss. 514, 515. If a witness, called to prove the handwriting of a party, says that he believes it to be the handwriting of the defendant from its contents and from other circumstances, he may be asked what those circumstances are; R. v. Murphy, (1837) 8 C. & P. 297.

8. S. 65, clause (g), ante, Rowe v.

Brenton, (1828) 3 M. & R. 133; Roberts v. Doxon, (1971) Pea N. P.C. 83.

9. Mayor v. Sefton, 2 Stark R. 274.

10. Spencer v. Billing, (1812) 3 Camp. 310.

11. Topham v. Mc. Gregor, (1844) 1 C. & K. 320.

12. Johnson v. Kershaw, (1847) 1 D.G. & S. 260; see Taylor Ev., S. 462; Stark. Ev., S. 645; Steph. Dig., Art 71 (h).

13. Ss. 159–161, post.

14. Ss. 141, 142, post.

15. S. 154, post.

16. S. 156, post.

17. S. 157, post.

18. S. 158, post.

deposition were under the circumstances only admissible by way of cross-examination with the permission of the Court, if the witness proved himself a hostile witness.¹⁹

13. Cross-examination. The most distinguished modern authority on the Law of Evidence states in an eloquent passage: "The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony unless it has been proved and sublimated by that test, has found increasing strength in lengthening experience.²⁰ Cross-examination is universally acknowledged to be a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story.

It is the common but sad experience of mankind that falsehood usually has a flying start and that truth comes limping afterwards. The paramount object of cross-examination is to halt falsehood in its tracks and discover the truth before courts of justice. In the daily commerce of life no Commandment is so frequently broken as the Ninth: "Thou shalt not bear false witness against the neighbour." and irreparable damage is done to innocent people by thoughtless indulgence in this vice.

The examination of witnesses in court is a practical application of the Socratic method of question and answer for arriving at a formal statement of truth. Cross-examination is intensive questioning, sometimes with suggestions of the expected answer. Whether cross-examination is an art or a science, and there are protagonists for either view, it is an indubitable fact that it is one of those skills a trial lawyer cannot do without, for omission by a party to cross-examine a witness called by the opposite party amounts to an acceptance of the evidence of that witness.

Functions of cross-examination. Whenever any person makes a relation of facts, be it on a judicial inquiry or not, and whether he tells his story spontaneously, and without being questioned, or on request and through questions put to him, it is certain the tale is often imperfectly or falsely told; and when this is known or suspected to be the cause and it is desired to have the exact truth, to ascertain what part of the story is true, what false, and what is left out, these matters may be learned, by searching for the questions put to the relater, an inquiry, that is called cross-examination.

"On a trial, the cross-examination of witnesses is often of the utmost importance and service towards discovering the truth, and the extent to which the witnesses are to be believed. In a civil trial a verdict for the plaintiff may give him an estate, or money, or other object of the suit; a verdict against the defendant may cause him to lose what the plaintiff gains. In many cases each party is honest, and desires justice alone, but where there is not this upright spirit, either or each of the parties, looking at the consequence the verdict will have, may endeavour to set the facts of the case in a light most favourable to himself, and therefore to mould, disguise, or suppress some of the circumstances. When such is the state of mind of each or either of the parties to a suit, it may be imagined it will sometimes infect the integrity of the witnesses. From this source may arise the unwilling, the prejudiced, the partisan, the false witness. In cases of this description the service which a cross-examina-

19. *R. v. Zawar Husen*, (1897) 20 A. 155. 20. Wigmore, Evidence, S. 1367.

tion may have is manifest. But the benefit of cross-examination is not confined to cases of this disreputable kind. For, on every trial after the witness's examination by his own side, or examination-in-chief as it is called, is closed, these considerations may arise in the mind of the opposite party: the witness may have spoken the truth, but not the whole truth, or he may have spoken the truth, and something besides the truth; or some of the truth may not have been brought out, because questions suited to elicit it were not put to him; the witness may be mistaken in a matter which he has stated as a fact; he may have misapprehended it; he may not have seen what he thinks he saw, or heard what he thinks he heard; he may have spoken to a fact with a greater confidence than is justified by his imperfect knowledge of it; his present story may not be consistent with his relation of it on some former occasion; the witness's character may require to be searched into, to judge how far his evidence is to be believed."

"1. To show that the witness did not see what he said he saw; as that the witness, who said he saw the prisoner at a particular place, did not see him there or, that the witness, who said he saw the prisoner coming from a particular place, was at the time of seeing him (as he said), unable, from the distance (220 yards) of the prisoner from him, to recognise the prisoner, to distinguish his features, to know him to be the prisoner; or, that the witness, who said he saw the prisoner fire a pistol at another man, was at the time of seeing him (as he said), unable from the distance of 220 yards of the prisoner from him to recognise the prisoner.

"2. To show that the witness did not hear what he said he heard; as, that the witness, who said he heard particular words spoken by the prisoner to a clamorous mob, was at the time he heard the words, under some agitation of mind, was in a degree in a considerable fury of spirits; or that, at the time when the witness (as he said) heard certain words spoken by a man at the head of a mob and addressed to the witness and others, the witness being nearest to the speaker, there was a good deal of noise and confusion, and that the witness was alarmed; and that considering the noise that prevailed at the time, and the witness's situation, and his alarm, the witness might not be able to swear positively to the precise words used.

"3. To show that the witness spoke from hearsay, as, that the witness who said a mob set fire to a chapel did not see them do it; that it was on fire when the witness first saw it, and who set it on fire he did not know; nor did he know that it was a chapel, only somebody told him so.

"4. To test the truth of what the witness has said in general terms, by making him particularise, when the witness has spoken in general terms of many persons, for instance, who were forced to do a particular act against their will, to tell the names of some persons, or the name of even one person present, or forced to do the act mentioned; or, when the witness has given evidence of words spoken by the prisoner to a large body of men, to test the truth of his evidence by asking the witness, whether he can name any person, who was present, when the prisoner spoke the words mentioned.

"5. To show the witness, who had identified a thing, had done so through mistake in the manner in which the identification had been put or left to him; as, where the witness had identified a greatcoat as the greatcoat worn by the prisoner on a particular occasion, and the witness in his cross-examination was asked, whether the greatcoat was not produced to him as the greatcoat the prisoner had on; whether it was produced to the witness singly, or with any other greatcoats?

"6. To procure an explanation of words used by witness; as the witness, who said the prisoner was at home on particular days, did not mean that the prisoner did not go out on those days, but only that he was at home some part of each of those days.

"7. To show that the conduct of the prisoner was consistent with his innocence, was inconsistent with guilt was open without concealment; as that, with regard to papers, which the witness found and seized at the prisoner's house, during the whole time the witness was employed in searching for them, there was not any endeavour made by the prisoner or any of his family, to conceal or secrete any of them; or that, with regard to any acquaintance which the witness said subsisted between the prisoner and himself, the witness was not in confidence with the prisoner and with regard to a conversation which the witness said the prisoner introduced to him, the prisoner imposed no confidence on him, and acquainted him that he had mentioned the matter of the conversation to some other persons, and intended to mention it to more, or that with regard to a matter which the witness said the prisoner communicated to him on the prisoner's accidentally meeting and stopping him in the street, the prisoner communicated it to him in the open street, and not with any secrecy; or that, the prisoner who went on board a ship at Portsmouth about a week before it sailed, and who, on the part of the prosecution it was alleged, went on board to fly from the accusation against him, did when on board pass by his own name, and at Portsmouth came on shore several times, and went publicly about the streets; or that at the time the prisoner was in custody, no man could act with more openness in all his conduct than did the prisoner; that on his examination before the Magistrate at L, he was discharged on his own recognizance; that after he was charged he remained at L for nine days until he was again taken into custody; and the witness, clerk to the Magistrate at L, knew where the prisoner was the whole of that time, and frequently saw him.

"8. To cause the witness to repeat something, which on his examination-in-chief, he has said favourable to the prisoner; as that he could not identify the prisoner as being one among a body of men or as the man who had used certain words; or that, although the prisoner was present when certain words were used, he was not near enough to hear them.

"9. To show that the evidence now given by the witness contains some addition to or contradiction of, or otherwise differs from, his evidence, statement or story given, made or told on some previous occasion."

Many are the just objects of a cross-examination according to the circumstances of the case in which it is used; its only design being to elicit truth. But the legitimate end of a cross-examination is sometimes perverted to serve a bad purpose,—to alarm, mislead, or bewilder an honest witness; when the effect may be to hide rather than to bring out the truth.²¹

Some useful pointers. So, wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is

21. See Bacon's Essays with annotations by Archbishop Whately, p. 495, Ed.

going to be made when the turn of party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. This much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.²²

If there is anything in the witness's statement which is disputed and the opponent avoids asking questions on those matters in cross-examination, the evidence in chief-examination must be accepted unless of course there are inherent improbabilities.²³ Suggestion in cross-examination which is denied by the witness is no evidence at all.²⁴ It is a well-known principle of the law of evidence that a party should put to his opponent's witnesses so much of his case as concerns that particular witness and on failure to do so the court will be entitled to presume the witness's account has been accepted.²⁵ Opportunity should be given to witness to explain and clear up the particular point of ambiguity or dispute before an allegation or document can be used against him.¹

Once a witness is examined to prove documents without his previously finding affidavit relating to them, cross-examination cannot be confined to matters deposed to in examination-in-chief. If it is directed to relevant matters it can cover the field not covered by examination-in-chief.²

Origin of the art of cross-examination. The origin of the art of cross-examination is lost in the mists of antiquity but we find it successfully employed in the Biblical story of Susanna and Elders.³ Solomon,⁴ the Platonic dialogues,⁵ the Trial Scenes of Mirchakatika, an ancient Hindu drama,⁶ defence of Roscius by Cicero,⁷ Times of William Rufus in England and in the city of Gaul in the Roman days.⁸

Cross-examination with an object. The golden advice of the sages of law in this respect has been that cross-examination should not be aimless, without a purpose or divorced of object.

"A mere aimless, haphazard cross-examination is a fault every (cross-examiner) advocate should strenuously guard against. It is far better to say nothing than to risk the consequences of random shots, which may as often wound your friends as your opponents. Very little experience in Civil or Criminal Courts, and in the latter especially, will assure you that there is no error so common as this. Some persons seem to suppose that their credit is

22. Carapiet v. Derderian, A.I.R. 1961 Cal. 359.

23. Jayalakshmi Devamma v. Janardhan Reddy, A.I.R. 1959 A.P. 272; Kar-nidan Sarda v. Sailaja Kanta, A. I.R. 1940 Pat. 683; Velu Pillai v. Paramanandam, A.I.R. 1954 T. C. 152; Commissioner of H.R. and C. E. v. M. Ayyavaraya, (1966) 2 Andh. L.T. 280 (284) : (1966) 2 Andh. W.R. 218.

24. Binapani v. Rabindranath, A.I.R. 1959 Cal. 218.

25. Ram Khosla v. Kishan Lal, 60 Punj L.R. 349.

1. Ali Mohammed v. Yusuf, A.I.R. 1962 Orissa 111.

2. Chandramani Naik v. Binapani Del,

33 Cut. L.T. 787 : 1968 Cr. L.J. 199; A.I.R. 1968 Orissa 17 (18) (Proceedings under S. 145, Cr. P. C.).

3. Cited in Wigmore on Evidence.

4. Wrottesley on Examination of Witnesses p. 102 (2nd Ed.).

5. Whewell's Platonic Dialogues, Vol. I.

6. Indian Usage and Judge-made Law in Madras by J.H. Nelson, Chapter 4; see also Mandlik's Mayukh.

7. Harris : Illustrations in Advocacy, pp. 136-140.

8. Professional Ethics by the late Mr. P.R. Sundaram Iyer. Aiyar : Art of Cross-examination, Law Book Company, Allahabad.

concerned in getting up a cross-examination, and they look upon the dismissal of a witness without it as if it were an opportunity lost, and they fear that clients would attribute it, not so much to prudence as to conscious incapacity. So they rise and put a number of questions that do not concern the issue and perhaps elicit something more damaging to their own cause than anything the other side has brought out, and the result is that they put their client in a far worse condition than before. In a trial for murder, the defence taken by accused was that the brother of the deceased committed the murder but in cross-examination of prosecution witness, a suggestion was made that some other person committed the murder. The defence version was thereby weakened.⁹ Let it be a rule with you never to cross-examine unless you have some distinct object to gain by it. Far better be mute through the whole trial, dismissing every witness with a word, than for the sake of appearances, to ply them with question without a purpose. You will not fall in the estimation of those on whom your fortunes will depend; but the contrary. It is well known that in legal conflicts, even more than in military ones, discretion is the better part of valour. Your first resolve will, therefore, be whether you will cross-examine at all. If the witness has said nothing material, usually the safer course is to let him go without a question, unless indeed you are instructed that he can give some testimony in your favour, or damaging to the party who has called him, and then you should proceed to draw that out of him. But unless so instructed, you should not on some mere vague suspicions of your own, or in the hope of hitting a blot somewhere by mere accident incur the hazard of eliciting something damaging to you—a result to be seen every day in our courts."

Quintillian advice on preparation of cases. The next particular that occurs is the matter of studying a cause which is the advocate's groundwork. There is hardly one of so slender a genius, who, when he has taken pains to learn everything in a case, yet may be inefficient to inform the judge of it.¹⁰ But how few are there that give themselves much trouble in this respect. To say nothing of the negligent incidents from persons and commonplaces which may afford them a handle for being clamorous; there are some so addicted to vanity, who, either partly as busy, and pretending always to have something, must first clear their hands of, order the client to come to them on the eve, or the very morning of the trial, and sometimes they even boast that they heard him only a moment before the Court was sitting; or, who partly to glory in their fine wit and partly because they may appear to have almost ready conception, pretend to know and be intelligent in the matter before they have scarcely heard anything; so that when they have blabbed out a deal of nonsense in their eloquent strain, and with the greatest fracas imaginable by which the judge is not a bit wiser, nor the cause the better, they procure themselves another instance of their insipid vanity, to be led back to the forum, in all their noble sweat and fatigue by a tribe of sycophants.¹¹

Scope and object. After the party calling a witness has concluded the examination-in-chief, the opposite party has a right to cross-examine the witness as a matter of course. An examination without opportunity to cross-examination is not legally acceptable.¹² If there is on the record any state-

9. Chandrika Parshad v. State, 1975 Rajdhani I. R. 551

10. Art of Winning Cases—Hardwicke : Cross-examination by D.R. Prem, p. 60.

11. Aiyar : Art of Cross-examination,

Law Book Company, Allahabad.

12. Moti Singh v. Dhanukdhari Singh, 1923 Pat. 53; 73 I.C. 339 : 24 Cr. I.J. 595; Gorachand Sircar v. Ram Narain, (1867) 9 W.R. 587, see also notes, post.

ient by any witness to the police, particularly if it purports to be based on personal knowledge, that statement can well be used by the accused for cross-examination and if he omits to avail himself of it, he cannot be heard to say that he was denied the opportunity to cross-examine the witness.¹³ Cross-examination, if properly conducted, is one of the most useful and efficacious means of discovering the truth. "The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been proved and sublimated by that test, has found increasing strength in lengthening experience."¹⁴ A witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish the personal trustworthiness of the witness. The utility of cross-examination lies in extracting these circumstances and facts from the mouth of the witness himself.¹⁴⁻¹ "Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story."¹⁵ The extent of its effectiveness no doubt depends upon the dexterity of the wielder of the weapon, but every cross-examiner should and can, if he is careful, indicate in cross-examination, whichever part of the evidence given in examination-in-chief is alluded to, and an omission to do so would lead to the inference that the evidence is accepted, subject, of course, to its being assailed as inherently improbable.¹⁶ If it is desired to challenge a statement made by a witness, it must be challenged by cross-examination.¹⁷ The right to cross-examine a witness of opponent arises only when the veracity of that witness is to be tested, where defendants conceded plaintiff's case they have no right to cross-examine the plaintiff.¹⁸ Though certain rules have been laid down for the guidance of advocates in this respect,¹⁹ the faculty of interrogating witnesses in effect is mainly the result either of natural acuteness or of practice.²⁰ It will, however, prove useful to recall here Mr. Norton's observation (Law of

13. *Magan Lal Radha Kishan v. Emperor* 1946 Nag. 173; 11 R. 1946 Nag. 126; 226 I.C. 245; 17 C.I.J. 851; 1946 N.L.J. 139.
14. *Wigmore, Ev.*, S. 1367.
- 14-1. *Wigmore, Ev.*, S. 1368.
15. *Per Hanworth, M.R.* cited with approval by Sankey, L.C., in *Mechanical and General Inventions Co. v. Austin Motor Co.*, 1935 A.C. 346 at p. 360.
16. *Ven Pillai v. Paramanandam*, 1954 T.G. 152; 1953 K.L.T. 587.
17. *Naba Kumar Das v. Rudra Narayan*, 1923 P.C. 95; 77 I.C. 141; 28 C.W.N. 589.
18. *Subba Rao v. Yallagadda Venkatapalaiah* (1977) 1 An W.R. 417; (1977) 1 A.P.L.J. 354.
19. See *Best, Ev.* Ss. 649-663A (in the last paragraph citing D.P. Brown's "Golden Rules," which are reproduced, post); S. 21 "Examination of witnesses; Hints for conducting a trial" Dees Moines Iowa, 1877; *Harris' Hints on Advocacy*;

- Quintillian Ins.*; *Orat*; *Bentham's Judicial Evidence; Hints to Witnesses in Courts of Justice*, by a Barrister (Baron Field), London, 1815, Stark Ev., 194; *Taylor, Ev.*, S. 1428; *Alison's Practice of the Criminal Law of Scotland*, 546, 547. Evans on cross-examination in his Appendix to Potlier's "Obligations" No. 16, Vol. II, pp. 235, 234, tests of credibility and concert; demeanour and other indications of truth or falsehood (ability, memory, descriptive powers); 6th Ed. 447, 448, 17-22 24-29, 29-31, 32-35; *Stewart Rapalje's op. cit.* S. 245, et seq; *Whatley's "Rhetoric"* and "Historic Doubts," *Campbell's Rhetoric*; *Glassford's Principles of Evidence* Edinburgh, 1820; see *Observations of Norman, J.* in *Sujad Ali v. Kashinath Dass*, 6 W.P. 181; *R. v. Rameshchandra Govind* (1895) 19 B. 759.
20. *Best, Ev.*, Ss. 650 663.

Evidence p. 320) that cross-examination is to be warily approached and the way carefully felt; that unless there is some very good ground for believing that the witness can be broken down, it is rarely good policy to submit him to a severe cross-examination. Sometimes, consequently, a cross-examination is little more than affectation in order that the examiner may not seem to let the witness go without question, as if he were totally impregnable, and a few questions are asked to shake his credit or show the weakness of his memory. "The object and scope of cross-examination is twofold—to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses. It is not confined to matters proved in chief; the slightest direct examination, even for formal proof, opens up the whole of the cross-examiner's case."²¹ In cross-examining a witness, the cross-examining lawyer not only tries to bring out contradictions in the evidence given in examination-in-chief, but he also tries to build up his case by establishing new facts.²² With this view the witness may be asked not only as to facts in issue or directly relevant thereto, but all questions (a) tending to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment; or (b) tending to expose the errors, omissions, contradictions and improbabilities in his testimony; or (c) tending to impeach his credit by attacking his character, antecedents, associations and mode of life²³; and in particular by eliciting (i) that he has made previous statements inconsistent with his present testimony, or (ii) that he is biased or partial in relation to the parties in the cause²⁴; or (iii) that he has been convicted.²⁵ One of the arts of the cross-examiner in a trial is to show that little credit can be attached to the testimony of a witness, and the cross-examiner if he is skilful and accomplished, does that not only by means of a direct attack but by means of eliciting from the witness's mouth answers calculated to show that the witness is not a person who has spoken the truth.¹

Relevancy of hearsay. The cross-examination must, as much as the examination-in-chief, relate to relevant facts.² Therefore, hearsay is always inadmissible as substantive evidence, whether the evidence be elicited in examination-in-chief or cross-examination.³ In so far, however, as the credibility of a witness is always in issue,⁴ 'relevancy' is a term of wider scope in cross-examination than in examination-in-chief, embracing all those questions to credit which are the subject-matter of Secs. 146–153, post.

Not confined to facts testified in examination-in-chief. Moreover the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief.⁵ This is permitted by the generality of Sec

21. Phipson, *Ev.*, 11th Ed., 648–649.

22. *Bishnu Murnoo v. Radhanath Patra*, I.L.R. (1951) 1 Cal. 87.

23. See S. 146, post.

24. See S. 155 (2) and (3) which deals with the impeachment of the credit of the witness by calling other persons to testify to the facts therein mentioned if he denies the same on cross-examination. The impeachment of credit in the text refers to impeachment by cross-examination of the witness himself and not by means of independent testimony. As

to the partiality of the witness, see S. 153, Exception (2).

25. See S. 153 (1).

1. *Ambar Ali v. Emperor* 1928 Cal 769; 48 C.L.J. 475; 35 C.W.N. 55

2. S. 138; see observations in *Wills Ev.*, 3rd Ed., p. 330.

3. Ante page 1539.

4. *Best, Ev.*, S. 263.

5. *Cambier v. E. Vanni*, Archbishop 1951 M.B. 86; the same rule prevailed prior to this Act; *R. v. Ishai Dutt*, (1871) 6 B.L.R. App. 88 15 W.R. Cr. 341.

143, "leading questions may be asked in cross-examination," and under Sec. 154 the Court has discretion to permit the prosecution to test by cross-examination the veracity of its own witnesses with reference to new matter so elicited by the defence.⁶ This is in accordance with the English practice by which the cross-examination is not limited to the matters upon which the witness has already been examined-in-chief, but extends to the whole case, and therefore, if a plaintiff calls a witness to prove a single, even the simplest, fact connected with the case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions, to establish, if he can, his entire defence.⁷ In America, however, on the other hand, the rule which prevails in most of the States is quite different and the cross-examination can only relate to facts and circumstances connected with the matter stated in the direct examination of the witness. If a party wishes to examine a witness as to other matters, he must do so by making the witness his own.⁸ Where a new issue was framed after both the parties produced their evidence and closed their case, it was held that in cross-examination of a witness produced by the defendant in rebuttal on the new issue the plaintiff could put questions relating to the issues evidence on which had already been closed.⁹

Contradicting testimony of witness. A witness may be cross-examined as to all facts relevant to the issue and his answers thereon may be contradicted. He may also be cross-examined on all matters which affect his credit, but his answer thereon cannot, except in two cases, be contradicted.¹⁰

Cross-examination when no issue is framed on a point. It is the duty of the Court to frame issues. Even if a counsel fails to take part in framing the issues, or fails to suggest a particular issue which consequently is not framed, it cannot be said that the party has abandoned that issue merely on the ground that his counsel has not taken pains to get proper issues framed. In such cases, the right to cross-examine cannot be denied on the ground that the party's counsel has failed either in taking part in framing issues or failed to get a particular issue framed.¹¹

14. Cross-examination as to irrelevant collateral facts. A witness cannot, however, be cross-examined as to any collateral independent fact irrelevant to the matter in issue, for the purpose of contradicting him, if his answers be one way, by another witness, in order to discredit the whole of his testimony.¹²

So where, as in the case last cited, defendant's counsel cross-examined a witness as to the nature of a contract made by him with Mr. S. (such contract not being the matter in suit nor Mr. S., a party thereto) intending, if the witness gave an affirmative answer to his question, to draw from thence a conclusion that he had made the same kind of contract with the defendant (which

6. *Amrita Lal Hazra v. R.*, 1916 Cal. 188; 42 C. 957; 29 I.C. 513; 21 C.L.J. 331; 19 C.W.N. 676.
7. *Mayor v. Murray*, 19 L.J. Ch. 281; *Taylor Ev. S.* 1432; *Steph. Dig. Art. 127*. The rule prevails though the proof is of a merely formal character; *Morgan v. Brydges*, (1818) 2 Stark 314.
8. *Burr Jones v. Ev.*, S. 1803.
9. *Cambler v. E. Venni Archbishop*,

- 1951 M.B. 86.
10. S. 153, post.
11. *Haridas Mundhra v. Indian Cable Co., Ltd.*, A.I.R. 1965 C. 369.
12. *Spenceley v. De Willott*, (1806) 7 East. 108; in other words no such question can be put for the mere purpose of impeaching the witness's credit for contradicting him, *Taylor. Ev.*, S. 1435.

was suggested to be the fact), or, if witness answered in the negative, to call Mr. S., and then to prove the contrary and thereby destroy the witness's credit, it was held the question could not be put.

15. Cross-examiner calling witness to prove his own case, effect of. Whether the right to cross-examine survives, if the cross-examiner afterwards calls his opponent's witness to prove his own case, seems in England doubtful. But the better opinion is that it does not, and that the witness cannot be asked leading questions on his second examination while he may afterwards be cross-examined by the party who originally called him.¹³ This last opinion appears to have been adopted by this Act. The party who calls a witness—apparently at any stage of the case—examines him in-chief. Such examination would naturally be directed to the support of his own case, upon which the adverse party would then have a right to cross-examine. If the adverse party again called the same witness he could clearly only examine him in-chief.

16. Questions that may be put in cross-examination. Leading questions may be put in cross-examination.¹⁴ As to evidence regarding matters in writing,¹⁵ cross-examination as to previous statements in writing,¹⁶ and the questions which generally may be put in cross-examination,¹⁷ see the section cited below.

17. Evidence given without opportunity to cross-examine or to rebut It is the right of every litigant, unless he waives it, to have the opportunity of cross-examining witnesses whose testimony is to be used against him, and even, when circumstances require, to adduce evidence on his own behalf to meet the evidence which such cross-examination may have brought forward. He is also entitled himself to examine the witnesses who can give evidence in support of his case, in order that he may bring out the necessary information as fully as he thinks possible, and in the form which he considers most favourable to himself. It follows that evidence given, when the party never had the opportunity either to cross-examine, or to rebut by fresh evidence, is not legally admissible as evidence for or against him unless he consents that it should be so used.¹⁸ Section 138 embodies a principle of natural justice that evidence not tested by cross-examination is no evidence.¹

The principle, requiring a testing of testimonial statements by cross-examination, has always been understood as requiring, not necessarily an actual cross-examination, but merely an opportunity to exercise the right to cross-examine, if desired. The reason is that, wherever the opponent has

13. Taylor Ev. S. 1433.

14. S. 143 of the Act.

15. S. 144 of the Act.

16. S. 145 of the Act.

17. Ss. 146–153 of the Act.

18. Gorachand Sircar v. Ram Narain, (1869) 9 W.R. 587, 588, per Phear, J., and see Radha Jeebun v. Taromonee Dossee, (1869) 12 Moo I.A. 380; Moti Singh v. Dhanukdhari Singh, 1923 Pat. 53 : 73 I.C. 339; 24 Cr. L.J. 595; Baliram Tikaram Marathe v. Emperor, A.I.R. 1945 Nag. 1; I.L.R. 1945 Nag. 151; 218 I.C. 294; 46 Cr. L.J. 448; 1945 N.L.J. 17; Gur Dyal v. Sukhnan-

dan, A.I.R. 1929 All 236; 117 I.C. 824; Harihar Sinha v. Emperor, 195 Cal. 356; 163 I.C. 9; 37 Cr.L.] 758 (F.B.); Velu Pillai v. Paramandam, 1954 T.C. 152; Chandan L. v. Amin Chand A.I.R. 1960 Pun 500; I.L.R. (1960) 2 Punj. 506; Nemi Nath v. Jamboorao A.I.R. 1966 Mys. 154; (1965) 1 Mys. L. 442; Mrs. Desai Chopra v. Pur Mal, (1975) 77 Punj. L.R. 42; 197 R.C.R. 152; I.L.R. (1974) 2 Del 779; A.I.R. 1975 Delhi 109.

19. Dwarka Das v. State, 1979 Cri. L. 550.

declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. This doctrine is perfectly settled.²⁰ Omission on the part of a party to cross-examine a witness called by his opponent amounts to an acceptance of the evidence of that witness.²¹

Omission to cross-examine, effect of. "This much counsel is bound to do, when cross-examining; he must put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which that witness had any share. Thus, if the plaintiff has deposed to a conversation with the defendant, it is the duty of the counsel for the defendant to indicate by the cross-examination of the plaintiff how much of the plaintiff's version of the conversation he accepts, and how much he disputes, and to suggest what the defendant's version will be. If he asks no question as to it, he will be taken to accept the plaintiff's account in its entirety."²² So, where a party fails to question his opponent's witness, the presumption is that his evidence is accepted,²³ but this presumption can be rebutted by other evidence or by showing that the testimony of the witness is inherently unreliable.²⁴ Phipson,²⁵ lists five exceptions where "failure to cross-examine... will not... amount to an acceptance of the witness's testimony, e.g., if the witness has had notice to the contrary beforehand or the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases or when counsel indicates that he is merely abstaining for convenience, e.g., to save time." Where the Court is to be asked to disbelieve a witness, the witness should be cross-examined, and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.¹ Where it is intended to suggest that the witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit.² The rule, that evidence given by

20. Wigmore, Ev. §. 1371.

21. Velu Pillai v. Parmanandam 1954 T. C. 152; see also Jayalakshmi v. Janardhan Reddy, 1959 A.P. 272 (chief-examination, facts to be accepted, if not inherently improbable).

22. Odger's Pleading & Practice, 13th Ed. p. 261.

23. Babulal v. Caltex (India) Ltd., A. I.R. 1967 C. 205 relying on Carapiet v. Derderian, A.I.R. 1961 C. 359, and Chunilal v. Hartford Fire Insurance Co., Ltd., A.I.R. 1958 Punj. 440; Chithalan v. C. Amrao Aamma, 1968 K.L.J. 123 (157) relying on Browne v. Dunn, (1895) 6 R. 67 (H.L.) at 70, per Lord Chancellor Herschell and at 76, 77, per Lord Halsbury; State v. Bhola Singh, I.L.R. (1969) 19 Raj. 273; 1969 Cr.L.J. 1002; A.I.R. 1969 Raj. 219 (234); Ibadat Ali v.

Baldia Co-operative Bank, (1968) 2 Andh. L.T. 124 (132); State v. Bhola Singh, I.L.R. (1969) 19 Raj 273; 1969 Cr.L.J. 1002; A.I.R. 1969 Raj. 219 (234); Bansi Lal Madan Lal v. E.B.R.S. Service, I. L.R. (1972) 2 Cal. 380.

24. I.L.R. 1974 Him. Pra. 509; Manika v. State, (1975) 41 Cut. L. T. 798.

25. 11th Edn. pp. 649, 650.

1. Halsbury's Laws of England, 4th ed., Vol. 17 para 278 citing Browne v. Dunn, (1895) 6 R. 67 (H.L.); Sachindranath Chatterjee v. Nilima, 74 C.W.N. 168; A.I.R. 1970 Cal. 38 (63); Sukhraj Bhuj Calcutta, Ltd. v. State Transport Corporation, A.I.R. 1966 Cal. 620 (622) (story of witness incredible or of romancing character).

2. Phipson, Ev., 11th Ed. p. 649.

one party cannot be made admissible against the other party unless the latter had an opportunity of testing its truthfulness by cross-examination, applies not only to civil cases of however trivial a nature, but also to criminal cases with must more force.³ The rule has been extended to a case where owing to the refractory attitude of the witness the Court was constrained to terminate all of a sudden and prematurely the cross-examination of the witness.⁴

The opportunity of cross-examination involves two elements: (1) notice to the opponent that the deposition is to be taken at the time and place specified, and (2) a sufficient interval of time to prepare for examination and to reach the place.⁵ When a case decided *ex parte* in the absence of the defendant, who had thus no opportunity of cross-examining the plaintiff's witnesses was readmitted to the file and to a hearing; it was held, that the Court of first instance ought to have recalled the plaintiff's witnesses and allowed the defendant an opportunity of cross-examining them; and this not having been done that their previous depositions could not be treated as evidence.⁶ When at a sessions trial for the defence had applied for leave to postpone cross examination till the next day, on the ground that he had been unprepared for the evidence given and was not in a position to deal with it, and this was refused, and the result had been that some witnesses were not cross-examined and others not very efficiently cross-examined as they would have been if the postponement had been granted, it was held that his request had been reasonable and that the accused had been prejudiced by its refusal, and a new trial was ordered.⁷

The Court is not bound to wait indefinitely and thus waste public time if the pleaders do not turn up in Court at the right moment. And absence of cross-examination, owing to the counsel not turning up in time, is no ground for not accepting the evidence of the witnesses.⁸ If the adverse party, despite notice, does not appear in person or through pleader to cross-examine witnesses, their evidence must be accepted, unless there are some inherent improbabilities in it.⁹ From the mere fact, that no record was made in the depositions of witnesses that there was no cross-examination, it cannot be inferred that a request to cross-examine the witnesses was disallowed.¹⁰ If, on a particular point, the statements recorded by the police in the course of investigation were the only material for cross-examination and that was not available to the accused in consequence of their destruction or otherwise, it must be said that the accused had no opportunity to examine the witnesses on that particular point and the evidence bearing on the point would, therefore, be inadmissible.¹¹ But, in a later Calcutta case, where also notes of statement

3. Hattu v. Emperor, 1933 All 837: 146 I.C. 1089.

4. Ram Kumar v. Emperor, 1937 Oudh. 168: I.L.R. 12 Luck. 553: 165 I.C. 486: 37 Cr.L.J. 1144.

5. Wigmore, Ev., § 1378.

6. Ram Baks v. Kishore Mohun, (1869) 3 B.L.R. (A.C.) 273.

7. Sadasiv Singh v. R., 1914 Cal. 834: 11 R. 11 Cal. 299: 25 I.C. 348: 15 Cr.L.J. 596; see also Pita v. King-Emperor, 1925 A. 285: I.L.R. 47 All 147: 85 I.C. 719: 26 Cr.L.J. 575 (where accused were not allowed opportunity to engage counsel to cross-examine witnesses).

8. Dwarkabai v. Ukhandia Ganpat, 1954 Nag. 252.

9. Bijai Ram v. Jai Ram, 1955 H.P.

57; Karnidan Sarda v. Sailaja Kant. 1940 Pat. 688: I.L.R. 19 Pat. 71: 192 I.C. 187.

10. Union of India v. T.R. Varma, 1957 S.C. 882: 1958 S.C.J. 142: 1958 S.C.A. 110: 1958 S.C.R. 499: 1957 A.L.J. 126: 1958 A.W.R. (HC) 165: (1959) 1 Andh. W.R. (SC) 67: 1958 M.P.C. 61: (1958) M.L.J. (SC) 66: 1956 M.L.J. (Cr.) 123: I.L.R. 1958 Punj. 27: 60 P.L.R. 126: (1957) 13 F.J.R. 237.

11. Maganlal Radha Kishan v. Emperor, 1946 Nag. 173: I.L.R. 1946 Nag. 126: 226 I.C. 245; see also Ba Ram Tika Ram v. Emperor, 1954 Nag. 1.

of witnesses made by the police during investigation were destroyed and consequently the accused could not get copies of the statements for the purpose of cross-examining the witness and the question was as to what the Court should do in such a case, Roxburgh, J., observed: "Even under Sec. 138, Evidence Act, read with Sec. 33, it is impossible to throw out as inadmissible the evidence of a prosecution witness who can be and is cross-examined by the accused as to all other matters but cannot be cross-examined as to the single matter of his statement to the police."¹² Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g., if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the abstinence arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to depose to the same point, it is not always necessary to cross-examine them all.¹³ When the witness dies or falls ill before cross-examination, his evidence-in-chief will be admissible, though its weight may be slight.¹⁴

18. No cross-examination without examination-in-chief. (1) The practice of tendering witnesses for cross-examination leads to considerable confusion and is to be deprecated. (2) A material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering if at all should be confined to witnesses of secondary importance. (3) Even in a case where the prosecution has already got sufficient evidence on a particular point and does not want to waste time by examining a witness, although material, who was examined in the lower Court on the same point, but at the same time does not want to deprive the defence of the right of cross-examination, it should ask the witness at least whether his evidence in the lower Court was true, and if he gave a general answer as to the truth of his evidence in the lower Court he could be cross-examined on that. (4) It is not the duty of the prosecution or of the Court to examine any witness merely because he was examined as a prosecution witness before the committing Magistrate, if the prosecution is of opinion that the witness was not likely to speak the truth. All that the prosecution need do, in such a case, is to see that the witness was present in Court so as to give the Court or counsel for the defence, as the case may be, an opportunity of examining him.¹⁵ "Cross-examination is, by hypothesis, a counter-examination,—the stage subsequent to a direct examination. Hence, it is not proper, if there has been no prior stage of examination at all. If the person has not become a

12. *Laxman Chandra v. Emperor*, 1948 Cal. 278; 52 C.W.N. 401.

13. *Phipson, Ev.*, 11th Ed., 649, 650; *Babulall v. Caltex (India), Ltd.*, A.I.R. 1967 C. 205; *Sukhradi v. Calcutta State Transport Corporation* A.I.R. 1966 C. 620.

14. *Taylor, Ev.*, S. 1469; *Phipson*, 11th Ed. 648, and cases there cited; *Shrikishun v. Emperor*, 1946 Pat. 384; 224 I.C. 402 (dissenting from *Narsingh v. Gokul Prasad*, 1928 All. 140; I.L.R. 50 All 113; 107 I.C. 243; 25 A.L.J. 775); *Ahmad Ali v. Joti Prasad*, 1944 All. 188 (2); I.L.R. 1944 All. 241; 1944 A.L.J. 182 (distinguishing 1928 All.

140, *supra*); *Mst. Horil Kuer v. Rajab Ali*, 1935 Pat. 34; 160 I.C. 445; 17 P.L.T. 101; *Diwan Singh v. Emperor*, 1933 Lah. 561; 144 I.C. 331; 34 P.L.R. 719; *Mangal Sen v. Emperor*, 1929 Lah. 840 (2); 118 I.C. 647; *Maharaja of Kolhapur v. Sundaram Ayyar*, 1925 Mad. 497; I.L.R. 48 Mad. 1; but see *Sundara Rajah v. Gopala*, 1934 Mad. 100; 150 I.C. 132; 39 L.W. 34; see also notes under S. 33 ante.

15. *Manzurul Haque v. State of Bihar*, I.L.R. 37 Pat. 274; 1958 Pat. 422 (426); 1958 Pat. I.L.R. 18 (notes deduced after discussion of authorities).

witness for the one party, he can testify only by being called by the opponent as his own, which cannot occur until his own general stage of the whole case (i.e. defence or in rebuttal) has been reached." Who is one's own witness depends in part upon which party has first called and made use of the witness. The question arises as to what constitutes, for the first party calling a witness so as to entitle the opponent to cross-examine, instead of the latter calling the witness under a direct examination. The object is "to define the point of time at which it may properly be said that the person has become the witness of the party for the purpose of forming the first stage of the examination. It would seem that the proper test is to be found in the question whether he has given admissible testimony. Until then, he may be potentially a witness (as are all persons having relevant knowledge), but is not actually a witness. Until he has made a contribution, by way of testimonial assertion, to the general mass of evidence, and this contribution has been accepted by the party and sanctioned by the Court as a part of the evidence, the person is only prospectively and not *de facto* a witness. Certain consequences follow from this :

(1) A person who has been sworn by mistake, as sometimes happens under the practice of swearing in a group and has not yet been put on the stand, is not yet the witness of the party for whom he was sworn.

(2) A person sworn but not yet asked any question is not the witness of the party swearing him; moreover, he cannot be cross-examined even to discredit him, for there is as yet no testimonial assertion to be discredited.

(3) A person sworn and asked questions, where he gives no answer or where the facts in his answer are irrelevant to the case, has not yet become the party's witness.

(4) A person who is questioned and answers merely to prove a document does become a witness of the party thus using him.

(5) If a deposition is offered, but the answers to the direct interrogatories are for some reason held inadmissible for the offering party, the answers to the cross-interrogatories are equally inadmissible, because otherwise a cross-examination would be allowed with no direct examination (*sic*) preceding."¹⁶ The test, therefore, in order to determine whether a witness has been called by the prosecution, is, whether he has been summoned and sworn and further whether he is a competent witness.¹⁷

It has been held that when a witness has been intentionally called and sworn by either party, the opposite party has a right, if the examination-in-chief is waived or if the counsel changes his mind and asks no questions, to cross-examine him.¹⁸ Where a witness called by one of the parties is a competent witness, the opposite party has a right to cross-examine him, though the party calling him has declined to ask a single question.¹⁹ But the practice

16. Wigmore, Ev., Ss. 1892, 1893; Panchoolal v. Bhiroolal, 1960 M.P. L.J. (Note) 17.

17. Manzurul Haque v. State of Bihar, 1958 Pat. 422 at 425.

18. R. v. Brooke, (1819) 2 Stark R. 472; Phillips v. Eamer, (1795) 1 Esp.

355, as to liability to cross-examination where an affidavit has been filed and withdrawn; see *Re Quartz Hill Co., Ex parte Young*, (1882) 21 Ch. D. 642.

19. R. v. Ishan Dutt, (1871) 15 W.R. Cr. 34.

of forcing a litigant to examine the adversary's witness has been condemned by their Lordships of the Judicial Committee in many cases.²⁰

19. Cross-examination of witness examined by mistake. If a witness be sworn under a mistake, whether on the part of counsel or of the officer of the Court, and that mistake be discovered before the examination-in-chief has substantially begun, no cross-examination will be allowed.²¹ So where the plaintiff's counsel called "Captain S" and Captain Hugh S answered and was sworn, and the plaintiff's counsel, after asking him a few questions, ascertained that it was Captain Francis S whom they meant to examine, this was held not to give the other side a right to cross-examine Captain Hugh S, as he was only examined by mistake.²² "Neither has the adverse party any right to cross-examine a witness, whose examination-in-chief has been stopped by the Judge, after his having answered a merely immaterial question. On the other hand, it is by no means necessary that the witness should have been actually examined-in-chief, for, if he has been intentionally called and sworn, and is moreover a competent witness, the opposite party has, in strictness, a right to cross-examine him though the party calling him has declined to ask a single question."²³

A witness called merely to produce a document under a *subpoena duces tecum*, need not be sworn, if the document either requires no proof, or is to be proved by other means; and, if not sworn, he cannot be cross-examined.²⁴

Witnesses to character may be cross-examined.²⁵

20. Tendering prosecution witness for cross-examination. There are ordinarily two classes of witnesses who are tendered: (1) witnesses whom the prosecution does not want to examine with a view to save time because there is already sufficient evidence on a particular point and the witnesses tendered would merely repeat that evidence, and (2) witnesses who, according to the prosecution, gave false evidence in the Court below and it did not, therefore, want to examine them in the Sessions Court. The practice of tendering witnesses for cross-examination, which is no doubt often adopted, is inconsistent with Sec. 138, Evidence Act, which says that witnesses shall be first examined-in-chief, and then, if the adverse party so desires, cross-examined, and, if the party calling him so desires, re-examined. It is obvious that, if a witness is examined by the defence without having given any evidence-in-chief, he is not being cross-examined, by whatever name the process may be described. The practice of tendering for cross-examination should only be adopted in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower Court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross-examination. But, strictly speaking, the witness ought to be asked by the prosecution, with the consent, of course, of the pleader for the accused, and the leave of the Judge, whether his evidence in the lower Court is true. If he gives a general answer

20. See *Benares Bank Ltd., v. Sashi Bushan*, 1948 Pat. 398: I.L.R. 26 Pat. 470.

21. *Manzurul Haque v. State of Bihar*, 1958 Pat. 422 at 425.

22. *Taylor. Ev.*, 12th Ed. p. 910 citing *Clifford v. Hunter*, (1827) 3 C. & P. 16 and see *Rush v. Smith*, 16

M. & R. 273; *Reed v. James*, 1 Stark M. & R. 273; *Reed v. James*, 1 Stark 132.

23. *Manzurul Haque v. State of Bihar*, 1958 Pat. 422 at 425.

24. Section 139, post.

25. Section 140, post.

as to the truth of his evidence in the lower Court he can be cross-examined on that. But, he must, in some way, be examined-in-chief before he can be cross-examined on that. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye-witness.¹

As regards the second class of witnesses, the State is not bound to call before the Court a witness who, it believes, is not going to speak the truth. If the State informs the accused of the name of the witness and produces him in Court, it can then leave it to the accused to call him or not, as he thinks fit. If the witness is called, the State can cross-examine him. Therefore, where a witness has been called before the committing Magistrate, and presumably he has told a story which the prosecution believe to be false, and consequently, they do not wish to call him in the Sessions Court, their proper course in such a case is not to call him themselves, but to give his name to the defence, see that he was present in Court and tell the defence, if they did not already know it, what he was prepared to say. He should not be tendered for cross-examination. The practice of tendering witnesses for cross-examination leads to confusion and does not induce to the discovery of the truth.² There is no meaning in tendering a witness for cross-examination, because when a witness has not given any statement in examination-in-chief, there is nothing in relation to which he is to be cross-examined. Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law to justify such a course.³

In a case the following rules were deduced from the authorities discussed : (1) The practice of tendering witnesses leads to considerable confusion and is to be deprecated. (2) A material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering, if at all, should be confined to witnesses of secondary importance. (3) Even in a case where the prosecution has already got sufficient evidence on a particular point and does not want to waste time by examining a witness although material, who was examined in the lower Court on the same point, but at the same time does not want to deprive the defence of the right of cross-examination, it should ask the witness at least whether his evidence in the lower Court was true and if he gave a general answer as to the truth of his evidence in the lower Court he could be cross-examined on that. (4) It is not the duty of the prosecution or of the Court to examine any witness merely because he was examined as a prosecution witness before the commit-

1. Sadeppa Gireppa Mutgi v. Emperor, 1942 Bom. 37; I.L.R. 1942 Bom. 115; 198 I.C. 245; 43 Bom. L.R. 946; Veera Koravan v. Emperor, 1929 Mad. 906; I.L.R. 53 Mad. 69; 30 L.W. 701; Empress v. Ram Sahai Lall, I.L.R. 10 Cal. 1070; see also Nga. Aung. Cyl v. Emperor, I.L.R. 14 Rang. 45; Brahmayya v. The King, 1938 Rang. 442.
2. Emperor v. Kasamalli Mirzalli, 1942 Bom. 71; I.L.R. 1942 Bom. 384; 199 I.C. 202; 44 Bom. L.R. 27 (F.B.); see also Kesar Singh v. State, 1954 Punj. 236; Abdul Latif v. Emperor, 1941 Cal. 533; 195 I.

- C. 439; 45 C.W.N. 763; Queen Empress v. Stanton, I.L.R. 14 Al 521; 12 A.W.N. 110; Empress v. Kali Prosonno, I.L.R. 14 Cal. 245; Queen-Empress v. Durga, I.L.R. 11 All. 84; 14 A.W.N. 7 (E.B.).
3. Chhota Singh v. The State, I.L.R. (1963) 2 Punj. 238; A.I.R. 196 Punj. 120; see also Thazhathethi Hamsa v. State of Kerala, A.I.R. 1967 Ker. 16; 1966 Ker. L.J. 184; Jogindra Singh v. State of Haryana 1973 Cur. L.J. 291; 76 Pun. L.R. 466; 1973 Chand L.R. (Cri.) 14; I.L.R. (1975) 2 Punj. 55; (1974) Cri. L.J. 117.

ting Magistrate if the prosecution is of opinion that the witness was not likely to speak the truth. All that the prosecution need do in such a case is to see that the witness was present in Court so as to give the Court or counsel for the defence, as the case may be, an opportunity of examining him.⁴

21. Cross-examination of prosecution witness. As a rule, the proper and convenient time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence; but it is in the discretion of the Criminal Court to allow the accused to recall and cross-examine the witnesses for the prosecution at any period of defence when the Court thinks that such a step is necessary for the purposes of justice.⁵ But it has been held by the Calcutta High Court that Sec. 347 of the Criminal Procedure Code (now Sec. 323 of the Code of Criminal Procedure, 1973), cannot be read as subject to Sec. 208 (omitted from the Code of Criminal Procedure, 1973), so as to render it imperative on a Magistrate, after he has decided to commit a case to Sessions, to allow the accused to cross-examine the prosecution witnesses and to call witnesses in his own defence; and that when the accused did not cross-examine the prosecution witnesses immediately, but applied for leave to examine them after the close of the case for the prosecution, and to call witnesses, the Magistrate was justified in refusing the application and committing the case⁶: Though a Magistrate is bound to examine all witnesses produced by the accused before commitment,⁷ he is not obliged to postpone it till he has examined those whom the accused is prepared to produce after process for their appearance.⁸ The procedure according to law does not warrant reservation of cross-examination by the prosecution of the defence witnesses. The witnesses must be cross-examined as soon as their examination-in-chief is over.⁹ As to cross-examination by co-accused and co-defendants, v. post. Though Secs. 137 and 138 do not speak of a further round of cross-examination, the accused could still exercise his right (of cross-examination) afresh, if the prosecution choose to make a further statement of fresh fact prejudicial to him. An accused is entitled to put further questions to a prosecution witness by way of cross-examination in respect of what he had stated in reply to questions put to him in cross-examination by the other co-accused. Each accused can test the evidence given against him.

4. *Manzurul Haque v. State of Bihar*, 1958 Pat. 422 at 426; I.L.R. 37 Pat. 274; 1958 Pat. L.R. 18; *Veera Koravan v. Emperor*, A.I.R. 1929 Mad. 906 relying on the decision in *Queen-Emperor v. Ram Sahai Lall*, (1885) I.L.R. 10 Cal. 1070; *Chhota Singh v. State A.I.R.* 1964 Punj. 120; *Thazathethil Hamsa v. State of Kerala*, 1966 K.L.J. 184; 1966 K. L.R. 160; 1966 K.L.T. 136; 1966 M.L.J. (Cr.) 409; 1967 Cr.L.J. 73; A.I.R. 1967 Ker. 16 (18).
5. *Khurrukdhar Singh v. Proshadec Mundul*, (1874) 22 W.R. Cr. 44; see Criminal Procedure Code, Ss. 256, 257 (now Ss. 246, 247, 243 (1) and 247 read with 243 (2) respectively of 1973 Code); In re *Thakoor Dyal*, (1872) 17 W.R. Cr. 51; *R. v. Ram Kishan*, (1876) 25 W.R. Cr. 48; *Talluri Venkayya v.*

- R.*, (1881) 4 M. 130; *R. v. Baldeo Sahai* (1869) 2 A. 253; *Faiz Ali v. Koromdi*, (1881) 7 C. 28; 8 C.L. R. 325; *Tambi v. Emperor*, 1919 L.B. 159; 44 I.C. 343.
6. *Phanindra Nath v. R.* I.L.R. 36 Cal. 48; 11 C. 469; 12 C.W.N. 1014 following *Clive Durant*. In re, 1898 *Ratanlal's Unrep Cr. Ca.*, p. 975; dissenting from *R. v. Ahmadi*, (1898) 20 A. 264; and *R. v. Muhammad Hadi*, (1903) 26 A. 177 and distinguishing *R. v. Sagal Samba*, (1893) 21 C. 643.
7. *Talihar Shaik v. Tamiz Shaik*, I.L.R. 39 Cal. 931; 17 I.C. 71; 16 C.W.N. 984.
8. *R. v. Surath*, 1616 Cal. 106; I.L.R. 42 Cal. 608; 28 I.C. 799; 19 C.W.N. 335.
9. *Bhagwan Charan v. Rex*, 1949 Oudh 76; 1948 Q.W.N. 102.

by a prosecution witness during cross-examination: such cross-examination need not be limited only to what had been stated in examination-in-chief.¹⁰

Effect of omission to cross-examine. Where a witness is not cross examined because the party having the right to cross-examine is not given a chance to cross-examine him, the evidence of such witness cannot be used against him. But it is different, where the party having the right to cross-examine, foregoes it. In such a case, it is not open to him to make any grievance about it.¹¹ So, where no question is put to a witness in cross-examination, in the absence of such a question, the necessary inference arises that the answer if given would not have helped the party omitting to put the question.¹²

22. Cross-examination of witness called by Court. A witness called and examined by the Court on its own initiative under Sec. 540, Criminal Procedure Code (now Sec. 311 of the Code of Criminal Procedure, 1973), is a Court witness.¹³ He may be cross-examined by both sides freely¹⁴; the Court cannot restrict the cross-examination of such witnesses by either party to the subject on which it had examined them.¹⁵ But complainant who is recalled at his own instance cannot claim to cross-examine himself.¹⁶

23. Cross-examination of the complainant. Experience shows that, on an average, one out of every three complaints filed in a Kacheri can be dismissed summarily, that another can be dismissed after preliminary enquiry, and that the third will only end in a conviction once in five times. The odds against a complainant are, therefore, considerable and it is *prima facie* curious that he should continue to carry his grievance by the hundred to the criminal courts. The explanation is of course that the ordinary complainant has no conception of his slender chances, and that, even if he had, he would still hope to be one of the fortunate few on the same principle of human nature that leads more sophisticated individuals to invest ments in lottery tickets. "The law is the lottery of lotteries," said Judge Bridle goose, and he ought to have known, since, according to Rabelais, "he never presumed to decide any case except by a throw of the dice". The complainant who has legitimate cause for resort to a criminal court is comparatively uncommon, the large majority being actuated by motives other than the just and lawful vindication of an injury. Every why hath a "wherefore" and the "wherefores" of such complainants are commensurate, both in number and variety, with "the many faces that falsehood hath".

The largest class comprises those who attempt to have a dispute of purely civil nature tried in the criminal courts. The latter are cheaper than the civil courts, their procedure is simpler and far more expeditious and the latent sanction of loss of liberty confers considerably greater authority on their decisions. A complainant of this class tries to bring pressure to bear on a recalcitrant debtor by accusing him of some misdemeanour, such as misappropriation or breach of trust, or endeavours to enforce an amicable settlement

10. C.T. Muniappan v. State of Madras, (1961) 1 Ker. L.R. 197.

11. See Shyamsingh v. Deputy Inspector-General of Police, J.J.R. 1965 Raj. 44; A.I.R. 1965 Raj. 140; 1965 Raj. L.W. 26.

12. State of Orissa v. Kaushalya Dei A. I.R. 1965 Orissa 38; see also Sohanlal v. Gulab Chand, A.I.R. 1966 Raj. 229.

13. Emperor v. Satyendra Kumar Dutt,

1923 Cal. 463; 71 I.C. 657; 37 I.L.J. 173.

14. Emperor v. Pita 1925 All. 285; I.L.R. 47 All. 147; 85 I.C. 71; Mohammad Shafi v. State, 1953 A 667; 1953 A.L.J. 366.

15. Chintamon Singh v. Emperor, I. R. 35 Cal. 243; 7 C.L.J. 177; C.W.N. 299.

16. Mohammad Shafi v. State, 1953 A 667, *supra*.

of a disputed succession by charging a rival claimant with theft of part of the property concerned. The commonest specimen is, however, the complainant who seeks a decision regarding the possession of cultivated land on the strength of the documentary evidence which, at most, establishes title. A civil suit for declaration of title and recovery of possession would be a comparatively expensive business, and he therefore boldly accuses the individual in actual possession of cutting a crop which belongs to the latter by the indeleasable right of having sown or transplanted it. He puts in his title deeds with his complaint and, unless a reliable local enquiry can be made, often succeeds in securing a summons against the alleged offender. No less an authority than a High Court Judge has said that, in India, "the only willing witness is the false witness and the personally-interested witness," and, if this is true in cases of crime affecting the whole community, it is *a fortiori* true in land disputes where no communal interests are involved. Every witness in such cases is either hired or, directly or indirectly, self-seeking. The latter are usually discredited in cross-examination, and the former, engaged for a trifling consideration and carefully coached, generally constitute therefore the principal oral evidence on which both sides rely to establish possession. Homer knew that "there is everywhere enough liberty of arguing, both for and against, on both sides," and all mofassil magistrates know that there is, as a rule, very little in the depositions of the witnesses to indicate on which side the truth lies in a land dispute. By a little exaggerated emphasis on the discrepancies in the evidence of one side, accompanied by a little judicious nodding over the weak points in that of the other, it would generally be possible to write in equally good judgment on either side. When the ancient Areopagites were perplexed they directed the parties to appear again after a hundred years, but the modern magistrate is denied this delightful device and usually has to depend on fortuitous instinct. In such circumstances documentary evidence is apt to turn the scale and secure the triumph of chicanery over *bona fides*. The layman may perhaps think that no great harm is done if the successful litigant is legally entitled to the land, especially as it is to the interest of everyone that there should be an end to litigation. But this argument, while it ignores the important legal distinction between ownership and possession, also indicates a sad lack of knowledge of the subordinate civil courts, where collusive cases are extraordinarily common and where *ex parte* decrees are easily obtained by comparatively small investments in the process-serving department. The securing of symbolical, or even actual possession on such decrees is similarly simple and does not necessarily involve any transfer transaction in the land itself. It has, in fact, happened before now that the same civil court has given possession of the same land to two different persons within a month or two, neither suit having been between the same parties. The criminal courts generally decline to entertain any complaint that betrays a civil avour and at a later stage, refuse to regard as relevant any civil court orders that are not strictly *inter partes*. Criminal cases of this type are usually concluded on the *uti possedetis* (as you possess) principle, and are merely preliminary skirmishes for position to determine which party will have to assume the role of plaintiff in the civil court, and bear both the *onus probandi* and the cost of court-fees.

The complainant who wishes to use the machinery of the criminal courts to attain some private end, appears fairly frequently under various specious disguises, and subsequent trouble may often be avoided by settling his little affairs without taking cognizance of his complaint. A typical example is the man whose wife is paying an unduly prolonged visit to her own family and showing little inclination, if not decided disinclination, to return to her lawful house. He complains that, at a comparatively recent date, his mother-in-law

visited his house and kidnapped his minor wife with designs which are, he apprehends, either directly or indirectly, immoral. He libels his mother-in-law freely, but the absence of criminal intention is generally obvious, and a warning that the wife cannot expect any legal maintenance from her husband will usually curtail her sojourn unless there is some really strong reason for her reluctance to return. It is only natural that the Indian wife should hanker after her own home at first and be unwilling to come back to the uncongenial shelter of her husband's hut, where an often shrewish mother-in-law rules the roost. In these matrimonial cases, the husband sometimes goes so far as to accuse some other man, who as often as not turns out to be a near relation of his wife, of enticing her away, with all her jewellery, for purposes about which he is emphatically unreticent. His only object, in any event, is to obtain a process that will frighten his relatives-in-law and enable him to effect a magnanimous compromise provided his wife is sent back. Another complainant of this class is the one who swears that some mahajan has stolen some property from him, the facts being that he has pledged the property with the accused who refuses to return it, though repayment of the consideration with full interest is tendered. If the accused does not admit the true state of affairs, he runs a real risk of being convicted and incurs the certainty of considerable expense; if he does so admit, his just dues are handed over in court, and the complainant is fully satisfied with the return of his property.

A third category of complainants comprises those who only complain in order to counter a true complaint against themselves. The strategic value of a counter-complaint is fully appreciated in India, and like a skilful general, an actual aggressor will often enhance its moral effect by getting in his complaint before the really aggrieved individual has collected the necessary funds for the purpose. The gentlemen of the long robe commonly collaborate in the concoction of such complaints, and experience enables them to produce some most artistic efforts. Unfortunately for them, it is not a case of *arcades ambo* (blackguards both) in the Byronic sense, the average complainant of this class usually giving the game away by the psittacine patness of his deposition. A little cross-examination as to details then causes a collapse, and like a stumped schoolboy seeking inspiration from the ceiling, the complainant first looks askance at his Mukhtear and his invention being even weaker than his memory; finally flounders into hopeless discrepancy. Occasionally, however, when a little Spartan resolution in receiving a lathi blow has lent verisimilitude to an imaginary assault, the desired impression that both sides are to blame is induced. The actually aggrieved party must then usually accept the situation, and consent to the withdrawal of his complaint as a *quid pro quo* to the abandonment of the charge against himself. It is all part of the glorious uncertainty of law, and the object-lesson teaches him to rely on his right arm in future difficulties.

There are various other species of complainants whose appearances do not perhaps attract so much attention by their frequency, though some of them are quite as remarkable in other ways. There is, for example, the complainant who rushes into court on little or no provocation. He alleges a more or less serious assault, but has no marks, and finds his complaint dismissed as frivolous. Quarrels between children, followed by mutual abuse between their respective relations and friends, are a fruitful source of trivial complaints, which can, however, be summarily disposed of under that useful section by which nothing is an offence that causes harm so slight that no person of ordinary sense and temper would complain of it. The fine flow of language and the complete command of abusive epithets, exhibited by an angry woman of low caste, may compel one's admiration but does not ordinarily justify a complaint of defama-

tion. The female complainant of this class is, however, the most difficult of all to deal with as a rule. She is an adept at *ad miseracordiam* appeal, and her advent is always marked by disturbing sobs that are intended to arouse compassion, but only succeed in exciting disgust. She considers it quite unnecessary, if she does not intimate that it is personal affront, that she should be required to make a solemn affirmation as to the truth of her complaint. After these preliminary difficulties have been surmounted, she proceeds to convey her grievance incoherently in a shrill and discordant tone and, if her story betrays flaws of improbability under stress of examination, her eyes immediately "smell onions" and one feels sure that she will weep anon if she does not do so at once. She eventually leaves the court protesting vehemently against the dismissal of her complaint, and thenceforth cherishes a firm conviction that magistrates are unsympathetic brutes.

Like the learned commentator who discovers in the writings before him perfections that their author never perceived, and a richer sense than he ever intended, the experienced magistrate reads between the lines of most of the complaints filed before him, and discovers in many a "plea so tainted and corrupt" the object that "obscures the show of evil". He knows that, like "the lunatic, the lover and the poet," the complainant is often "of imagination all compact" and he soon realizes the truth of Montaigne's observation that human actions are inconstant and frequently the result of diverse motives unconnected with the nearest allied circumstances. Among other things, he learns that all is not human blood that is red, and also that a business-like bandage does not necessarily cover an open wound. In a word, though frequently found a fool by judges, he has to be a judge among fools and must therefore continually look out for.

"The seeming truth which cunning times puts on, to entrap the wisest."
(Round the Kacheri) (Nainu).

24. Cross-examination of accused: Examination of accused and the cross-examiner. The observations of the notable Criminologist, Dr. Hans Gross, are very instructive for all cross-examiners where the accused is to be examined. He writes: "The examination of an accused person is the most difficult of all tasks for an investigator who appreciates its value. We can here give only a few hints. He who knows men, who is gifted with a good memory and presence of mind, who takes pleasure in his work and zealously abandons himself to it, who is always scrupulously bound by the rules laid down in law, and who sees always in the accused a fallen brother or one wrongfully suspected, he will question well. But an officer who is wanting in a single one of these qualifications will never do any good.

And yet even these qualifications are not all; there are other conditions which the investigator ought indeed never to lose sight of, but which are exceptionally necessary in the examination of an accused.

Sincerity of the examiner. Thus, the officer must compel himself to be sincere even to the limits of pedantry. It seems obvious that an honest man should speak the truth; and yet the investigator is tempted only too often, by excess of zeal, to alter, be it but in the minutest detail, the deposition of a witness, the report of an expert, or some other document, which he communicates to the accused—to assist him in making a clean breast of it; often too, he is led to pretend to know something of which he is ignorant, or knows only imperfectly, or to affirm something without substantial grounds.

Calmness and patience. But how terrible are the consequences! The fear that the falsehood may be discovered, the confusion if the accused remains incredulous, the lifelong torments inflicted by conscience, what at the moment appeared but a slight 'inaccuracy' lives in our recollection as time goes on as an infamous lie; its effect, if it has any, seems to us a success unfairly obtained, and the man whose guilt was certain will be transformed into an innocent victim. Calm and absence of passion are also indispensable. The officer who becomes excited or loses his temper delivers himself into the hands of the accused, if the latter, wiser than the officer preserves his sang-froid, or even with happy foresight sets himself deliberately to exasperate his questioner so as to get the better of him. Certainly it is not always easy to maintain a calm demeanour; the crime may be of a nature to justify disgust or hatred, the accused may deny everything too impudently, may be always evading the real object of the question, may be unwilling to understand, or may talk only nonsense, but in spite of everything the investigator must never forget that he has to do his duty and that his duty enjoins on him not to allow himself to be beaten by the accused. A conscientious officer, however naturally irascible, will not allow himself to be carried away, he will be constantly repeating to himself these words, 'It is my duty to find out the truth'. In short cross-examination does not mean to examine crossly.

Fearlessness. Further, an investigator who is afraid of the accused is lost. It is difficult not to feel fear when one is naturally timid but whoever is wanting in courage has no business to be an investigator. Besides we have all seen examples of men by nature cowardly who, thanks to their own determination and force of long habit, have quite forgotten that there was a time when the rolling eyes of an accused made them feel very uncomfortable.

We do not assume the responsibility of saying that an investigator should never take precautions for his safety as regards the accused, as having him put in irons or guarded during his examination; let each man do what he thinks necessary. Will not a mortifying impression be produced upon the accused when he finds himself dragged in chains into the office of the investigator, or if he notices that, before he has been brought in, scissors, heavy ink bottles, paper knives, and all dangerous utensils which he might snatch up and use as weapons of offence have been carefully put aside or even if the officer maintains a respectful distance and changes his tone whenever the accused raises his voice or clenches his fists? The officer will not by this means convince him by his arguments.

An even when all precautions have been taken, even if the accused be brought shut up in an iron cage, if he really wishes to do anything he can always do it. But that is of no importance. It is as rare to see an accused raise his hand against an investigator, as to see a meteor kill someone in its fall; should any mischief befall an investigator at the hands of an accused person, the former can always console himself with the reflection that it is certainly his own fault.

There are other and better means of self-protection which the investigator has always at his disposal; among these are perfect composure, prudence and procedure in strict conformity with law and humanity. There are, it is true, extremely dangerous prisoners, with whom extreme caution is never out of place. One must become accustomed in such a case never for one moment, not even one single moment, to remove one's eyes from the individual, to cease following and watching all his looks, all his movements. Further, one

must never sit down near a suspicious character; both in attack and in defence one should always be standing; for if one is afraid when attacked, the mere getting up and putting oneself on the defensive causes considerable loss of time. If the accused be seated as he ought to be, and the officer be standing, the latter has the advantage whatever happens.

Further, one should stand as near the accused as possible without attracting his attention. He observes him better, does not forget constantly to keep an eye on him; he is not so tempted to do anything if he sees the officer close to him, and if the worst comes to the worst, one is in the best possible attitude for seizing him.

But all that is only to frighten him. There are indeed few cases where an attack would have been of any use; for example, in a very small court or office room, with no police in the passages or at the doors, the accused might try to get away in this manner. If in such a case the investigator is not accompanied by a clerk or attendant, or if the latter is at a distance, he must never for an instant take his eye off the accused, as for instance to search for some documents on the record, for then if the accused be armed he may very well endeavour to strike down the officer and attempt to fly, but here there are so many 'ifs' and so many imprudences that such a concatenation of circumstances is almost impossible.

Another case in which the accused may raise his hand against the investigator is where the latter shows himself unfair, passionate, rude, or contemptuous towards the accused, thus exciting his anger. If, in such circumstances, one of those misfortunes to which human nature is exposed befalls the investigator it is only what he deserves. Do not say 'there must have been a mistake, perhaps the accused fancied that he was being treated or judged in an unjust manner, when in reality it was not so.' That does not usually happen. The accused, to whatever class of society he belongs, will react, like a child if one treats him with unjust severity. He will never rebel against severity, and the most perverse is impressed when he sees the official doing his duty zealously; the harshest severity will not affect the accused if he finds the investigator at the same time exhibiting towards him a humane goodwill and not endeavouring solely to crush him whenever possible, but setting out in relief as zealously everything which can establish his innocence or mitigate his offence.

Knowledge of accused. The very technique of the examination demands a knowledge and understanding of the man with whom we have to do. If the previous history of the accused has been registered only at the end of the record to which he has been a party, we need not expect any good to come to the whole enquiry, for the investigator has not taken the trouble to study the accused before setting to work, and if he has not done so he must have omitted many points absolutely necessary. But if we find the antecedents of the accused carefully registered at the beginning of the record, the whole inquiry will be conducted at least carefully and intelligently.

Antecedents of accused. In thus setting out his antecedents with accuracy we learn all what sort of man is before us, we can hark back to events of long ago and establish, with the help of questions, many things which, if not strictly relevant to the matter in hand, often enable us to form an accurate estimate of the character of the accused. As a general rule the accused here speaks the truth, at last to a great extent, and if he does not do so, we can learn thereby to recognise his usual style of lying. In addition, we can quickly pick out the

lies. We take notes and establish certain periods, then we make him go over the story again a little later, and then note the impossibilities, the contradictions, the gaps; also we can often pick up from the old records antecedents incidentally mentioned by the accused and compare them with his story. If we recall them to the accused at the same time letting him see that we are not going to allow ourselves to be imposed upon, he may not infrequently be led to renounce his intention of lying about the matter in hand, and penitently admit his guilt when the affair under inquiry is imperceptibly introduced. It is a good plan not to draw too accurate a line between the antecedents and the examination strictly so called, but rather, proceeding in chronological order, to arrive gradually at the moment at which the crime has been committed, in the hope that he will begin himself to speak about it.

Nothing is gained by making his confession a painful task to him. In rendering his avowal easy, we are acting in his interest, for it is always to his interest to confess; his actions appear in less sombre colours, if he is sure of a less severe punishment, and the disburdening of his conscience is a blessing to the most hardened criminal.

Psychology of guilty. It is merciless or rather psychologically wrong to expect anyone boldly and directly to confess his crime, perhaps an abominable offence; persons with an extensive acquaintance with men of the lowest character know only too well repugnance they feel in employing the correct expression, even after a complete avowal. Persons of a somewhat higher moral grade often shrink from using the word 'steal'; while the number of periphrastic expressions employed to avoid uttering the simple word 'kill' is extraordinary. Now if it is repugnant to such people to pronounce a single characteristic word, it must be much more painful for them to make without ceremony a confession of their misdeeds in a connected recital. We must smooth their way, render their task easy. Often also we must seize the exact moment when confession is easiest to the guilty man; we must often have abundance of patience; we must advance slowly, step by step; we must make troublesome investigations, if the guilt is only partially admitted or if from a number of facts the accused recognises only some. We must often in such a case make very accurate distinctions; frequently an accused admits only up to a certain point, that is to say, as far as he can go without compromising an accomplice, or again up to the time when his conduct becomes criminal or perhaps when a less serious crime may be transformed into one carrying a heavier punishment, e.g., theft in a dwelling-house into house-breaking and theft.

There often exists, even among the vilest specimens of humanity, a certain standard of honour, which it is most important the investigator should appreciate at its true value. Frequently the attempts of the accused to prevent his crime appearing worse than it really is, are very like an attempt to deny everything that can possibly be denied. We cannot absolutely be certain as to what is true and what is not true, unless, in the course of our examination, we come to know the character of the accused sufficiently well to enable us to judge what line he is most likely to take.

To sum up, we must never shrink from any trouble which will help us to know the accused, his history, and the necessary details of the matter in hand, for nothing will so entirely and so definitely sweep away any ascendancy we may have acquired over him as to betray ignorance of details, even the most insignificant. If the accused notes any gap, any mistake, any piece of ignorance on the part of the investigator, he at once intrenches himself be-

hind it, and all the labour and all the sagacity of the officer are powerless to make him abandon his asylum."¹⁷

25. Cross-examination of female witnesses: (i) *General.* The testimony is to be appreciated on merit and not sex-complex considerations of differential values. Moore on facts, p. 1080, states that reports of numberless cases reveal strong evidence that their testimony stands up on merits regardless of sex. They are as reliable as man and often give better testimony on some points.¹⁸ They are the best witnesses, they describe exactly what takes place; which so many men utterly fail to do.¹⁹ Taylor says that if due allowance be made for the feminine weakness of proneness to exaggerate, the testimony of women is at least deserving of equal credit to that of men. Indeed, in some respects they are superior witnesses; for first, they are, in general, closer observers than men; next their memories, being less loaded with matters of business, are usually more tenacious; and lastly, they often possess unrivalled powers of simple and unaffected, if rather lengthy, narration.²⁰ The female testimony should be appreciated with due allowances of the following facts :

(i) Their proneness to exaggerate memory in recollecting dates and details.

A woman's testimony is worse than man's in regard to matters connected with the man's vocation.²¹ The reverse is also true. Women are less reliable than men in estimating the length of short periods of time.²²

The ancient theory that woman was man's inferior shows itself in the tendency to reject, or at least to regard with suspicion, her evidence in legal matters.

Observation may lead one to believe that women as a rule have somewhat less regard for the spirit of their oaths than men, and that they are a trifle more ready, if it be necessary, to commit perjury. This arises from the fact that women are fully aware that their sex protects them from the same severity of cross-examination to which men would be subjected under similar circumstances. It is today fatal to a lawyer's case if he be not invariably gentle and courteous with a female witness, and this is true even if she be a veritable Sapphira.²³ Of course, a woman has always an advantage over counsel. In the first place, she is so everlastingly in the fidget that it is difficult to put any question whatever to her; in the second, she never sticks to the point and will not be kept to it; in the third place, she is a woman, and has the sympathy of the Court. If further she is clever and pretty as long as jurors are men, she must be invincible.²⁴

Writers have commented with derision on the weight of female testimony. "As the chief motive for exaggeration springs from an innate love of the marvellous and as this love like others is most remarkable in the softer sex, a pru-

17. Dr. Hans Gross: Criminal Investigation, pp. 55-59; Aiyar: Art of Cross-examination, Law Book Co., Allahabad.

18. Judge Fisher of Supreme Court of New Brunswick in Napier v. Ferguson, 18 N. Brn., 415, 430.

19. Judge Wills K.C. in Law Journal, L. E.—437

London, Nov. 23, 1907, at p. 731.

20. Taylor: Evidence, p. 57.

21. Moore on Weight and Value of Evidence, Vol. I, 1908 S. 921.

22. Ibid; Strahan: Bench and the Bar.

23. 14 Ame. Lawyer 301-304.

24. Emperor v. Intizar Ali Khan, 10 Cr. L.J. 27.

dent man will in general do well to weigh with some caution the testimony of female witnesses."²⁵

In general, however, woman's testimony differs little in quality from that of men, all testimony being subject to the same limitations irrespective of the sex of the witness. These differences are quite as noticeable at the breakfast table as in the court-room; and are no more patent to the advocate than to the ordinary layman. The purely psychological limitations of woman's testimony are relatively of trifling importance, it is the physical influence of sex upon masculine juries which should give us pause. How far are twelve men physically able to act as unbiased judges of fact where a weeping and attractive young woman is the complainant? How far can they be trusted to render a fair and impartial verdict when she sits downcast at the bar of justice?²¹

(ii) *Mixing up facts and inferences.* Mr. Strahan in his fine little book on the Bench and the Bar says: "Men reflect on and draw inferences from what they have seen, and are apt to mix in their evidence what they surmise must have happened with what they actually saw happening. Women usually tell just what they saw. Their evidence, however, is reliable only so long as their passions are not involved; when love of their husband or children, or hatred of their neighbour, enters into the question, not a word they utter can be trusted. They have no conscience."²²

An experienced barrister furnishing London newspapers with some of his impressions of feminine witnesses, said: "Most women are more skilled in concealing anything they do not wish to be known than men are. Men may be bolder liars when it comes to perjury, but they lack the air of candour and simplicity which are a woman's chief defence in a similar predicament...."

Women are not usually good witnesses with regard to precise dates and details. In numberless cases most important letters written by ladies have been vaguely dated "Sunday night" or "Thursday after dinner". When you press the importance of the date, the witness usually shakes her head and says, "But I really don't." A man may be frightened or bullied into making admissions by a determined cross-examiner, but any such attempt with a woman witness ends only in a flood of tears, the indignation of the jurymen, and the probable loss of the case.²³

While the educated woman is usually able to partake of any awkward question, witnesses of less education and lower social position sometimes get nervous and lose their heads, and that is why the evidence of domestic servants is regarded as doubly dangerous, in the divorce court especially. An indiscreet witness called for the defence has in this way often proved the strongest possible witness for the other side.²⁴

(iii) *The Law and Lady.* Mr. Fleetwood in response to the toast "The Law and the Lady" at a meeting of the Vermont Bar Association humorously remarked: "The one always troublesome to a lawyer, the other equally vexatious to a bachelor. Both are uncertain, variable, varying, requiring constant interpretation. The one harks back to precedent, the other is a creature of the compelling present. The authority of the one rests on the written

25. Taylor: Evidence, p. 54.

1. 4 Cr.L.J. 9 (12).

2. Strahan: Bench and the Bar, p.

69.

3. 24 Green Bag. 409.

4. Ibid.

opinion, the authority of the other fastens itself to the spoken word. The centuries bind the age of the one, the other never crosses the great divide of forty years. Reason fortifies the one, emotion controls the other. The great commandment of the One is 'Thou shalt not'. The credulous statement of the other is, 'I will'. Both delight in declarations and pleas. Rejoinders are rare in the one but persistently present in the other. Replications appear in the one, supplications are the life of the other. Mergers are common to the one while the other is never merged or submerged but is ever paramount. Estoppels often bar the application of the one but never control the conduct of the other. Both frequently use the aid of twelve good men and true.

The relations of the Law and the Lady have been three-phased. First came the period of infraction, then the age of subjection, and finally the era of enfranchisement."⁵

The contrary view has been adopted by authorities who think woman as an inferior creature.⁶

Lord Chesterfield wrote to his son, "judge individually from your knowledge of them and not from their sex; among women, as among men, there are good as well as bad and it may be full as many or more good than among men."⁷

Whatever difference does exist in character between the testimony of men and women has its root in the generally recognised diversity in the mental processes of the two sexes. Men, it is commonly declared, rely upon their powers of reason, women upon their intuition. Not that the former is any more accurate than the latter. As husbands and lovers we must all admit that women's instinct is often worth all the logics of the schools twice over. But our courts of law are devised and organised, perhaps, unfortunately, on the principle that testimony not apparently deduced from the observation of relevant fact by the syllogistic method is valueless, and hence woman at the very outset is placed at a disadvantage and her usefulness as a probative force sadly crippled.⁸

(iv) *Intuition*. In point of fact, the intuition, or instinct of women of which we speak is an entire misnomer. Women reason just as do men, but they are prone to skip over the intermediate steps and land firmly upon their conclusions in the first instance. Their minds do not "work quicker" than men's minds; they merely do less work and hence achieve their results in a shorter space of time. Essentially the process is the same: while John is thinking, Jane has got here; but when John in due time has arrived the chances are all in favour of his being able to explain to a jury how he got there, whereas Jane cannot. All she knows is that she is there. What we mean by a woman's "intuition", therefore is, properly speaking, merely her general inability to explain her reasons, and the failings of her testimony are simply the result of careless thought.⁹

This vice and kindred aberrations are not peculiar to women, according to a great number of reported cases.¹⁰

5. 22 Green Bag, 12.

6. *Godden v. Burke*, 35 La. Ann. 160, 183, per Manning, J.; see Moore on Facts, p. 1080.

7. Letter No. CXX; see Moore on

Facts, p. 1060.

8. 5 Cr. L.J. 2.

9. 4 Cr. L.J. 3 (Jour).

10. Moore on Weight and Value of Evidence, Vol. II, 1908, S. 921.

(v) *Divorce cases.* If the wife's maid deposing in her mistress's favour be deemed biased, it could be said with equal confidence that husband's servant also suffered from the same.¹¹ Dr. Lushington held that no presumption should be dressed against wife from her failure to call her servant whom she had discharged.¹² In a husband's suit for divorce on the ground of adultery, Vice-Chancellor Blake of Ontario Court of Chancery, observed that such is the way of an adulterous women: "She eateth and wipeth her mouth and saith, I have done no wickedness."¹³ "A wife who has been accused of unfaithfulness to her husband will, I fear, go almost any length to negative such a charge. . . . The accusation made is so disgraceful in its character, and so dire in its results, that one feels justified in adding almost any other sin to it, in order to free one's self from the punishment so much dreaded and to escape detection."¹⁴

"Women work and act upon their intuition more than upon their reason." With women in witness chair habit becomes a fact.¹⁵

26. Cross-examination of police witnesses. The testimony of police officers should be treated in the same manner as the testimony of any other witness and the view that their testimony without corroboration by independent witness is unworthy of belief cannot be supported. There is no presumption that police officials are liars.¹⁶ To discredit the witness merely because he is a policeman is impossible.¹⁷ A policeman's testimony like that of every other witness must be judged on its own merits and should be accepted or rejected according to the circumstances of each case.¹⁸ Statements of high Government officials should be considered like the statements of other witnesses. Court should not surrender its judgment to such officers. The evidence will succeed or fail exactly like that of any other material witness.¹⁹

Morrison typifies the police witness as: "What a familiar figure in Indian Courts, with his uniform, his little round torage cap, with the chin strap round his ears. He advances with a salute and forthwith begins to arrange his slip of Bally paper containing the first information or his notes. He is probably aware that your clients have obtained complete copies of all his notes, and the police diaries. He may even have assisted for a consideration in placing them at their disposal. Yet he is prepared and not with assumed but real down-hearted earnestness to defend the sanctity of those very diaries and papers. He is never friendly to the accused in Court for even though he has been bribed beforehand, and though his tendency was to favour the accused yet on coming into Court he cannot be more than lukewarm. As a rule, however, he is hostile. He looks upon it as a sort of personal combat between himself and the advocate or pleader for the accused. He is a power in the land much

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| <p>11. Sir Herbert Jenner in <i>Dysett v. Dysett</i>, Rob. Ex. 106; Sir William Scott (Lord Stowell) in <i>Waring v. Waring</i>, (1813) 2 Phill Ec. 132.</p> <p>12. <i>Saunders v. Saunders</i>, (1847) 1 Rob. Ec. 549, 564.</p> <p>13. Proverbs XXX, 20.</p> <p>14. <i>Campbell v. Campbell</i>, 22 Grant Ch. (4c) 322, 357.</p> <p>15. Atiyar: <i>Art of Cross-examination</i>, Law Book Co., Allahabad.</p> <p>16. <i>Dwarka v. State</i>, 1953 All. L.J. 580; 1954 All 106; <i>Anji v. The State</i>, 70 M.L.W. 1012 (Rama-</p> | <p>swami, J.).</p> <p>17. <i>Emperor v. Santa Singh</i>, 215 I.C. 161; A.I.R. 1944 Lah. 339 (F.B.); <i>Nathu v. Emperor</i>, 1934 Lah. 870; 154 I.C. 130.</p> <p>18. <i>Bagomal v. Emperor</i>, 159 I.C. 687; A.I.R. 1935 Sind 223; <i>B. N. Mukerji v. Emperor</i>, I.L.R. 1945 Nag. 176; 221 I.C. 99; A.I.R. 1945 Nag. 163, following <i>Natural Chandra v. Emperor</i>, A.I.R. 1927 Cal. 265; 100 I.C. 115; 31 C.W.N. 239.</p> <p>19. <i>Anji v. The State</i>, <i>supra</i>.</p> |
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feared and with a reputation for cunning. To allow himself to be outwitted would mean disgrace in the eyes of his subordinates and the public. He, therefore, says in one quiet glance: "See how much you can get out of me."²⁰

Methods of cross-examination: Preparation. "In order that a police officer should be cross-examined effectively, the defence counsel should prepare himself with all the details and steps taken in investigation by the said officer. He generally identifies himself with all the details and steps taken in the case as if it is his personal one. Therefore, it is risky to question him in a haphazard manner unless you know that he can be caught in the net."²¹

The cross-examiner should make a clear study of the police regulation relating to the investigation. He should be conversant with the practices and routines employed by the police officers in execution of their duties. A man of subtle practices, conventions and seeming deviations from written regulations would come to his light.

He needs very cautious handling for if he is hostile he will in his answers try to introduce matters of damaging nature and having probably been subjected to cross-examination times without number he knows how to do it successfully as part of his legitimate answers to questions.²²

27. Cross-examination of identification evidence. Identification (Latin: *idem* the same) means the process of establishing the identity of a person or thing or, in other words, the determination of his or its individuality, by proving that he is the man he purports to be, or if he is pretending to be someone else, the man he really is, or in case of dispute, that he is the man he is alleged.²³

The evaluation of identification evidence is perhaps one of the most difficult problems which confront a judge when we remember the extent of human fallibility and the fragility of memory and the tricks played by our senses. It is no cause for surprise that in England and America it has been found that the major sources of miscarriage of justice are due to wrong identification.²⁴

In criminal cases identification parades have to be held to establish the identity of the culprit. Identification parades are held not for the purpose of giving defence advocates material to work upon, but in order to satisfy investigating officers of the *bona fides* of the prosecution witnesses.²⁵

General principles of identity evidence. Identity may be thought of as a quality of a person or thing,—the quality of sameness with another person or thing.

20. Morrison on Advocacy, pp. 141-143.

21. Taylor, Evidence, S. 57.

22. Morrison on Advocacy, pp. 141-143. Aiyar: Art of Cross-examination, Law Book Co., Allahabad.

23. Kamaraj Gounder v. State, 1959 M. W.N. (Cr.) pp. 133-136.

24. Dwight McCarty's American Classic Psychology for the Lawyer (New York Prentice Hall Inc., 1929) in Ch. VII, p. 2951 foll., and Prof.

Glanville Williams in Proof of Guilt (Hamlyn Lectures) at page 83 and foll. "Identification Evidence" have expounded the manifold inaccuracies of recall. Therefore identification evidence should be examined with great care.

25. State v. Ghulam, A.I.R. 1951 All 475; 1951 A.L.J. 437; Public Prosecutor v. Sankarapandia Naidu, 1932 M.W.N. 427.

The essential assumption is that two persons or things are first thought of as existing, and that then the one is alleged, because of common features, to be the same as the other. The process of inference operates by comparing common marks found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the necessariness of the association between the mark and a single object. Where a circumstance, feature or mark may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of relevancy, the other conceivable hypotheses are so numerous, i.e. the objects that possess that mark are numerous, and therefore any two of them possessing it may well be different. But where the object possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are nil or are comparatively small. Hence, in the process of identification of two supposed objects, by a common mark, the force of the inference depends on the degree of necessariness of association of that mark with a single object. For simplicity's sake, the evidential circumstances may thus be spoken of as a mark. But in practice it rarely occurs that the evidential mark is a single circumstance. The evidencing feature is usually a group of circumstances which as a whole constitute a feature capable of being associated with a single object. It is by adding circumstance to circumstance that we obtain a composite feature, or mark which as a whole, cannot be supposed to be associated with more than a single object. Each of these circumstances by itself might be a feature of many objects, but all of them together make it more probable that they co-exist in a single object only. Each additional circumstance reduces the chance of there being more than one object so associated.¹ It may also be noted that a mark of identity may be negative as well as affirmative, i.e. where a certain circumstance would be necessarily associated with an object in issue,² the lack of the feature in a particular object offered tends to show that it cannot be the object in issue.³

Identity of persons When a party's identity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics, e.g. age, height, size, hair, complexion, voice, handwriting, manner, dress, distinctive mark, faculties, or peculiarities including blood group as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places or facts and other details of personal history.⁴ In this connection, too, identity of mental qualities, habits and dispositions may become relevant, though it would be excluded in more specific enquiries. Where, however, a party's identity is only material as showing that he did some particular act, the range of acts is much narrower. In civil cases a party's identity most frequently comes in question as having executed a particular document; and here identity of name, handwriting, residence and occupation, or even of name and handwriting alone, will generally suffice.⁵

1. Wigmore, Evidence, S. 411.

2. Wigmore, Evidence, S. 412.

3. Ramsdale v. Ramsdale, 173 L. T. 393.

4. Phipson Evidence, 11th Edn., p. 164, citing R. v. Orton, (1874) unreported.

5. See also Wigmore, Evidence, S. 411 circumstances identifying persons are corporeal marks, voice, mental peculiarities, clothing, weapons, name, residence and other circumstances of personal history.

The presence or absence of motive,⁶ of means, opportunity, preparation, or previous attempts on the part of the accused to do the act; his knowledge of circumstances enabling it to be done, his declarations or intention of threat to do it or his enmity towards the injured party,⁷ are admissible to prove identity. Generally all preliminary facts, whether criminal or not, rendering the crime more easy, certain and effective, are receivable as in the nature of preparation. On the other hand, similar facts merely showing habits of disposition, and character, are generally inadmissible to identify the doer of an act.⁸

In *Asharfi v. State*,⁹ James and Takru, JJ. (judgment delivered by James, J.) of the Allahabad High Court have exhaustively dealt with the theory of identification evidence so far as identification parades are concerned.

Facts which establish the identity of any person or thing whose identity is relevant are, by virtue of Sec. 9 of the Evidence Act, always relevant. The term 'identification' means proving that a person, subject or article before the Court is the very same that he or it is alleged, charged or reputed to be. Identification is almost always a matter of opinion or belief. With regard to a criminal offence identification has a twofold object: first, to satisfy the investigating authorities, before sending a case for trial to Court, that the person arrested but not previously known to the witnesses was one of those who committed the crime, or the property concerned was the subject of such crime; second, to satisfy the Court that the accused was the real offender or the article was concerned with the crime which is being tried.

Identification proceedings are therefore as much in the interest of the prosecution as in the interest of the accused. As was explained by the Supreme Court in *Ramkishan Mithanlal Sharma v. State of Bombay*,¹⁰ an identification parade is held by the police, or at their request, in the course of their investigation of an offence for the purpose of enabling the witnesses to identify the persons who are concerned in the offence or the properties which are its subject-matter; they are not held merely for the purpose of identifying persons or properties irrespective of their connection with the offence; the witnesses are explained the purpose of holding these parades and are asked to identify the persons or the properties which are concerned in the offence.

But it is obvious that if before the Court a witness pointed to a stranger and stated that he was the offender, or pointed to an article and affirmed that it was his property which had been stolen, there would be no guarantee of the truth of his assertion. Consequently in order to have some assurance of the truth a test identification is held, that is to say, the witness at an earlier stage is confronted with the alleged offender not standing alone but mixed with a number of innocent persons of the same age-group and of similar build and features or the suspected stolen article is mixed with a number of other articles which resemble it. That is to say, it is to give credence to the evidence of a witness who does not know the accused previously, or who has not seen the article subsequent to the commission of the offence that a test identifica-

6. *R. v. Ball*, 1911 A.C. 47, 68; *R. v. Ellwood* 1 Cr. App. 181; *R. v. Ebromonich*, 7 Cr. App. R. 145, 147.
7. *R. v. Ball*, *supra*.
8. Phipson, Evidence, 11th Ed., p. 165; Aiyar: Art. of Cross-examination,

Law Book Co., Allahabad.
9. A.I.R. 1961 All 153; 1960 All. L. J. 595.
10. A.I.R. 1955 S.C. 104 at pp. 113-144; 1955 S.C.A. 410; 1955 S.C.J. 129; (1955) 1 S.C.R. 903.

tion is held, since, without it the evidence of the witness concerned would have little value.

Of course, the substantive evidence, i.e., evidence on which alone the Court can base its order of conviction or acquittal, is that given by the witness before the Court. But the value of his deposition thereof having identified the accused in the act of the crime, or identified the article, is of little consequence; before the Court can accept such identification as sufficient to establish the identity of the accused or article, it is very necessary that there be reliable corroborative evidence, and the corroborative evidence which the Court is entitled to accept in such cases is that of a test identification conducted with due precautions—if no proceedings for identification have been held, the witness's reliability has not been put to a test. In short, a test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court.

But of all evidences of fact, evidence about identification of a stranger is perhaps the most elusive, and the Courts are generally agreed that the evidence of identification of a stranger based on a personal impression even if the veracity of the witness is above board, should be approached with considerable caution, because a variety of conditions must be fulfilled before evidence based on the impression can become worthy of credence.

28. Cross-examination regarding identity: Distance at which persons can be recognised. On this topic Dr. Gross says: "Dr. Vincent in *Legrand and Saule's Legal Medicine* lays down that, presuming the eyesight to be normal and the light good, one is able in broad daylight to recognise, (a) persons whom he knows very well, at a distance from fifty to ninety yards; when there are particular and very characteristic signs, one hundred and sixty-five yards; (b) persons one does not know very well and has not often seen, from twenty-eight to thirty-three yards; (c) people one has seen only once, sixteen yards. By moonlight one can recognise, when the moon is at the quarter, persons at distance of twenty-one feet; in bright moonlight, from twenty-three to thirty-three feet, and at very brightest period of full-moon, at a distance from thirty-three to thirty-six feet. In tropical countries as in India, the distances for moonlight may be increased."¹¹ These are only approximate identifications; in practice they are of but slight value. In the first place, the statements concerning good normal eyesight and good light are vague, and in addition certain supplemental circumstances often have decisive influence. The gaseous air of the town compared with the limpid atmosphere of the mountain diminishes the range of vision by at least ten per cent; the position of the sun, the background, the wind, and the temperature also combine to affect it to perhaps the same extent.¹²

29. Cross-examination—Mistaken evidence—The accuracy of recall Notable experiments have been made upon this subject by psychologists. Sir Cyril Burt staged a kidnapping scene in the middle of one of his lectures. When quiet was restored and the members of the audience had recovered from their amazement, they were asked to write out an account of their raid. On an average one statement out of four was found to be quite untrue.

11. Identification of persons seen in moonlight, See *Ray v. Donnel*, 4 Mclean U.S. 504 Fed Cas No. 11, 590 (at p. 327).

12. Dr. Hans Gross : *Criminal Investigation*, p. 123, 1950 Ed. ; Aiyar *Art of Cross-examination*, Law Book Co., Allahabad.

Professor Bartlett, in his important work 'Remembering', describes experiments that show how temperament, interests and attitude determine the content of perceiving and recalling. One element that is often of great importance in legal trials is the order in which events took place. Professor Bartlett reports that even in short tests, with only brief intervals elapsing, the order of sequence was a factor extremely liable to disturbance. Of twenty subjects who took part, seven were wrong as to the order of sequence in the first experiment.

Sometimes the literal accuracy of words reported is a vital issue in a trial. Professor Bartlett's experiments give small cause for comfort in this matter. When subjects were invited to remember a story, their reproduction consisted almost entirely of paraphrase. "Accuracy of reproduction, in a literal sense, is the rare exception and not the rule."¹³ This conclusion is supported by the experiment at the London School of Economics, by Prof. Gower where no witness gave a wholly accurate account of the dialogue that had preceded the show of violence.

That a witness forgets facts is not a great danger to an accused person, for it will generally be in his favour. The danger arises when the witness, through a trick of memory, believes that he saw or heard what he did not. The intensity of a false belief of this kind is sometimes surprising.¹⁴

30. Identification in passing off action cases. In regard to deceptive resemblance on the foot of which an infringement and a passing off action are based and the relief of interlocutory injunction is asked for, an important question suggests itself, who are the persons whom the resemblance must be likely to deceive or confuse and what rules of comparison are to be adopted in judging whether such resemblance existed and deception and confusion would be likely to be caused.

On this point for a detailed discussion of trade mark cases, see Kerly, *Law of Trade Marks and Trade Names*, 7th edition (Special edition for India) and distributed by M. N. Tripathi & Company, 1951, and, the Indian Kerly, viz., Dr. Venkateswaran's classical treatise on the Law and Practice under the Trade Marks Act, 1940, pages 174 and 254 to 263 and 287 and brought up to date in the excellent supplement published in 1953.

The persons to be considered in estimating whether the resemblance between the marks, get-up, etc., in question is likely to deceive are all those who are likely to be purchasers of the goods upon which the marks are used provided that such persons used ordinary care and intelligence.¹⁵

13. 'Remembering', (Cambridge), 1932, 98.

14. George IV remembered vividly being at the battle of Waterloo. The Proof of Guilt by Glanville Williams: Stevens & Sons, Ltd., London.

15. George Angus & Company Limited, (1943) 60 R.P.C. 29, where the entire case-law has been reviewed. See also Subbiah Nadar v. Kumara-vel Nadar, (1946) 63 R.P.C. 187 (P.C.) ; Abdul Hamid Rowther v. Muthiah, (Application No. 69 of 1949, Calcutta High Court, Harris,

C. J. and Banerjee J., March 10, 1950). (Application for Anju Poo Beedi is opposed by "Poo" Beedies); Watkins Mayor and Company v. Jessa Uttam Singh, (unreported No. 376 of 51 Punjab High Court by Kapur, J., Re Dec. 28, 1951) (Chaff 7 cutter blades bearing device of Lion and words Lion Brand popularly known as Sher Brand opposed by Tiger Brand and device of Tiger, tiger also being known in Punjab as Sher).

In regard to this class of purchasers of the goods in question we must not assume that the probable purchaser is a thoroughly careless and uncritical person or he is particularly careful and hypercritical person; nor can the purchaser be assumed to be one who is familiar with both the marks as such a person will neither be deceived nor confused. The tribunal will assume a national user in a fair and normal manner of the goods who would not make normally a careful or intelligent examination of the mark and would buy the goods without testing the goods by label but by general appearance which the articles present from the shelves or places in which they are exhibited. In assessing the likelihood of deception or confusion, the deception to the eye as well as to the ear will be considered. In this connection the test of imperfect recollection has received much attention.

The following five decisions throw much light on this aspect of deception or causing confusion :

(1) In *Aristoc Ltd. v. Rysta Ltd.*,¹⁶ the House of Lords have emphasized that the question of deceptive or confusing similarity is largely a matter of first impression, that weight should be given to the effect of any strong syllable or emphatic element in each of the marks, and to the tendency to slur over certain parts of the words and that allowance should be made for imperfect recollection of the normal purchaser. The reasoning and conclusion of Luxmoore, L. J., in the Court of Appeal in that case on the question of deceptive similarity between the marks were accepted by the House of Lords as the proper test. "The answer to the question," said Luxmoore, L. J., "whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of Sec. 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word and perhaps an imperfect recollection of it who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants." His Lordship added: "The tendency to slur a word beginning with 'a' is, generally speaking, very common and the similarity between 'Rysta' and 'Aristoc' would, I think, be fairly obvious. It would not be surprising to learn that a person asking for 'Aristoc' stockings had been supplied with the latter and *vice versa*." When the case came before the House of Lords, Lord Simonds stated that he found himself in complete accord with the above statement of the law, and proceeded to say: "A comparison of the two words 'Rysta' and 'Aristoc', syllable by syllable, may be necessary as a test, though it will serve to emphasise difference rather than similarities. But I think that the truer test is to take the hypothetical case of a saleswoman, who has heard of 'Rysta' stockings but not of 'Aristoc' stockings, being asked by a customer whether she has any 'Aristoc' stockings. Is there in such a case a reasonable possibility that she will think that it is 'Rysta' stockings for which the customer is asking? The answer is necessarily one of first impression, but no doubt is left in my mind that there is a real danger of confusion." Thus while an exact comparison in detail of the two-word marks does not serve any useful purpose, a general structural examination of the two words is permissible as a test.

(2) In *Subbiah Nadar v. Kumaravel Nadar*,¹⁷ where the plaintiff's registered trade mark consisted of his portrait in Marathi head-dress surrounded by rays of light and other matter and the defendant's mark consisted of the portrait of the defendant also in a Marathi dress and turban similar to the dress and head-dress in the plaintiff's photo and surrounded by almost identical features, it was held by the Privy Council that the defendant's mark was an infringement of the plaintiff's mark. Their Lordships observed that purchasers of beedies who were generally illiterate would not make a close examination of the labels on the beedies which they purchased, that the general effect on their mind would be to confuse, that the similarities were so close as to make it impossible to suppose that such marks were devised independently of each other, and that in the absence of any evidence of common origin, the conclusion must be that the defendant copied the mark of the plaintiff.

(3) In *De Cordova v. Vick Chemical Company*,¹⁸ their Lordships of the Privy Council held that the defendant's use of a label containing descriptive matter and the words "Karsote Vapour Rub" was an infringement of the plaintiff's registered trade mark which consisted of similar descriptive matter and the words "Vicks Vapo Rub". Their Lordships said that in comparing two trade marks attention should be directed to the leading or essential features of the two marks, that a side by side comparison is not the proper test, and that the idea conveyed by each mark must be considered. "The identification of an essential feature," their Lordships said, "depends partly on the Court's own judgment and partly on the burden of the evidence that is placed before it. A trade mark is undoubtedly a visual device; but it is well-established law that the ascertainment of an essential feature is not to be by ocular test alone. Since words can form part, or indeed the whole, of a mark, it is impossible to exclude consideration of the sound or significance of those words. Thus it has long been accepted that, if a word forming part of a mark has come in trade to be used to identify the goods of the owner of the mark, it is an infringement of the mark itself to use that word as the mark or part of the mark of another trader, for confusion is likely to result." After referring to some earlier decisions to the same effect their Lordships proceeded to say, "The likelihood of confusion or deception in such cases is not disproved by placing the two marks side by side, and demonstrating how small is the chance of error in any customer who places his order for goods with both the marks clearly before him, for orders are not placed, or are often not placed, under such conditions. It is more useful to observe that in most persons the eye is not an accurate recorder of visual detail, and that marks are remembered rather by general impressions or by some significant detail, than by any photographic recollection of the whole."

(4) In *James Chadwick Bros., Ltd. v. National Sewing Thread Company*,¹⁹ Chagla, C. J., said :

"What is important is to find out what is the distinguishing or essential feature of trade mark already registered and what is the main feature or the main idea underlying that trade mark, and if it is found that the trade mark whose registration is sought contains the same distinguishing or essential feature or conveys the same idea, then ordinarily the Registrar would be right if he came to the conclusion that the trade mark should not be registered.

17. (1946) 63 R.P.C. 187 : A.I.R. 1946 P.C. 109

18. (1951) 68 R.P.C. 103 (P.C.) at p.

106.

19. A.I.R. 1951 Bom. 147 : 53 Bom. L.R. 556.

The real question is as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing. It is impossible to accept that a man looking at a trade mark would take in every single feature of the trade mark. The question would be what he normally retains in his mind after looking at the trade mark? What would be the salient feature of the trade mark which in future would lead him to associate the particular goods with that trade mark?"

(5) In *Marly's case*²⁰ the Master of the Rolls said: "You must not judge by a very critical analysis of the rival view of the mark; you have to allow in the ordinary rough and tumble of life, for a certain degree of carelessness—a certain degree." In applying the test of imperfect recollection it should be borne in mind that short words as well as common words which are well understood by the public are more easily distinguished and remembered, whereas invented words are more difficult to remember. Where, therefore, the opponent's mark is an invented word, a lesser degree of similarity than might be required if the two marks consisted of ordinary words, may be held to be sufficient as likely to cause confusion. Also, the customer on account of the difficulty in clearly recollecting an invented word conveying no intrinsic meaning will have greater need to rely upon the mental picture suggested by any emphatic part or characteristic feature in the mark.²¹ Again, in the case of a composite mark the average customer is likely to remember the essential or leading feature of the mark even after the other details of the mark are forgotten and in the case of marks, both having in common an element common to the trade, it is the distinctive feature of each of the marks, rather than the common descriptive element, that would remain in his memory.²² The fact that one of the contrasted words is in a foreign language would in general reduce the probability of confusion through imperfect recollection.

But, when all is said and done, the inspection by Court, as mentioned by Hopkins on the *Law of Trade Marks, Trade Names and Unfair Competition*, Second Edition (American Publication) is the main and indeed the final test of the alleged resemblance in trade marks cases.

To sum up in the words of Lord Halsbury, the whole question in this case is whether the thing taken in its entirety, looking at the whole thing, is such that in the ordinary course of things a person with a reasonable apprehension and with proper sight would be deceived.²³

31. Cross-examination of the Indian rustics and members of the criminal classes in the Madras State and in India formerly registered under the Criminal Tribes Act and Aboriginal Tribes in Scheduled Areas. In regard to Indian rustics, their physical and mental make up, abilities, modes of thought and action are in many respects profoundly different from the urban city dwellers. Their powers of observation, retention and narration and reaction to questioning being dissimilar to those of Nagarakas,

20. *Marly Laboratory's Application*, (1952) 1 All E.R. 1057 : 69 R.P.C. 156 C.A.

21. *Taw Manufacturing Company, Limited v. Notox Engineering Company, Limited*, (1951) 68 R.P.C. 271 at

p. 271.

22. *Coca Cola v. Pepsi Cola*, (1942) 59 R.P.C. 127 (P.C.) at 134.

23. *Schweppé's case*, (1915) 22 R.P.C. 601 (H.L.).

cross-examination of these witnesses has to be done on different lines. This requires not only mixing with the Indian villagers but also study of the writings of several administrators who have spent a good portion of their lives mixing with the villagers and administering criminal justice and studies of the crimes in villages.

In regard to the writings of the administrators we may mention Butterworth, I.C.S., *Southlands of Shiva*; Hilton Brown, I.C.S., *Civilian's South India*; R. G. Brown, I.C.S., *Burma as I saw It*; Brayne, I.C.S., *Socrates in an Indian Village*; Garstairs, I.C.S., *The Little World of an Indian District Officer*; Sir Reginald Craddock, I.C.S., *The Dilemma in India*; Darling, M.L., I.C.S., *The Punjab Peasant*; ²⁴ Rusticus Loquitur, 1930; *At Freedom's Door*, 1949; Sir Andrew Fraser, I.C.S., *Among Indian Rajas and Ryots*; Garratt, I.C.S., *An Indian Commentary*; Sir Michael O'Dwyer, I.C.S., *India as I knew It*; Molony, I.C.S., *Book of South India*; Al Carthill, I.C.S., *Madampuri*; *Company of Cain*; C. A. Kincaid, I.C.S., *Sixty-four Years a Public Servant*; Sir Theodore Piggott, I.C.S., *Outlaws I have known and other Reminiscences of an Indian Judge*; D. A. Wilson, I.C.S., *East and West*. ²⁵

In regard to studies about the rural life we may mention the valuable District Gazetteers and Manuals, such as the Madras District Gazetteers and District Manuals prepared by Messrs. Francis, Brackenbury, Hemmingway, Evans, Pate, Richards and Rice of the Indian Civil Service and Messrs. Carmichael, Boswell, Crole and N. Gopalakrishnamma.

This knowledge must be supplemented by a study of the crimes in India concerning which there is considerable body of literature of which mention may be made of the following works: Sir Edmund Cox, *Police and Crime in India*; John Carruthers, *Indian Policeman*; S. M. Edwards, *Crimes in India and Bombay City Police*; Gayer, *Stepping Stones to Police Efficiency*; P. Sanyasaya Naidu, *Crime: Its Investigation and Detection*; Warner and Hussain, *Practical Methods in Police Work*; S. F. Chetham, *Crime: Prevention, A Study of Crime*; Banerjea, *Aids to the Investigation of Professional Crime*; J. C. Adams, *Hans Gross's Criminal Investigation*; *Indian Police Commission Report, 1902-1903*; Whalley, *Control of Professional Crime in India*, a useful pamphlet, published by Thacker, Spink and Co.; J. C. Curry, *Indian Police*; ¹ Ilahi, *Detection and Prevention of Crime*; Ali Kuli Khan, *Investigation of Presentation of Criminal Cases*; Warner and Hussain, *Practical Methods in Police Works*; S. K. Ghose, *Law Breakers and Keepers of the Peace*; E. L. Iyer, *Bar-at-Law, Crimes, Criminals and Courts*, published by J. Ramaswami Sastrulu and Sons at the Vavilla Press, Madras, 1940; Gayer, *Detection of Burglary in India*; Edwards, *Crimes in India*; Harvey, *Cameos of Indian Crime*; N. L. Bhattacharya, *Crimes in Calcutta*; Somerville, *Crime and Religious Beliefs in India*; Sir George McMunn, *The Religious and Hidden Cults of India*; Sinha and Bose, *History of Prostitution in India*; S. S. Haikerwal, *Economic and Social Aspects of Crime in India, etc.* This is only a brief selection of the most interesting books on village crimes.

In regard to the Criminal classes in the Madras State formerly notified under the Criminal Tribes Act the following works may be consulted with profit: F. C. Mullaly, *Notes on the Criminal Classes in the Madras Presi-*

24. 4th Edition, 1948.

25. See Chapter on Aryans Old and New.

1. A useful and instructive book of

reference which ought to be in the hands of every policeman, Magistrate, and Vakil.

gency; History of Bauria by Paupa Rao Naidu; History of Professional Poisoners and Coiners by Paupa Rao Naidu; History of Railway Thieves, by Paupa Rao Naidu; History of Koravars, Erukulas, etc., by Paupa Rao Naidu; Thurston, Castes and Tribes in Southern India, 7 Vols., Madras Government Publication; Ramchandra Sastri, History of the Criminal Tribes in the Madras Presidency; W. J. Hatch, The Land Pirates in India—An Account of the Kuravars, a remarkable tribe of hereditary criminals, their extraordinary skill as Thieves, Cattle Lifters and Highway Men; Haimendorf Chenchus, Report of the Socio-economic Conditions of the Aboriginal Tribes of Madras by Dr. A. Aiyappan (contains chapters on Criminal Tribes), published by the Superintendent, Government Printing Press, Madras; Sri V. Raghavan, The Problem of the Criminal Tribes, published by Bharatiya Adimjati Sevak Sangh; The Irulas, Kadars, and Malamalasans; A. V. Thakkar, Tribes of India, 1950, published by the Bharatiya Adimjati Sevak Sangh, Kingsway, Delhi, contains articles on Madras Tribes (2 Vols.).

The following works may be usefully consulted with regard to the Criminal classes in India : G. W. Gayer, Lectures on some Criminal Tribes and Religious Mendicants, published by the C. P. Government; M. Kennedy, Notes on Criminal Classes in the Bombay Presidency; Lemarchand, Guide to Criminal Tribes, published by the C. P. Government; Daly, Manual of Criminal Classes operating in Bengal; Harikishen Kaul and L. L. Tomkins, Criminal and Wandering Tribes in the Punjab.

Similarly regarding aboriginal tribes and scheduled areas Verrier Elwin, The Maria and the Ghotul; Verrier Elwin, Maria Murderer and Suicide; Grison, I.C.S., The Maria Gonds of Bastar; R. V. Russell and Hiralal, The Tribes and Castes of the Central Provinces of India; Pandit Laxmi Narayan Sahu, Hill Tribes of Orissa; Report of the Socio-economic Conditions of the Aboriginal Tribes of the Province of Madras; A. V. Thakkar, Tribes of India; Speech of the Hon'ble Sri K. M. Munshi in the Constituent Assembly of India on 5th September, 1949 on Schedule No. 5 of the Constitution of India, published by Bharatiya Adimjati Sevak Sangh, Kingsway, Delhi; Rehabilitation of Aboriginal and Welfare of Backward Classes, 1941–1948 in Hyderabad (Deccan), published by Bharatiya Adimjati Sevak Sangh, Kingsway, Delhi; L. S. O'Maley, I.C.S., Modern India and the West (See Chapter on Primitive Tribes) may be usefully consulted. Justice P. N. Ramaswami has studied these aspects in the Magisterial and Police Guide, Volume I (in Part III, pages 267 to 450).

"The Village Portrait Gallery" constructed by Sir Herbert Risley upon the proverbs current in Northern India has been given as an appendix. Proverbs are notoriously pungent, often uncharitable and generally express half-truths and get out-moded by passage of time. But still they constitute an interesting excursion into rustic psychology and it is hoped that a modern Risle would arise and bring them up to date and thereby furnish the cross-examiner with valuable insight into rustic psychology, so essential for the ascertainment of truth, which is the sole object of the Law of Evidence.

32. Incidental matters relating to cross-examination. A witness ought to be allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief.² Where a party's counsel simply asks a witness in cross-examination as to whether a certain event happened, it cannot be said that that party commits himself to the assertion that

2. R. v. Tulsī Dosadh, (1872) 18 W. R. 57.

such an event actually took place.³ A counsel cannot be compelled to disclose the questions which he desires to put in cross-examination, because one of the factors of a successful cross-examination is that questions should be put suddenly to the witness.⁴ Sometimes cross-examination tends to be abused and the words of the advocate are recorded as the words of the witness when the witness has in fact only given an affirmative or negative monosyllable, without understanding the implications of the questions, and sometimes without understanding the questions themselves. The Judge should insist that the witness understands the suggestions put before obtaining an answer or before an answer is recorded.⁵

A witness is not always compellable to answer questions put to him in cross-examination and though he may be contradicted on all matters directly relevant to the issue he cannot (except in the cases mentioned in Sec. 153.⁶ post), be so contradicted on matters relevant merely as affecting his credit.⁷ A witness's credit may be impeached either by cross-examination,⁸ or by calling independent testimony to prove the facts mentioned in Sec. 155, post.⁹ Cross-examination is notice to the opposite party of the line of defence adopted and will therefore in some cases prevent evidence being given in reply.¹⁰ The decisions on the question whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent, are somewhat conflicting. On the whole, however, the practice seems to be that if the cross-examining Counsel after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity, his adversary will have no right to see the document, but that if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents, or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite Counsel.¹¹

33. Length of cross-examination. Cross-examination may be, and in this country not unfrequently is inordinately long.¹² No doubt cross-examination is one of the most important processes for the elucidation of the facts of a case and all reasonable latitude should be allowed, but the Judge has always a discretion as to how far it may go or how long it may continue. A fair and reasonable exercise of his discretion by the Judge will not generally be questioned by an appellate Court. As Lord Sankey, L. C. said in *Mechani-*

3. *Mr Syed Hasan v. Mst Taiyaba Begam*, 1914 Oudh 52 : 26 I.C. 547 ; see also *Liladhar v. State*, I. L.R. 1962 Raj. 1081 : 4 R.L.W. 348.

4. *Harnam Singh v. Emperor*, 1931 Sind 58 : 131 I.C. 138.

5. *Hari Lal v. Emperor*, 1935 Pat. 263 : I.L.R. 14 Pat. 225 : 156 I.C. 921.

6. See also S. 155, cl. (2).

7. Ss. 147, 148, post.

8. See S. 146, post.

9. In this Act, the term "impeaching credit" is confined to the latter of these modes. The English and American writers often use the term in a wider sense. It is obvious that a witness's character may often be

successfully impeached by cross-examination without recourse to independent testimony under the provisions of S. 155.

10. *Wharton v. Lewis*, (1874) 1 C. & P. 529.

11. *Taylor Ev.*, s. 1452, and cases there cited ; where the document is used to refresh memory, see S. 161, post. The right should be exercised before or at the moment the witness uses the document ; In re *Jhubboo Mah-ton*, (1882) 8 C. 739, 744.

12. See as to such cross-examination, *Golden River Mining Co. v. Buzton Mining Co.*, 97 Fed. Rep. 414 (Amer.), cited in 4 C.W.N. cxxi.

cal and General Inventions Co. and Lehweß v. Austin Motor Co.,¹³ ".....a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time." The Lord Chancellor went on to say that such a cross-examination may become indefensible.¹⁴ The length of the cross-examination may depend upon the matters in issue. The case may be a simple one. In such a case, the cross-examination may not be long. But there may be cases in which there would be vast materials and in such a case it may well be that the cross-examination may take a long time to be completed. However that may be, the principle is indisputable, that the Court has, and should have, a discretion in controlling the cross-examination, and while the Court will allow reasonable latitude to an advocate or counsel to cross-examine a party or a witness, it should always be remembered that the Court has an undoubted control and a discretion in the matter of controlling the cross-examination of a party by counsel of the opposite party. While the Courts will not interfere with the proper exercise of the right of cross-examination, the Courts must have and should have the power and the authority to control the cross-examination of a witness if the Court is satisfied that the cross-examination has been irrelevant or has been rambling. It is quite true that neither the Evidence Act nor the Code of Criminal Procedure contains anything which would justify a Court in imposing a particular time-limit. But if the Court has a discretion and has control over the proceedings, surely the Court must be presumed to have the power, apart from the Evidence Act or the Code of Criminal Procedure.¹⁵ The Court has inherent power to check prolix examination and cross-examination.¹⁶ It is the duty of the Judge to control the cross-examination in such a way as to disallow any question which he considers to be misleading or improper.¹⁷ Where the Court is satisfied that the cross-examination of any witness on commission is being unnecessarily prolonged, it will order such cross-examination to be concluded within a certain time.¹⁸ "The Court should check abuses in the cross-examination of witnesses on commission, when such examination is unduly protracted and is wholly irrelevant to the issues raised in the suit."¹⁹ Before passing an order stopping further cross-examination the Court is bound to satisfy itself that questions were being asked which could not affect the result of the suit, in short that the right of cross-examination was being abused.²⁰ Too much interruption by the presiding Judge in the course of the cross-examination of witnesses by the counsel for the accused has, more often than not, the result of robbing the cross-examination of its efficacy and therefore undue interference in cross-examination must be avoided by the presiding Judge.²¹ The cross-examination of a witness cannot be forbidden on the ground that he was embarrassed.²² Where a Magistrate fixed an arbitrary limit of five minutes for cross-examination his order

13. 1955 A.C. 346 at p. 350.

14. *Vassiliades v. Vassiliades*, 1945 P.C. 38; 221 I.C. 603; 1945 A.L.J. 34.

15. *Yeshpal Jashbbhai v. Rasiklal Umed Chand*, 1955 Bom. 318; 1 I.L.R. 1955 Bom. 675; 57 Bom. L.R. 282; see also *Brahmayya v. The King*, A.I.R. 1938 Rang 442; *Niamat Singh v. State*, I.L.R. (1958) 2 All 250; *Rahimatalli v. Emperor*, 1920 Bom. 402; 62 I.C. 401; 22 Bom. L.R. 160.

16. *F. W. Solar v. Emperor*, 1917 Sind 46 (2); 41 I.C. 658; 11 S.L.R. 27.

17. *Abbas Ali Shah v. Emperor*, 1933 Lah. 667; 143 I.C. 479.

18. *Suraj Prasad v. Standard Life Insurance Co.*, (1903) 30 C. 625; *Mst Bibi Kaniz Zainab v. Mubarak Hussain*, 1924 Pat. 284; 72 I.C. 748.

19. *Raj Kumar Sen v. Ram Sundar Shaha*, 1932 P.C. 69; 136 I.C. 102; 1932 A.L.J. 198.

20. *Bankey Lal v. Kanhaiya Lal*, 1922 Oudh 124 (2).

21. *Salag Ram v. Emperor*, 1937 All 171; 167 I.C. 515.

22. *Ma Aye Mya v. Chew Cheng Guat*, 1941 Rang 334.

was set aside.²³ A fair and reasonable exercise of discretion by the Judge will not generally be questioned by an appellate Court. It is, however, necessary that the order stopping further cross-examination should give reasons which would enable the Court of appeal to consider whether the discretion had or had not been properly exercised. Case-law referred.²⁴ The Judge need not however note on the record every question which is disallowed, for such a procedure would defeat its own object, which is to get on with the case. When a question disallowed is important or there is reasonable doubt whether it should not be allowed, it may be useful for the Judge to note the question and his reasons for disallowing it.²⁵ To sum up, a Judge is, and always must be, in control of the proceedings in his Court. On the one hand the right of cross-examination must be carefully guarded, and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. It may be important that a witness whom he does not consider truthful should not be put on his guard by immediate presentation of the case set up by the opposing side. If questions are couched in too blunt a form he may readily deny them. Hence considerable latitude is desirable, since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard; and there are cases in which it is necessary to drop a particular issue in the course of cross-examination and to return to it again discretely at a later stage. On the other hand, the length of cross-examination is by no means the criterion of its excellence, and it is lamentably true that lack of skill in advocacy often leads to a failure to appreciate this fact. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warnings an advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the Judge has enquired what are the material matters on which he still desires to cross-examine and is satisfied that no satisfactory reply has been forthcoming from the advocate and that no legitimate questions by him have been shut out. In any case, the Judge should make a note of the submission of any advocate as to further questions which he desires to put or as to any specific question which has been disallowed.¹

34. Multiple examiners. It has long been a tradition that but one counsel should question during a single stage in the examination (direct or cross or re-direct) of a single witness. This tradition rests on a wise policy of protecting the witness from undue and confusing interrogation, as well as of securing system and brevity by giving the control of the interrogation into a single hand. It (the rule) is of course subject to reasonable exceptions allowable in the trial Court's discretion; moreover, it ought not to apply to the examination of another witness nor of the same witness at another stage or by a separate party in the same stage, nor to any process but that of putting the questions to the witness.²

23. *Emperor v. Abed Ali Tufan*, 1921 Cal. 118 : 62 I.C. 412 : 34 C.L.J. 172.

24. *Niamat Singh v. State*, I.L.R. (1953) 2 All 250.

25. *Sardar Dewan Singh Maftoon v. Emperor*, 1940 Lab. 527 : 192 I.C. 347 : 42 P.L.R. 589.

1. *Brahmaya v. The King*, 1938 Rang 442.

2. *Wigmore, Ev.*, S. 783.

Cross-examination by one co-accused. Right of other co-accused to further cross-examine him on his statement in such cross-examination. Each accused is entitled to test the evidence given against him by a prosecution witness by cross-examination. Section 137 does not say that such cross-examination has to be limited only to what has been stated by the prosecution witness in examination-in-chief. Indeed Sec. 138 mentions that the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief, nor is there anything in law to justify the conclusion that once the right of cross-examination has been exercised after charge, it cannot be exercised again; while it is true that Secs. 137 and 138 do not speak of a further round of cross-examination, there is neither in these sections nor anywhere else in this Act anything to bar the accused from exercising his right of cross-examination afresh, if and when the prosecution witness makes a further statement of facts prejudicial to him.³ Rules of procedure are designed to secure justice. They may be departed from in cases where the ends of justice so require.

35. Intimidating cross-examination. "It is the duty of a Judge to control the cross-examination, so as to prevent any gross abuse and to protect a witness from being unfairly dealt with. The authority given by Sec. 152, Evidence Act, ought to be exercised whenever the occasion arises; nor ought a counsel or a pleader to be allowed to terrify or browbeat a witness by vociferations or gratuitous suggestions of falsehood, calculated rather to crush a weak man or to engage an irascible one, than to elicit the truth. A witness giving evidence is, *prima facie*, performing a public duty. The degree to which he may properly be pressed depends on circumstances, but it is subject to the general principle that the purpose in view is to get out the truth, not to force on the witness admissions that confuse or distort it."⁴ Professor Wigmore remarks :

"An intimidating manner in putting questions may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also questions which, in form or subject, cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanour and utterance that the impression produced by his statements does not do justice to his real testimonial value. These are two of the notorious abuses of cross-examination, and always have been, both in the early period when it was still chiefly used by Judges only, and also since the time of its mature elaboration, more than a century ago, as the greatest weapon of the truth ever forged. In two note passages of fiction its inveterate abuse has been satirized."⁵

"The remedy for such an abuse is in the hands of the Judges. The disgrace of these occurrences is even more theirs than that of the offending Counsel; for the former have not the temptation of partisanship to sway them, and their duty to interfere is easier to fulfil than the Counsel's duty to refrain. The slack sense of duty thus so often exhibited, becomes the more blamable in contrast with a scrupulous sentimentality which will be exhibited in insisting on the tender quiddities of the law that favour guilty persons,—such as the rules for confessions and the privilege against self-crimination. For the probably guilty when brought to book, there is often an abundance of protection, while for the unimplicated and innocent witness, coming to serve

3. Muniappan v. State of Madras, A. I. R. 1961 S.C. 175.

4. Queen-Empress v. Sarfuddin, Rat Un Cr. C. 344.

5. Dickens : The Pickwick Club, C¹ XXIV ; Anthony Trollope : "The Three Clerks", Chap. XI.

justice and truth, there is scanty assistance. The sport is of more interest than the victim. Such Judges, as well as Counsel, were justly pilloried by the great novelist (Dickens), and his pen expressed only the widespread feeling of dread and disgust among the laity for the abuses of the witness-box. Those abuses, it is true, are, as a whole, probably less today than they formerly were; but they are in many places still not uncommon. They are too frequent when they occur at all. The just denunciations of high-minded Judges have sometimes stigmatized these practices as they deserved,⁶ and there can be no doubt that the law sanctions the power and establishes the duty of the trial judge to use a proper discretion to prevent and rebuke them.⁷ See Smollett's letter of rebuke to a Counsel who had wantonly abused him.⁸

Mr. W. D. Evans, in his Notes on the French Jurist Pothier, says:

"The abuses to which this procedure is liable are the subject of very frequent complaint, but it would be absolutely impossible by any but general rules, to apply a preventive to these abuses without destroying the liberty upon which the benefits above adverted to essentially depend; and all that can be effected by the interposition of the Court is a discouragement of any violence towards the witnesses which is not justified by the nature of the cause, and a sedulous attention to remove from the minds of the jury the impressions which are rather to be imputed to the vehemence of the advocate than to the revarication of the witness. Whatever can elicit the actual dispositions of the witness with respect to the event,—whatever can detect the operation of a concerted plan of testimony, or bring into light the incidental facts and circumstances that the witness may be supposed to have suppressed,—in short, whatever may be expected fairly to promote the real manifestation of the merits of the cause, is not only justifiable but meritorious. But I conceive that a client has no right to expect from his Counsel an endeavour to assist his cause, or what is a more frequent object, to gratify his passions, by unmerited abuse, by embarrassing or intimidating witnesses of whose veracity he has no real suspicion, or by conveying an impression of discredit which he does not actually feel; and that where such expectations are intimated, there is an imperious duty upon the advocate who, while the protector of private right, is also the minister of public justice, which requires them to be repelled. Considering the subject merely as a matter of direction, the adoption of an unfair conduct in cross-examination has often an effect repugnant to the interest which it professes to promote.... But, however, unfavourable and indidious asperity of cross-examination may be to the advancement of a cause, for the most part, is congenial to the wishes of the party; the neglect of it is regarded as an indifference to his interest and a dereliction of duty; and the practice of it is one of surest harbingers of professional success."⁹

On the same point Bentham remarks:

"Under the name of brow-beating (a mode of oppression of which witnesses in the station of respondents are the more immediate objects) a practice is designated which has been the subject of a complaint too general to be

6. Mr Baron Alderson once remarked to a Counsel of his: 'Mr—, you seem to think that the art of cross-examination is to examine crossly' (Sergeant Ballantine's Experiences, 105).
7. Wigmore, Ev., S. 781. referring also to "Cross-examination—A Socratic Dialogue" by F. Manson (8 Law

Quant Rev 160).

8. Foss' Mementos of Westminster Hall, I. 295.

9. W. D. Evans in his Notes to Pothier, ii. 229 (1806), as regards, however, the last observation the date of it is to be observed, and it has not the same truth at the present day.

likely to be altogether groundless. Oppression in this form has a particular propensity to alight upon those witnesses who have been called upon that side of the cause (whichever it may be) that has the right on its side; because the more clearly a side is in the right the less need has it for any such assistance as it is in the nature of any such dishonest arts to administer to it. Brow-beating is that sort of offence which never can be committed by any advocate who has not the Judge for his accomplice. Rule 1. Every expression of reproach, as if for established mendacity: every such manifestation, however expressed—by language, gesture, countenance, tone of voice (especially at the outset of the examination)—ought to be abstained from by the examining advocate. If the tendency of such style of address were to promote the extraction of material truth, at the same time that the action of it could not be supplied to equal effect by any other plan of examination,—the vexation thus produced (how sharp soever) not being of any considerable duration, the liberty might be allowed, with preponderant advantage for the furtherance of justice. But, on a close investigation, no advantage, but rather a disadvantage, even in respect of furtherance of justice, seems to be the natural result of an assumption of this kind.

“ By reproachful and terrifying demeanour on the part of a person invested with, and acting under, an authority thus formidable, it seems full as natural that an honest witness should be confounded, and thus deprived of recollection and due utterance, and even (through confusion of mind) betrayed into self-contradiction and involuntary falsehood, as that a dishonest witness should be detected and exposed. The quiet mode above described is not in any degree susceptible of this sort of abuse; the outrageous mode seems more likely to terminate in the abuse than in the use. Rule 2. Such unwarranted manifestations if not abstained from by the advocate, ought to be checked, with marks of disapprobation by the Judge. In the presence of the Judge, any misbehaviour, which being witnessed at the time by the Judge, is regarded by him without censure, becomes in effect the act, the misbehaviour, of the Judge. On him more particularly should the reproach of it lie; because for the connivance (which is in effect the authorisation) of it, he cannot ever possess any of those excuses, which may ever and anon present themselves on the part of the advocate. The demand for the honest vigilance and occasional interference of the Judge will appear the stronger when due consideration is had of the strength of the temptation, to which on this occasion, the probity of the advocate is exposed. Sinister interests in considerable variety concur in instigating him to this improper practice. Rule 3. When on the false supposition of a disposition to mendacity, an honest witness has been treated accordingly by the cross-examining advocate (the Judge having suffered the examination to be conducted in that manner for the sake of truth)—at the close of which examination all doubts respecting the probity of the witness have been dispelled—it is a moral duty on the part of the Judge to do what depends on him towards soothing the irritation sustained by the witness's mind; to wit, by expressing his own satisfaction respecting the probity of the witness and the sympathy and regret excited by the irritation he has undergone. Under the spur of the provocation, I remember now and then to have observed the witness turn upon the advocate in the way of retaliation. On an occasion of this sort, I have also now and then observed the Judge to interpose, for the purpose of applying a check to the petulance of the witness. For one occasion in which under the spur of the injury, the injured witness has presented himself to my conception as overstepping the limits of a just defence,—ten, twenty or twice twenty have occurred, in which the witness has been suffering, without resistance and without remedy, as well as without just cause, under the torture inflicted on him by the oppression

and insolence of an adverse advocate. Scarcely ever, I think had I the satisfaction of observing the Judge interpose to afford his protection to the witness, either at the commencement of the prosecution, for the purpose of staying or alleviating the injury, or at the conclusion, for the purpose of affording satisfaction for it,—such inadequate satisfaction as the nature of the case admits of.”¹⁰

Lord Langdale, M. R., said in *Johnstone v. Tool*,¹¹ “Witnesses, and particularly illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions.”

Lowrie, J., in *Elliott v. Boyles*,¹² said: “It is entirely natural that in the public trial of causes the earnestness of Counsel should often become unduly intense; and it is not possible to prevent this without such an attribution and exercise of powers as would be entirely inconsistent with the freedom of thought that is necessary to all through investigation. The remedy for it is to be found in inner rather than in outer discipline. Those who are zealously seeking the truth cannot always be watchful to measure their demeanour and expressions in accordance with the feelings or even with the right of others. This zeal, even when inordinate, must be excused, because it is necessary in the search of truth; and generally it is not possible to condemn it as misguided or excessive until its fault has been proved by the discovery of the truth in the opposite direction; and possibly its very excess may have contributed to the discovery. When the presiding Judge is respected and prudent, a hint kindly given is generally all that is needed to restrain such ardour, when it does not arise in any degree from habitual want of respect for the rights of others and for the order of public business. Witnesses often suffer very unjustly from this undue earnestness of Counsel, and they are entitled to the watchful protection of the Court. In the Court they stand as strangers surrounded with unfamiliar circumstances giving rise to an embarrassment known only to themselves; and in mere generosity and common humanity they are entitled to be treated by those accustomed to such scenes, with great consideration,—at least until it becomes manifest that they are disposed to be disingenuous. The heart of the Court and jury, and all disinterested manliness, spontaneously recoils at a harsh and unfair treatment of them, and the cause that adopts such treatment is very apt to suffer by it. It is only where weakness sits in judgment that it can benefit any cause. Add to this that a mind rudely assailed naturally shuts itself against its assailant, and reluctantly communicates the truth that it possesses.”

36. Insulting and other observations on the evidence. “There is another matter connected with cross-examination, in which there is no room for doubt as to the duty of Counsel and so as to the duty incumbent upon Judges to enforce that duty stringently. The legitimate object of cross-examination is to bring to light relevant matters of fact which would otherwise pass unnoticed. It is not unfrequently converted into an occasion for the display of

10. Jeremy Bentham, *Rationale to Judicial Evidence*, B. II, c. IX, B. III, c. 5.

11. (1843) 5 Beav 601.

12. (1857) 31 Pa. 66 (Amer.) cited *Wigmore*, p. 876.

wit, and for obliquely insulting witnesses. It is not uncommon to put a question in a form which is in itself an insult, or to prepare a question or receive an answer with an insulting observation. This naturally provokes, retorts, and cross-examination so conducted ceases to fulfil its legitimate purpose, and becomes a trial of wit and presence of mind which may amuse the audience, but is inconsistent with the dignity of a Court of Justice and unfavourable to the object of ascertaining the truth. When such a scene takes place the Judge is the person principally to blame. He has a right on all occasions to exercise the power of reproving observations which are not questions at all, of preventing questions from being put in an improper form and of stopping examinations which are not necessary for any legitimate purpose."¹³

37. Questions which mislead or assume facts not proved. "It is an established rule, as regards cross-examination that a Counsel has no right even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it has not. Indeed, if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society."¹⁴

A question which assumes a fact that may be in controversy is leading, when put on direct examination, because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect. Similarly, such a question may become improper on cross-examination, because it may by implication put into the mouth of an unwilling witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his.¹⁵

In the Parnell Commission's Proceedings,¹⁶ the "Times" having charged the Irish Land League with complicity in crime and outrage, a constable testifying to outrages was cross-examined by the opponents as to his partisan employment by the "Times" in procuring its evidence thus: Mr. Lockwood: "How long have you been engaged in getting up the case for the 'Times'?" Sir H. James: "What I object to is that Mr. Lockwood, without having any foundation for it, should ask the witness 'How long have you been engaged in getting up the case for the 'Times'?' Mr. Lockwood: "I will not argue with my learned friend as to the exact form of the question, but I submit that it is perfectly proper and regular. If the man has not been engaged in getting up the case for the 'Times' he can say so." Sir H. James: "I submit that my learned friend has no right to put this question without foundation. Counsel has no right to say 'When did you murder A. B.?' for it assumes the fact." President Hannen: "I do not consider that Mr. Lockwood was entitled to put the question in that form and to assume that the witness has been employed by the 'Times'."

38. Co-defendants co-accused. The Evidence Act gives a right to cross-examine witnesses called by the adverse party.¹⁷ One accused person,

13. Stephen's History of the Criminal Law of England, Vol. 1, pp. 435, 436; see as to offensive questions, S. 152, post.

14. Joseph Chitty, Practice of the Law, 2nd Ed. iii, 901; see also Binapani v. Rabindranath, A.I.R. 1959 Cal. 215.

15. Wigmore, Ev., S. 780.

16. 19th Day, Times Rep, pt. 5, p. 221.

17. Ram Chand v. Hanif Sheikh, (1893) 21 C. 401; for the rule prior to the Act, see R. v. Surroop Chunder, (1889) 12 W.R. Cr. 75, cited in the last case; see R. v. Burdett, (1820) 4 B. and Ald 95; Lord v. Colvin, (1855) 3 Drew 222, 225.

therefore, may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.¹⁸ In a Lahore case it has been held that the statement made by a defence witness against a person other than the one who had called him as a witness could not be treated as evidence against such person.¹⁹ But where a witness called by an accused states that he saw the co-accused striking the deceased with a stick, such statement is admissible against the co-accused as in such a case it is entirely necessary for the witness who professes to have seen the assault to state who it was that committed the assault if such person is known to him. The mere fact that he is a witness for the other accused, who, clearly, has not made the assault, is no justification for rejecting the evidence of such a witness.²⁰

The section does not make special provision for the case of cross-examination by co-accused or co-defendants. It is, however, well settled that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by cross-examination.²¹ It has been further held that all evidence taken, whether in examination-in-chief or cross-examination, is common and open to all the parties.²² It follows that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to cross-examine. The right, therefore, of a defendant (and *a fortiori* an accused) to cross-examine a co-defendant or co-accused is, according to the English cases, unconditional and not dependent upon the fact that the cases of the accused and co-accused are adverse, or that there is an issue between the defendant and his co-defendant.²³ If a defendant may cross-examine a co-defendant's witnesses, *a fortiori* he may cross-examine his co-defendant if he gives evidence.²⁴ In a suit for divorce the fact that co-respondent's Counsel has based questions in cross-examination upon contents of letters which had properly been admitted as evidence against the respondent does not make the letters evidence against the co-respondent.²⁵

39. Re-examination. The party who called the witness may, if he likes, and if it be necessary, re-examine him. The re-examination must be confined to the explanation of matters arising in cross-examination. The proper office of re-examination (which is often inartistically used as a sort of summary of all the things adverse to the cross-examining counsel which may have been said by a witness during cross-examination) is by asking such questions as may be proper for that purpose, so as to draw forth an explanation of the meaning of the expressions used by the witness in cross-examination, if they be in themselves doubtful; and also of the motive or provocation which induced the witness to use those expressions; but a re-examination may

18. *Ram Chand v. Hanif Sheikh*, (1893) 21 C. 401 followed in *Chaman Lal v. Emperor*, 1940 Lah. 210 : I.L.R. 1940 Lah. 521 : 188 I.C. 440.

19. *Chaturbhuj v. Emperor*, 1931 Lah. 57 : I.L.R. 12 Lah. 385 : 131 I.C. 238.

20. *Aung Than v. The King*, 1937 Rang 540.

21. *Allen v. Allen*, (1894) P. 248, 254.

22. *Lord v. Colvin*, (1855) 3 Drew 222.

23. *ibid*; followed in *Allen v. Allen*, *supra*; *Dryden v. Surrey C.C.*, (1936) 2 All E.R. 535, the only

other alternative, which is, however, hardly practicable is to declare the evidence given not to be common to all the parties; see *R. v. Surroop Chunder*, (1889) 12 W.R. Cr. 75.

24. *Allen v. Allen*, *supra*; but see *Kirmany and Sons v. Aga Ali Khan*, 1928 Mad. 919 : 109 I.C. 170; *Mrs Des Raj Chopra v. Purn Mal*, (1975) 77 Punj. L.R. 42 : I.L.R. (1974) 2 Delhi 779 : A.I.R. 1975 Delhi 109.

25. *Vrasapillai v. Eliatamby*, 1925 P.C. 229 : 52 I.A. 372.

not go further and introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness.¹ So if the witness has admitted having made a former inconsistent statement, he may in re-examination explain his motives for so doing.² Even if inadmissible matters are introduced, the right to re-examine upon them remains.³ Where cross-examination of a witness is begun on a certain day and is completed on another day, the right of re-examination should not be restricted to the matters arising in the cross-examination on the later day but should be permitted on the whole of the subject-matter. If the matter elicited in re-examination gives rise to any suspicion that it is the result of tutoring it would of course be open to the Judge to draw the attention of the jury to the fact that the lapse of time might have given an opportunity for preparation; but this would not be a ground for refusing to let the question in re-examination be put.⁴ But, as observed, new facts or matters which are not properly explanatory cannot be introduced in re-examination. So where a certain conversation had been admitted in cross-examination distinct matters occurring in the same conversation were not allowed to be proved in re-examinations which, although connected with the subject-matter of the suit, were not connected with the assertions to which the cross-examination related.⁵ If facts are called out on cross-examination which tend to impeach the integrity or character of the witness, he may, in re-examination, make explanation showing that such facts are consistent with his credibility as a witness although such testimony would be otherwise irrelevant.⁶ New matter may, however, be introduced by permission of the Court, in which case the adverse party may further cross-examine upon the matter.⁷ But this cannot possibly entitle the prosecution to examine-in-chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness.⁸ If a document is produced after the cross-examination of a witness, the witness can be recalled for further cross-examination.⁹ Any discrepancy between cross-examination and re-examination should be cleared up before any suggestion of perjury can be made.¹⁰

If an answer to a question is elicited in re-examination and even though it is a fresh matter, the court records the answer without any objection, it must be deemed to have permitted the aforesaid question.¹¹

Referring to the subject of re-examination Mr. Wrottesley says: "The chief object of re-examination is to give the witness an opportunity to explain what he said on cross-examination. It is absolutely necessary in many cases to give a witness an opportunity after he had been cross-examined to explain

1. Taylor, Ev., S. 1474; Greenleaf, Ev., 467.

2. R. v. Woods, 1 Cr. & D. 439. The Queen's case, (1802) 2 B. & B. 297.

3. Blewett v. Tregonning, (1835) 3 A. & E. 554.

4. Bakhori Gope v. Hafiz Halim, 195 I.C. 107 : 1941 Pat. 362 : 22 P.L.T. 327.

5. Prince v. Samo, (1838) A. & E. 627; Burr. Jones, Ev., S. 876.

6. Burr. Jones, Ev., S. 875. So where a witness has stated that he came from jail it was held proper for the party calling him to ask on what

charge he had been committed; State v. Ezell, 41 Tex. 35 (Amer.).

7. S. 138; see Taylor, Ev., S. 1477; Salagram v. Emperor, 1937 All 171.

8. Shivadhin Singh v. Emperor, 1923 Pat. 116 : 60 I.C. 662 : 3 P.L.T. 32.

9. Shashi Bhushan Banerji v. Ramjas Agarwala, 1924 Pat. 402 : I.L.R. 3 Pat. 85 : 83 I.C. 205.

10. Sah Mauji Ram v. Sah Chaturbhuj, 1939 P.C. 225 : I.L.R. 1939 Kar. 375 : 183 I.C. 196 : 1939 A.L.J. 752.

11. Daulat Ram v. Bharat Insurance Co., A.I.R. 1973 Delhi 160 (182).

any statements which he may have inadvertently made while he was undergoing a severe cross-examination. And an advocate whose duty it is to re-examine a witness must be on the alert to note every point which requires explanation. If the advocate is skilful he will not only reinstate the witness whom he has called in the confidence of the Court if it has been shaken by the cross-examination but he will secure a repetition of the most important portions of the testimony of the witness and thus imprint it more firmly on the mind of the Court. As a rule in re-examination counsel should only touch upon matters brought out in cross-examination and he must use great discretion in asking for explanation of what the witness stated in cross-examination. He should before doing this be satisfied that the witness can explain satisfactorily the apparent contradictions in his testimony, for it would be more hurtful to call for an explanation and obtain one that is injurious than to pass over in silence the point not susceptible of explanation. After a witness has emerged from the fiery furnace of cross-examination, if we may use the expression, the probability is that he has been scorched and that he is not in a very happy frame of mind and the total or partial destruction of the testimony of his witness is not calculated to improve the good humour of counsel himself; therefore he must guard against showing the slightest sign of being disconcerted or dumbfounded at the ravages made in his case by that most dangerous and destructive engine the cross-examination, but he must proceed with the greatest coolness and patience to repair the damage which has been done to him. Before beginning his cross-examination counsel should determine in his own mind what fact brought out in examination-in-chief has been displaced or obscured and what new matter has been introduced in answer to the question of his opponent. Having in this manner taken a survey of the situation he should as nearly as possible begin to repair the damage in the order in which it was done. We take it for granted that the counsel has paid the strictest attention to the cross-examination and that he is therefore able to proceed in the work of repair as the destroyer proceeded in his work of destruction."

Sir Frank Lockwood on one occasion said of re-examination: "Re-examination—the putting of humpty-dumpty together again was by no means an unimportant portion of an advocate's duty. Once in the Court of Chancery a witness was asked in cross-examination by an eminent Chancery leader whether it was true that he had been convicted of perjury. The witness owned the soft impeachment and the cross-examining counsel very properly sat down. Then it becomes the duty of an equally eminent Chancery leader to re-examine. "Yes", said he, "it is true you have been convicted of perjury. But tell me, have you not on many other occasions been accused of perjury and been acquitted?" He recommended that as an example of the way in which it ought not to be done."

If the testimony of your witness has not been shaken upon cross-examination and there is nothing that should be explained, or nothing forgotten in your examination-in-chief, dismiss the witness. Avoid re-examining as to trifling matters; besides taking up the time of the Court unnecessarily the Court may give undue weight to things of no importance upon which you dwell at length.

* If an answer favourable to your side has been brought out in cross-examination don't press the witness to restate; you can comment upon it when you argue your case.

If your witness has been **completely broken down** in cross-examination and has involved himself in **hopeless contradictions**, hope nothing from him but **get rid of him as soon as possible**. If there is a chance, however, to set him on his feet do it.

Counsel should not have such an itch to re-examine as to disturb the case he has already made. His preparation of the case should always be so thorough as to leave nothing improved by his direct examination and as we have said he should carefully abstain from asking questions upon comparatively unimportant matters. He should let well enough alone. We have known many advocates get into deep water by not doing this. After proving their case clearly they were not satisfied with their performance but were determined to kick their assailant after he had been knocked down. The foolish course of such advocates reminds us of that of the Italian whose experience was embodied in the epitaph upon his tombstone which read as follows: "I was well; I wanted to feel better; I took medicine; and here I am."¹²

40. Golden Rules as to examination and cross-examination of witnesses. The following are David Paul Brown's "Golden Rules for the Examination of Witnesses":

"First, as to your own witness. (i) If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner toward them which may be calculated to repress their assurance.

(ii) If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as, for instance,—Where do you live? Do you know the parties? How long have you known them? etc. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches lest you may again trouble the fountain from which you are to drink.

(iii) If the evidence of your own witnesses be unfavourable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

(iv) If you perceive that the mind of the witness is imbued with prejudices against your client, hope but little from such a quarter; unless there be some facts which are essential to your client's protection, and which that witness alone can prove, either do not call him, or get rid of him as soon as possible. If the opposite counsel perceives the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils, the worst and the least to be resisted is an enemy in the disguise of a friend. You cannot impeach him; you cannot cross-examine him; you cannot disarm him; you cannot indirectly even assail him; and if you exercise the only privilege that is left to you, and call other witnesses for the purposes of explanation, you must bear in mind that, instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces and in the very heart, perhaps, of your camp. Avoid this by all means.

¹² Magisterial and Police Guide by P. N. Ramasami I.C.S., Vol. II. pp. 2259-2260,

(v) Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination,—take from your opponent the same privilege it thus gives to you,—and, in addition thereto, not only render everything unfavourable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

(vi) Never ask a question without an object, nor without being able to connect that object with the case, if objected to as irrelevant.

(vii) Be careful not to put your question in such a shape that, if opposed for informality, you cannot sustain it, or, at all events produce strong reason in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

(viii) Never object to a question from your adversary, without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objection; it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in not making them good.

(ix) Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest; and make him also speak distinctly and to your question. How can it be supposed that the Court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

(x) Modulate your voice as circumstances may direct,—‘Inspire the fearful and repress the bold.’

(xi) Never begin before you are ready; and always finish when you have done. In other words, do not question for question’s sake, but for an answer.

“Cross-examination. (i) Except in indifferent matters, never take your eye from that of the witness. This is a channel of communication from mind to mind, the loss of which nothing can compensate.

(ii) Be not regardless, either, of the voice of the witness. Next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time, the question is asked: Were you at the corner to Sixth and Chestnut Streets, at six o’clock? A frank witness would answer, perhaps I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers No; although he may have been within a stone’s throw of the place, or at the very place, within ten minutes of the time. The common answer of such a witness would be, ‘I was not at the corner at six o’clock’. Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise, with a skilful examiner, to the question. ‘At what hour were you at the corner, or at what place were you at six o’clock?’ And in nine instances out of ten, it will appear that the witness was at the place about the time, or at the time about the place. There is no scope for further illustrations; but be watchful, I say, of the voice, and the principle may be easily applied.

(iii) Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail, or the fearful; rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that you may shine, but that virtue may triumph, and your cause may prosper.

(iv) In a criminal, especially in a capital case, so long as your cause stands well, ask but few questions; and be certain never to ask any the answer to which if against you, may destroy your client, unless you know the witness perfectly well, and know that his answer will be favourable equally well; or unless you be prepared with testimony to destroy him, if he plays traitor to the truth and your expectations.

(v) An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always leads to, or excuses, an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth; or if by cunning, it is the cunning of the witness, and not of the counsel.

(vi) If the witness determines to be witty or refractory with you, you had better settle that account with him at first, or its terms will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken your power or his own. But, in any result, be careful that you do not lose your temper; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

(vii) Like skilful chess-player, in every move fix your mind upon the combinations and relations of the game; partial and temporary success may otherwise end in total and remediless defeat.

(viii) Never undervalue your adversary, but stand steadily upon your guard; a random blow may be just as fatal as though it were directed by the most consummate skill; the negligence of one often cures, and sometimes renders effective, the blunders of another.

(ix) Be respectful to the Court and to the jury, kind to your colleague, civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward either."¹³

41. Examination of witnesses: Judge Donovan's five rules. Judge Donovan, says: "There are no better rules of cross-examination than five:

- (1) Know what you need, and stop when you get it.
- (2) Risk no case on the hazard of an answer that may destroy it.
- (3) Hold your temper while you lead the witness, if convenient, to lose his.
- (4) Ask as if wanting one answer when you desire the opposite, if the witness is against you, and reverse the tactics if he is more tractable.

13. The above rules are reproduced from Best, Ev., S. 663-A. Mr. David Paul Brown, the author of the

"Rules" was a member of the Boston Bar, who published "The Forum" in 1856.

(5) Treat a witness like a runaway colt; and see that he does not get too much start of his master; and if he does, let off the reins at the first stage turn in the testimony; but if you see any object to break his running, call the turn quickly".¹⁴

An old barrister's rules. The following compendium of the rules of an old barrister is worth knowing: "To cross-examine is to test in a court of law the evidence of an opposing witness."

This is done by means of questions, and in accordance with the following working rules: "Come to the point as soon as possible". "Do not argue with a witness". "Do not ask a question unless there is a good reason for it". "Except in cases where your position is so bad that nothing can injure it, and something may improve it, do not splash about and do not ask a question without being fairly certain that the answer will be favourable to you." "If a witness is manifestly lying, leave him entirely alone. Keep calm."

These rules represent the practice of good cross-examination at the present time.¹⁵

Davis' Rules of Cross-examination. A jurist and Governor Davis of St. Paul sent the following excellent rules:

(1) Discount by at least 25 per cent what your client says, he himself will swear to.

(2) Do as little cross-examination as possible. Never on cross-examination ask a question when you do not know what the answer must be if the witness is honest; and, if he is a liar, don't ask the question, unless you are ready to ruin him with a contradiction by facts in evidence or by other witness. I have seen more good cases ruined by cross-examination, by the lawyer who ought to have suppressed his curiosity or vanity, than by any other cause.

(3) Never mis-state or overstate testimony to a jury, in a summing up. You will always be detected by some juror, and he will resent your attempt to "play him a fool".¹⁶

Cox's suggestions. Cox, in his work on 'The Advocate' concludes the case of cross-examination. "In considering these remarks on cross-examination, the rarest, the most useful and the most difficult to be acquired of the accomplishments of the advocate, we would again urge upon your attention the importance of calm discretion. In addressing the jury you may sometimes talk without having to say, and no harm will come of it. But in cross-examination every question that does not advance your case injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here: the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been rightly defined to consist of knowing when to sit down, that of an advocate may be described as knowing when to keep his seat. Very little experience in our courts will teach you this lesson, for every day will show to your observant eye instances of self-destruction brought about by imprudent cross-examination. Fear not that your discreet reserve may be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are

14. See Donovan's 'Fact in Court', pp. 81-82.

15. Cited in Pearson's Magazine and Chi-

cago Legal News.

16. See Donovan's 'Fact in Court', p. 102.

lawyers, who know well the value of discretion in an advocate, and how indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment it will be recognised in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring. No let me add one or two words of my own. Remember that cross-examination is a duty we owe to our clients, not a matter of mere personal glory or fame. Remember that regard must be had for true administration of justice, and that justice must not be defeated by improper cross-examination. Remember that we owe an obligation to the State which gives a monopoly to our profession, and that we should render that to the State which inures to the benefit of the public. Remember also that in cross-examination we owe a duty to ourselves, and that we are bound to give the best that is in us in that most difficult art, however we may fail in the result, and so, if we fulfil all these obligations our names will be re-called as those who lent honour and dignity to our profession, we will be remembered as those who regarded fairness as one of the great elements of advocacy, and whose talents and genius were not aimed at self-glorification, but were used to establish truth, to detect falsehood, to uphold right, and justice and expose the wrong-doings of dishonest men."¹⁷

Johnson's cardinal rules of cross-examination. Mr. Johnson in the course of his address to the members of an American Bar Association enunciated certain cardinal rules as follows:

"The first is that the examining counsel must have a continuity and concentration of thought. If he has not that, he cannot cross-examine. By concentration I mean that which eliminates and excludes every other thought excepting the subject in hand, and the witness he is dealing with. By continuity I mean that it is not to be broken in patches, that his concentration is not to be fixed here this moment and somewhere else the next, but there should be a continuity throughout the whole of his cross-examination. And that leads to the second rule, which is, 'Never let the witness get away with you.' You will see a witness who is being well cross-examined, but the witness whether through craft or unintentionally leads off into some other branch and counsel follows him into that branch, and the counsel's work to the extent to which he had got before he was led away, is practically nullified. If he had not permitted himself to be led away, if he had kept his witness to the point, if he had not allowed the witness to get the mastery of him and take him into some side issue, the chances are he would have done good work, but the moment the break is made, the moment the man gets the whip hand, and takes you away into a side issue your continuity is broken, your concentration is weakened, and the opportunity is gone that you perhaps have been striving to attain for half-an-hour with that particular witness. Then the third cardinal rule that I should say should be crystallised is, 'Don't begin to cross-examine upon any point unless you have a good ground for gaining that point, and stop absolutely short when you gain it.' Let me illustrate what I mean by that: A witness is called, and he is asked if he said a certain thing upon a certain occasion. In many cases the answer of the witness is: 'No, I don't remember that I did.' He asks again, 'Well, think it over, didn't you say so and so?' 'I don't remember. I don't remember anything about it.' Counsel goes about three questions further and then he says, 'No, I never said it.'

17. Cox's Advocate cited in Examination of Witness by Whittesley, pp. 145-147.

ow, that is a thing that happens in almost every trial. If counsel had been satisfied to take the want of memory, whilst it may have been against the contention of the counsel, it may have been against his side of the case, it is infinitely better for counsel that a witness should not remember than that he could remember and swear point blank that he never said such a thing.

"The fourth rule is important as regards policy. It is one I have given a good deal of thought to, because one does not like to announce principles without consideration—I can only say I have tried it in my own cases, and when I have not done it, I have always thought that I would have been better off if I had taken the rule and followed it, and that is this: Always attack your witness in the weakest point at the opening unless it is some complicated matter involving long accounts or something of that kind. Always attack your witness where he is least prepared or protected. And the reason for that, when you come to think of it, is very apparent. When a cross-examiner gets to put his questions the witness is more or less nervous. In many cases he has been told, "Oh, well, wait until John Smith or James Jones, the eminent C. gets hold of you; he will turn you inside out in three minutes." The witness has some apprehension, he is a bit nervous, he is unused to your tone of voice, and there is a complete and sudden change of style in the method of cross-examining from the method of examination-in-chief. There is no time at all for him to get his evidence in mind, and the first moment that you strike him at the weakest point of his testimony under these conditions, you strike him when he is least prepared for it, because in a few minutes, even a nervous witness will regain his confidence and he feels, you are not such a tremendous man after all, that you cannot turn him inside out, that you cannot smash him, and that he can hold his own fairly with you. You ask him the same question in fifteen minutes after he has become prepared, and he has everything in his mind, he says, "Yes, or no" and "I will explain that to you." and he will at once explain, whereas if he has been attacked in the first place and caught him just at the moment when the sudden change occurred between the two methods of examination, you might have got the answer that you were looking for, and very likely a true answer, because when a witness has his time to think, knowing that he is a witness there in favour of the man who calls him, naturally and without any malevolence or without any wrong-doing on his part, his mind intuitively and unconsciously gets a sudden twist or turn which is very difficult to straighten out.

"One other point in regard to this subject, is "that counsel should always go to the level of his witness; and I will illustrate that by a well-known story of Lord Jeffrey. The counsel, an academic man, was examining a poor workman at the Court in Edinburgh. It was a question of the mental capacity of the testator, and the information he desired to get from this witness was how well he knew the deceased, and the lawyer put to the witness questions in various forms—"Were you on terms of intimate relationship with the deceased"—and the witness looked at him and said, "Eh?"; he repeated the same question, using big words all over the level of the witness—who didn't understand the question at all. Lord Jeffrey finally became impatient and said, "Let me ask the witness a question" and he turned to the witness and said, "James, did you ken Sandy Thompson in his lifetime?" "Well, I did." "How well did you ken him?" "Ken him—why me and him sleep in the same room for 40 years." Now there was a degree of intimacy that could not be denied, and developed because Lord Jeffrey came to the level of the witness. Believe that very often questions are asked of witnesses that they do not understand, and if they do understand them the complex form or high sound-

ing words may be a pretence that they don't, and it only gives them the advantage of getting, as I say, a certain time for reflection and a certain amount of consideration before answering.

"In cross-examination it is important to eliminate any concern about your own case, because the moment you are thinking about what your case is or will be, or what effect the evidence will have on your case, your mind is distracted from a subject which requires singleness of eye and purpose, and singleness of mental action. Then, I think, it is very important that we should determine a line of attack on each point. Sometimes we have to employ different methods as you all know, to get at results, sometimes one line of attack would not suit in another; as you know, one line of cross-examination would not apply to another case at all; and therefore, we have to so prepare and so put down on paper—I think, it is important that everything should be put down on paper—that the eye as well as the mind will see where the thing is leading you on, that is, to so prepare that the hearing and result are clear to the mind of the examiner. Method, of course, is largely governed by the moments."¹⁸

Mr. Cornelius' rules of cross-examination. Mr. Cornelius in his treatise on the "Cross-examination" of witnesses handed down the following general rules:

(1) Do not cross-examine a witness unless you have a definite objective in mind. The asking of rambling questions in the hope that something will turn up should never be practised.

(2) Give some thought, in advance of the trial, as to how the witnesses of the adverse party are to be interrogated and, wherever possible, prepare the cross-examination in advance.

(3) During the cross-examination, watch the witness closely and require that he answers your questions without evasion. You will never achieve any measure of success in cross-examination unless you do this.

(4) Never be diverted from the objective of your cross-examination by some promising lead that may be injected in the case by the witness. Exhaust one objective before taking up another.

(5) Never attempt to make much of the trifling discrepancies in the testimony either by your cross-examination or by your argument to the jury. The latter know that human memory is not exact as to time, dates and amounts.

(6) Use language just as simple as possible in cross-examining witnesses.

(7) Invariably be courteous and fair towards the witness even though you are demolishing his testimony by cross-examination. If you show the jury that the witness is a liar by your cross-examination let it go at that but do not call him one.

(8) Stand up close to the witness in cross-examining. Standing back at a distance and shouting at the witness is never productive of favourable results.

18. Mr. Johnson's address cited in the Canadian L.J. 11 Cr. L.J. pp. 81-82.

(9) Avoid the "sledge-hammer" or "brow-beating" method of cross-examination. This sort of thing can only be used on the witness who is obviously lying or is stupid or timid, or both. Use of the brow-beating method by the lawyer who is naturally of a domineering disposition is fatal.

(10) Never try to show off your smartness in cross-examination. The court-room before a jury is not a place for the smart-aleck lawyer. The lawyer who believes he is smart, and discloses his egotism is almost certain to gain the ill-will of the jury.

(11) "To whom have you talked about the case?" This question or one of similar import can be put to almost any witness without any disadvantageous results. If the witness answers in the negative, almost invariably he is lying and the cross-examiner may then discredit his entire testimony.

(12) Never use sarcasm or ridicule against a witness of his poverty, lack of education, personal appearance, or his stupidity. The jury is quick to resent such an attitude on the part of the cross-examiner.

(13) If you are representing the defendant bring out the humorous aspects of the case whenever opportunity affords; such a course tends to lessen the gravity of plaintiff's case.

(14) Always keep a poker face. If a witness makes a break which goes badly against you, smile it off. Do not show it when badly hit.

(15) Never allow yourself to be influenced by what your client desires you to ask a witness. You and not he, have the responsibility of the litigation.¹⁹

Conclusion : Seven steps to successful cross-examination. The experiences of forensic giants have from time to time sublimed in formation of certain principles for cross-examination—as irresistible indication of the "science" underlying what is known commonly as "art" of cross-examination. While the whole book has been devoted to present the art and science of cross-examination covering broad bases of principle and rational classification, only well formulated rules have been given in this chapter as drawn from theirs.

1. The first thing that a cross-examiner should do in every and any case is that "he should work out like an engineer his own theory of facts". Every lawyer does this work, though in a crude or haphazard or undisciplined style and it is the first and the foremost step in treading the ladder of success, that well-seasoned, probable and appealing theory of facts be worked out.

2. Having worked out the theory of the facts and the scheme whereby it will be proved or disproved, the second rule that a cross-examiner should bear in mind is "the study of the witness who is going to step-in". Study of the witness will commence the day the cross-examiner has worked out his theory of facts or the day he first knows of the witness and will be completed till the witness steps down the witness-box. A deep insight into the human mind and its operations together with the varied and rich experiences of life, men and surroundings around us, is the only and the best teacher in this respect.

19 Asher L. Cornelius on 'Cross-examination of Witnesses', pp. 43-45 : 5th Printing, July 1940 published by

Bobbs Merrill Company Inc., Indianapolis, U.S.A.

3. The third rule is "Adapt your style of cross-examination as occasion and characteristics of the witness under testimonial operation calls for." If one has not the stamina to tailor-make his style, it is better he should make room for others to cross-examine. Every witness is a new problem to be solved.

4. Put such purposeful questions in such a form that they will usually fetch favourable answers only. This rule is both positive and negative.

5. The fifth rule to be followed is "Develop a calm and pleasing style so that you do not make the witness your enemy or unfriendly towards you."

6. Conduct your testimonial operations tactfully. Tact is always the core of advocacy, be it in the dealing of the client or opening of the case or examining the witness or summing up. Like the art of advocacy, it varies from case to case and facts to facts, hence it cannot be formulated in any shape. The only thing which can be said is that the cross-examiner must imbibe it and try to enrich his case with it. Every witness is an intellectual combination with which one cannot dream of success without commanding fighting strategy and diplomacy.

7. The last rule can be best expressed in Paul Brown's (ninth) rule:

"Be respectful to the court and the jury; kind to the colleagues, civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening defence towards either."

These seven rules are more in the nature of assistance whereby the lawyer will plan his own things than any ten or twenty ready recipes. In consonance with the modern intellectual experiences, the rules have been framed and designed with a view to provide the lawyer a complete system of thinking, method of dealing with witnesses by preparing a frame of mind and action.

42. Re-examination. The party who called the witness may, if he likes, and if it be necessary, re-examine him. The re-examination must be confined to the explanation of matters arising in cross-examination. The proper office of re-examination (which is often inartistically used as a sort of summary of all the things adverse to the cross-examining counsel which may have been said by a witness during his cross-examination) is by asking such questions as may be proper for that purpose, so as to draw forth an explanation of the meaning of the expressions used by the witness in cross-examination, if they be in themselves doubtful; and also of the motive or provocation which induced the witness to use those expressions; but, a re-examination may not go further and introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness.²⁰ So, if the witness has admitted having made a further inconsistent statement, he may in re-examination explain his motives for so doing.²¹ Even if inadmissible matters are introduced, the right to re-examine upon them remains. Where cross-examination of a witness is begun on a certain day and is completed on another day, the right of re-examination should not be restricted to the matters arising in the cross-examination on the later day but should be permitted on the whole of the subject-matter. If the matter elicited in cross-examination gives rise to any suspicion that it is the result of tutoring,

20. Taylor, *Ev.*, 3. 474; Greenleaf, *Ev.*, 467.

21. *R. v. Woods*, 1 Cr. & D. 439. The

Queen's case, 2 B. & B. 297.

22. *Blewett v. Tregonning*, (1835) Ad. & El. 554.

would of course be open to the Judge to draw attention of the jury to the fact that the lapse of time might have given an opportunity for preparation; but this would not be a ground for refusing to let the question in re-examination be put.²³ But as observed, new facts or matters which are not properly explanatory cannot be introduced in re-examination. So where a certain conversation had been admitted in cross-examination, distinct matters occurring in the same conversation were not allowed to be proved in re-examination which, although connected with the subject-matter of the suit, were not connected with the assertions to which the cross-examination related.²⁴ If facts are called out on cross-examination which tend to impeach the integrity or character of the witness, he may, in re-examination, make explanation showing that such facts are consistent with his credibility as a witness although such testimony would be otherwise irrelevant.²⁵ New matter may, however, be introduced by permission of the court, in which case the adverse party may either cross-examine upon the matter.¹ But this cannot possibly entitle the prosecution to examine-in-chief on the substantive case of the prosecution after the defence has disclosed its case in the cross-examination of the witness.² The emerging inconsistency between the cross-examination and re-examination of witness should be cleared up before any suggestion of perjury can be made.³

Necessity for re-examination: Settling obscurity and lightening evidence. Judge Elliot, in his work on the Advocate, says:

"It is often said that the object of a re-examination is to afford the witness an opportunity to make explanation, rendered necessary by his cross-examination, but this is a view narrower than the principles of advocacy warrant. More can be accomplished by a skilful re-examination. Obscurities can be cleared away, and facts be brought to stronger light by questions that re-call the mind of the witness to the facts to which he testified in his direct examination, and of which his knowledge is clear and distinct. This may be done by a suggestive method, yet without violating the rule forbidding leading questions, for the witness may have his attention directed to one fact which is clear in his mind, and gradually let from that fact to those on which he appears to have been confused. Care must be taken to begin upon matters, regarding which the mind of the witness is not confused, and on these he could be detained long enough for the faculties of association and reflection to do their work. It is almost always dangerous to go at once to the point where the confusion exists. First settle one or two distinct ideals in the mind of the witness, clear all mists away from these, and he will grow stronger and clearer as he goes on. If the opposite course is pursued, the chances are that the confusion will be deepened. If once the witness can be made to feel that he is on solid ground he will regain confidence, and not only explain what he has explained, but will also make clearer and stronger many parts of his previous testimony.⁴

23. *Bakhori Gope v. Hafiz Abdul Halim*, 1941 Pat. 362.

24. *Prince v. Samo*, (1838) 7 A. & E. 627; *Burr. Jones, Ev.*, 876.

25. *Burr. Jones, Ev.*, 875 (So where a witness stated that he came from Jail it was held proper for the party calling him to ask on what charge he had been committed) *State v. Erell*, 41 Tex. 35 (Amer.).

1. *Id.* 138. See *Taylor, Ev.*, § 1477;

Salagram v. Emperor, 1907 All 171.

2. *Shivadhim Singh v. Emperor*, 1923 Pat. 116; 60 I.C. 662; 3 P.L.T. 82.

3. *Sah Mauji Ram v. Sah Chaturbhuj*, 1939 P.C. 225; 1 L.R. 1939 Kar. 375; 185 I.C. 196; 139 A.L.J. 752; 50 L.W. 414.

4. *Elliot's Advocate*, p. 273.

The purpose of re-examination is explaining any part of the cross-examination which is capable of being construed unfavourably to the party for whom he has given examination-in-chief. The re-examination cannot be allowed for new matters except with the leave of the court. It is not permissible to put in re-examination two or three questions into one question.⁵

Clearing confusion. "The business of a re-examination", says Mr. Cox, "is the restoration of your witness to the confidence of himself and of the jury." A cross-examination sometimes so confuses an honest witness that his powers of memory and reflection seem almost paralysed, and when this occurs the first thing to be done is to clear away the confusion and restore the power of these faculties. In this, perfect composure must be maintained by the examiner, and he must proceed with calmness and deliberation. "Soothe his irritation by your words and aspect. When he is restored to himself, take him quietly through his story. Bring out, as far as you can, the strong points of his testimony which have not been shaken on the cross-examination."

Questions in the nature of cross-examination can be permitted at the stage of re-examination. The Court can permit a party who calls a witness to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it gives an opportunity to the other party to cross-examine him to the answers elicited which do not find place in the examination-in-chief. Section 154 lays down that the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.⁶

Putting new facts of cross-examination in favourable perspective. "Favourable facts in the shape of new matter are very often developed on cross-examination, and the advocate who fails to make good use of them on the re-examination has either slept at his post or is not well fitted out for his duty. However, in some cases the facts are so fully brought out on the cross-examination as to be plain enough without assistance from the counsel conducting the re-examination, and when this is so it is the better policy to leave them untouched until the time comes for making them available in the argument to the jury. In other cases it may be unsafe to follow the cross-examiner into this new matter, since he may have left it unfinished for the very purpose of enticing the re-examiner into an uncomfortable situation. Here, as well as everywhere, he is the wise man who lets well enough alone."

Cox marks a note of caution. "When you come to some doubtful matter on which the cross-examination has damaged you, extract from the witness an explanation of it, he can make it; if he cannot satisfactorily explain it pass it by, for a failure to effect this object serves only to give it a double importance in the estimation of the court. Here it is that all your sagacity is called into play. It happens frequently that your brief gives you no information on the new point stated, and the attorney who sits behind you cannot help you; it is as new to him as to yourself. Failing help from these sources you will seek to form a judgment from the manner of the witness whether the fact is as it appears, or if he can give any explanation of it. If, when questioned upon it, he showed signs of annoyance and an eager desire to say something more about it, you may conclude that he can explain and you can safely call upon

5. Charan Singh v. State of Haryana, 1971 C.A.R. 318 (S.C.) : A.I.R. 1971 S.C. 1554 (1557).

6. Dahyabhai v. State of Gujarat, A.I.R. 1964 S.C. 1563 : (1964) 1 S.C.W.R. 831 : (1964) 2 Cr. L.J. 472.

him to do so. If this symptom is absent, then your sagacity will be exercised in a review of the internal probability or otherwise of the matter itself. If any improbability appears you may try with **extremest** caution to approach the topic, so as to afford to your witness an opportunity of clearing himself, if he can, but so tenderly that you may retreat unharmed should you find that you are treading on dangerous ground. Wanting all these encouragements, you will prove your discretion by passing it unnoticed".⁷

43. Art of no re-examination. Avoid risks of seeking explanation. In many cases it will require close observation and clear judgment to determine whether it is safe to ask an explanation. If there is **great doubt** whether a satisfactory explanation can be given, none should be asked. A failure to explain will intensify the injury done by the cross-examination. If in some doubt whether the witness can give a reasonable explanation, but with reason to hope that he can, it is expedient to gradually approach the subject, and by your question set it in the plainest way before the witness. If his answers indicate that his mind is at work intelligently and that his confidence has been regained then it will be safe, as a general rule, to seek the explanation as directly as practicable. But, in every case where there is doubt, great or little, approach the subject cautiously, and do not get so entangled that you cannot safely retreat by going to some other topic. While in reality retreating, avoid the appearance of doing so.

Do not re-examine for unimportant discrepancies. As a general rule it is not good policy to re-examine for the purpose of explaining unimportant discrepancies, since they seldom do harm. There is sometimes real harm done by a re-examination on such matters, for a witness is frequently bewildered by a discovery that there is some discrepancy which friendly counsel deem so important as to demand an explanation, and, as his confusion increases, he goes from bad to worse. So, too, a re-examination on such points magnifies their importance, and gives them greater weight than they would otherwise possess.

Do not rescue the corrupt. Judge Elliot says: "If the witness is a corrupt one, and conclusively so shown on cross-examination, it is neither wise nor proper to attempt to rescue him. This is not to be understood as implying that a bad man is necessarily a corrupt witness. A man of bad reputation may tell the truth, and, as a general rule, will tell it, unless there is some motive for lying. If it is apprehended that the reputation of the witness may be attacked, then the re-examination should secure as many circumstances tending to give probability to his testimony as possible. Little things creeping out without apparent design do very much to fortify the testimony of such a witness."

• *Contradiction and re-examination.* "If the cross-examination discloses a purpose to impeach by contradiction, and if it is expected that the attack will be formidable, then the re-examination should, as much as possible, draw off attention from the points upon which it is supposed the contradiction will be strongest. It is a mistake to magnify the points where contradiction is anticipated, except in cases where the attack will be weak, or the support of the witness very strong. If it can be made to appear that the contradiction is on a point of little importance, it will not be difficult to convince the jury in argument, that contradictions on such points go a very little way towards proving a witness guilty of perjury. If the defence of a witness attacked can be

made very strong then magnify the point on which it is supposed he will be contradicted, since, if the witness makes a successful defence, his testimony will have greater force, because the jury naturally rejoice at the vindication of a witness unfairly or unjustly assailed."

Advice to cross-examiner. Do not allow re-examination on omission. "An artifice of many cross-examiners is to examine up to a certain point in a transaction or conversation and then turn off abruptly to some other phase of testimony, thus weakening the effect of the evidence by creating the impression that what was called out is all there is of the testimony on the particular subject. In such cases the course is clear. Bring out on the re-examination the parts omitted in the cross-examination. When the artifice is detected and successfully exposed, its author will have good cause to repent of its employment; but the difficulty is in detecting and exposing it, for the process is often conducted with such adroitness that it can only be detected by the keenest observer. A dull or careless one will seldom notice it. The advocate adroit enough to make the artifice successful will not fail to make effective use of it in argument."

Do not allow second opportunity of cross-examination. Judge Elliot says: "Eliciting new matter on re-examination, and thus affording the opposing counsel an opportunity of re-cross-examining is always injurious, and sometimes fatal. A skilful cross-examiner will seldom fail to greatly impair, if not entirely destroy, the whole testimony. This he will do by covering up important points in the previous testimony, or by bringing out contradictions and inconsistencies. The advocate who does his duty well will bring out all of the facts in the direct examination, and in the re-examination keep so closely to the cross-examination as to shut off all pretence of a right to re-examine."

Art of no re-examination. Mr. Harris in his sixth Chapter concludes the subject: "Re-examination arises from a right to explain. It is often so advantageous that a case may be won by its judicious exercise, while it is usually so innocent of evil that it would require the utmost ingenuity of the most inexperienced counsel to make it the means of losing one. You must have a thorough knowledge of your facts and have watched every question of the cross-examination with the utmost vigilance to take the full benefit of your right and to make your case stand out in the bolder relief which the re-examination will afford to it. First ascertain what fact has been displaced or obscured and what new matter introduced, and then you will know what requires to be rearranged and to be explained before you rise to put a single question."

"In re-examination, as in cross-examination, after learning thoroughly, How to do it the next branch of learning to which the student had best direct his assiduous attention is, How not to do it?"⁹

44. Professional ethics and cross-examination or the prerequisites of an efficient and worthy cross-examiner. We cannot conclude this portion of our commentaries on effective examination of witnesses better than by pointing out that every lawyer as a member of an honourable profession must appreciate that the dread of cross-examiner keeps many respectable and valuable witnesses away from the witness-box. Therefore in the memorable words of Cockburn, C. J.: "The arms which he wields are to be the arms of a

8. Elliot's Advocate, p. 278.

9. Harris cited in Reed's Conduct of Law Suits, p. 336. Aiyer: Art of

Cross-examination, Law Book Co., Allahabad.

warrior and not of the assassin," and as the learned Chief Justice has added : "It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty which is incumbent on him to discharge the eternal and immutable interest of truth and justice." It is imperative, as Lord Atkin said, that a lawyer should avoid confusing his client's interest with the still higher duty of observing his truth. A lawyer is an officer of Court, a co-operator with it in the search for truth. Therefore in order to make himself a worthy collaborator in the adduction, sifting and analysis of evidence, there is a corresponding obligation on him to observe a high code of professional ethics and these prerequisites of a worthy cross-examiner can arise not solely from a skilful acquisition of the art of advocacy in the courtroom but from a wide knowledge of men and things thus assuring an honourable place in public esteem, can be set out as follows :

1. *Professional conduct : Nature of legal profession.* Addressing the French Bar the great Chancellor of Louis XV said that "the most deep-seated and perhaps the most incurable disease of your profession is the blind temerity with which men venture to engage themselves in it without having rendered themselves worthy of it by long and laborious preparation." The genius of success is the genius of labour. You cannot gain the rewards of diligence without suffering its fatigues. He who does not work neither shall he eat, says Art. 3 of the U.S.S.R. Constitution. Work is in communication with God. To work is not merely a duty or a primrose path to success, it is also an indefensible right. In another connection, Denning, L. J. has given in *Abbot v. Sullivan*,¹⁰ judicial recognition to the right to work. No doubt experience smooths the way in all professions. The only way however to develop the germ of future excellence in the young lawyer is assiduous industry. The legal profession is not a bed of roses. If you have bed you have no roses.

Self-confidence. The will to succeed and faith in oneself are next in order of precedence. Confidence is the first necessity and the last accomplishment in the supreme art of advocacy. A determination to go ahead with the practice of the law is fundamental. Far too frequently one finds the lawyer deviating to quasi-political activities or straying to pursuits for economic betterment. It is obvious that one cannot have the best of both the worlds at once. To many new entrants the answer of the small boy in the Texas Sunday School to the question, "Where do the wicked finally go?" "They practise law for a while and then go to the Legislature" is both revealing and instructive.¹¹

Good and bad advocacy. Advocacy has never changed in its principles. What it was in the days of Cicero when he defended Roscius, it is even today. Like any other art it can only be learned by the exercise of it. There are no shortcuts or recipes and no cure-all remedies. The types of advocacy vary from lawyer to lawyer. It is however only possible by an inductive process to generalise a few maxims. It is easier far to postulate what it is not. You may scramble through a case. This is not advocacy. You may brow-beat a witness. This is not art. You may be perfect in your script. This by itself carries one some way but not far enough. You may be gifted with eloquence. But abundance of eloquence block the Courts of law. "*Satis eloquentiae Sapientie Perum*" is an old saying. "He had great eloquence but little sense." Poverty of language is one thing; selection of words is another. The highest gifts of oratory are out of place in a Court of law. Affectation is a weakness.

10. (1952) 1 Q.B. 189.

11. 29 American Law Review, p. 272.

It is tolerated but never admired. Moderation is more effective and carries more steam than exaggeration. Absence of seriousness is fatal, but a gift of mild but not explosive humour or wit would ease the corner in many a forensic battle.

Lawyer and client. This leads on to the fundamental rule which transcends all others. Without a knowledge of human nature life is static. Objectively and essentially the human element is the lynch pin which holds together all things great or small. The others are mere trappings. An apprehension of this truth will enable one to adjust one's repertoire in all situations. The lawyer is not merely the instrument of the litigant. This aspect cannot be put more forcibly than in the words of Coleridge in Blackstone's Commentaries: "The advocate, so far from being entitled to say more than his client would be allowed to say under the same circumstances, is laid under great restraint." To serve the client may be one's highest duty but it should not cause him to forget his duties as a man. Loyalty to a client is important but not paramount. The lawyer is a representative and not a delegate. One may recall the beautiful epic in the Book of Job how the man of flock became poor, was afflicted with disease, was forsaken by his kindred and was asked to curse God and live gloriously. He replied, "Till I die I will not remove my integrity from me." The Missouri Legal Code enjoins an entrant to "uphold the honour and maintain the dignity of man." The ideal is what Abraham Lincoln prescribed, viz., "To live with malice towards none, with charity for all, with firmness in the right as God gives us to see the right." Abandon a cause which you can only win by dishonourable means.

Higher conduct. The higher purpose and conduct inherent in all the learned professions may perhaps appear as copy-book maxims unsuited to modern conditions where each one has to fend for himself. Philosophy bakes no bread, and gets atrophied on contact with the realities of existence. It is unnecessary to answer this specious plea. Success is only a means and not an end in itself. "The rank is but the guinea stamp, the man is the gold for all that." Even success in life depends upon the number one man can make himself agreeable to and it will be hazardous to assume that position and wealth would alone attract or secure a place in the hearts of one's fellowmen.

Equipment. On the question of equipment of the lawyer there is an entire library devoted to the subject. It was said by Bacon centuries ago that "too much reading is a weariness to the flesh" but a little knowledge is a dangerous thing. It is arduous to collect a library but to possess one and not to use it, is like the psychology of the child who wants the light to be burning even when it is asleep.

Knowledge of principles of law is a prerequisite. Easy familiarity with Statutes, Rules and Standing Orders is equally necessary. Reported case-law is the refuge and the anathema of every practising lawyer. They fall "Thick as leaves in Vallombrosa." The diligence of lawyers can embowel authority for almost any proposition. Law reporting has ceased to be an art. It is a large-scale process. It goes on growling along the pathway of the lawyer. But precedents are adjuncts of the Rule of Law. The lawyer young or old who allows decisions to pass by finds himself left at the starting point. Here again the endeavour must be to disentangle the grain and absorb like the swan the milk of undiluted principles.

It is however necessary to remember that hardly five per cent of cases are decided on law. Facts, details and events have to be sifted, classified, nurtured and released smoothly from the coil-spring of one's own resource.

Cardozo, the great American Judge in his "Nature of Judicial Process" has realistically approached this matter. Orderliness, system, a positive instead of a negative approach will always hit the target direct and even if you fail you do so with honour.

To earn the respect of the Bench and of your colleagues is more abiding than the plaudits of the multitude and the doubtful friendship of men in authority. "The soft answer that turneth away wrath" is often observed in its breach. Many a cause is lost by the uncertain temper of the lawyer and a tendency to asseverate an opinion on every conceivable occasion. One must always remember that the client is the paymaster. The counsel on the other side is not merely a friend by courtesy or etiquette. Discourtesy to the Bench is a wedge that breaks the tradition of the profession. The conflicting ego of irate lawyers and impatient judges have caused more disharmony than all the fights for principle or reputedly wrong decisions. To be rebuffed without cause has a potency to mischief. But there is the old saying that "He who runs away from a fight lives to fight another day." This is not an exhortum to cowardice. The silence of conscious strength must actuate action, and if and when a principle is involved, you as self-respecting men must fight and fight to the last ditch. I believe that sensitiveness and belligerency have no place in the makeup of a lawyer. But when he ceases to fight he ceases to be a lawyer and must be removed from the active list and relegated to an interesting and colourful background, to rest on his oars.¹²

2. *Lawyer's five C's and three L's.* Art of advocacy and professional ethics has been the subject of a large number of books and studies.

The Hon'ble Mr. Justice Raj Kishore Prasad, Judge, Patna High Court, read a paper at the Rotary Club meeting outlining the lawyer's duties in all its facets.¹³ This lawyer's comprehensive *Panch Shila* is:

Lawyer's duty towards five C's: Country, Community, Client, Court and Colleagues, may aptly be called Lawyer's *Panch Shila*, because the *Panch Shila* or the five principles underlying lawyer's fundamental duties have become "international coin".

Three L's:

(i) *Law.* In the forefront should be kept the well-known dictum of Solon: "It is the essence of democracy to obey no master, but the law." The rule of law is one of the fundamental and basic values in a democratic State. Unless there is the rule of law, there is a danger that the administration would become totalitarian. The maintenance of the rule of law in administration is, therefore, of paramount importance. It is only by asserting the supremacy of the Constitution that our democratic society can be preserved.

(ii) *Legal Profession.* Francis Lynde Stetson, in praise of the legal profession, rightly said: "A man could be of greater service to his country, and his race, in the foremost ranks of the Bar, than anywhere else. To be a priest, and possibly a high priest, in the temple of justice, to serve at her altar, and aid in her administration, to maintain and defend those inalienable rights of life, liberty and property, upon which the safety of society depends, to succour

12. Professional Conduct : An Address delivered by Taikund Subramania Iyer to Law Apprentices, Madras, on

15th September, 1956, published in A.I.R. Journal, 1957, pp. 1-3.

13. A.I.R. Journal, October, 1956.

the oppressed and to defend the innocent, to maintain constitutional rights against all violations, whether by the executive, by the Legislature, by the resistless power of the press, or, worst of all, by the ruthless rapacity of an unbridled majority, to rescue the scapegoat and restore him to his proper place in the world—all these seem to me to furnish a field worthy of any man's ambition."

If, therefore, we care for the future of our country, we have to live with a purpose, and not to do things which offend our self-respect, and good name. Real and genuine democratic, and survival of democratic institutions, depend upon proper growth of "democracy spirit", which is only possible under judicially minded leadership in the country. The country, therefore, needs men of ability, spirit and sacrifice, and idlers, who fritter away their energies in frivolities. We should remember that it is from the Bar that we get a neverending flow of trained leadership competent to deal with the complex problems, which the future holds for us. Members of the Bar are the cream of the people, who constantly and closely, work with every substratum of society.

(iii) *Lawyer: His equipments.* (a) Carping criticisms generally levelled against the lawyer as a class prove beyond all doubt the eminence of his position in society and his popularity. At the same time, they ought to awaken the lawyer to the measure of the responsibility that lies on him in that conduct of the profession. He should take note of the changing conditions and govern himself accordingly.

(b) He should get over narrow exclusiveness, groupism and feelings of casteism, parochialism and provincialism, and should learn to stand erect unitedly. The fissiparous tendencies in him should be checked. He should be taught to think in terms of broad nationalism, and to work for the uplift, oneness and unity of the country as a whole. Disunity will weaken our cause, and retard our national progress. The work of national reconstruction must, therefore, have as its foundation strong and unshakable unity.

(c) A lawyer should no longer confine himself to the cloistered seclusion of the law. He who says that he takes no interest in politics and public life, and devotes himself wholly to his profession, should at this day, be said to be but half a lawyer. To travel outside the confines of his work is the need of the hour, and public life and its many activities are waiting to absorb his services.

In the words of Sir Alladi Krishnaswami Iyer, the days, when lawyers could content themselves with working at their own cases and earning money, are over, and the lawyer of today should, if he would take his place in society, and not become a back number, enlarge his mental outlook and realise his duties to society—equip himself for the purpose and make his contribution to the social and economic welfare of society.

There is a tendency among lawyers to live in some distant past, and to think, not in terms of the present, or of the future but in terms of a bygone age. The Bar seems to be drifting away from public life, and unless the members of the Bar take steps to remedy the situation, they are likely to be submerged. It is, therefore vital that a lawyer should take interest in public affairs.

(d) What the lawyer at the present moment has to realise is that he is a citizen, and that he owes a heavy duty to the society in which he lives. Duty

he must remember, is the perfect subordination of self to constituted authority, and the absolute consecration of self to the service of one's country.

He should live the life of love, labour and service for others; the life where ego rapidly becomes a back number in one's own thoughts, yet an exemplar of respect to other minds. As the late eminent Professor Einstein expressed: "Man is here for the sake of other men. Many times a day I realise how much my own outer and inner life is built upon the labours of my fellowmen, both living and dead; and how earnestly I must exert myself in order to give in return as much as I have received."

(e) He should have self-confidence, and firm faith in the future, and vision. His motto should be: "All things are possible for those who believe." Do not perish on the rocks of frustration. If you believe and act on your belief, then your aspirations will come to pass. The converse is also true. You must, therefore, have appreciation of your inner power; and train your creative powers to serve you in your efforts to get out of life the best it can give. Confident people have a blue-print for their future happiness carefully filed in their sub-conscious mind. Creative people may face opposition and obstacles, may be starved or beaten, but the creative urge is stronger than mere physical pain. Adversity and persecution, discouragement and misfortune, cannot swerve them from their fixed purpose, nor quench their indomitable determination to reach their goal. You must, therefore, make up your mind, be a man of firm determination, and make the most and best of life. Said a wise man: "We live in deeds, not years; in thoughts, not breaths; in feelings, not in figures on the dial; we should count time by heart throbs. He most lives who thinks most, feels the noblest, acts the best." Life without aim, aspiration, work and achievement would be monotonous treadmill.

(f) His very vocation opens to his opportunities for doing his country immense service in different spheres of life. The undertaking of this responsibility may very well expose him to criticism, and considerable risk, and hazard, but he must face the situation with courage, unselfishness and sacrifice, and bear his part in bringing about social amelioration, and advancement in the country. There should be less of selfishness, and more of devotion to work; less of sectarianism, and more of patriotism. He should concentrate on larger national interests. He should always keep in the forefront of all his work the motto: "Service above Self."

(g) A lawyer of today has great opportunities before him to serve the people and the Government, provided he puts his shoulder to the wheel. In order to discharge his responsibilities, he should not only possess great mental capacity, but must conform to a high ethical standard of moral conduct. He should be well-informed, and a man of wide culture. He should keep himself in close touch with day-to-day world affairs.

(h) New problems involving interpretation of Constitution and other statutes, arise every now and then, and tax the greatest ingenuity of a lawyer, and unless he has comparative knowledge of history, political science, economics, constitutional laws of other countries and international law also, he will not be able to find easy solution to problems confronting him.

(i) Interpretation of fiscal statutes, and law relating to industrial disputes, present no less difficulties to a lawyer, and sometimes baffle solution. So intimate knowledge of the inland trade and commerce, and also of the systems prevalent in other countries, are essential for their satisfactory solution.

(j) Every lawyer, however, should remember that character, as Judge Donovan points out, "is the foundation of lawyer's fortune. Character grows from every transaction, little and large. It is built up from large and small cases. It is in attention to details, it is in integrity of remittance, it is in open frank dealings; it is in the quality of the services and fairness of dealing." It has been rightly said: "If wealth is lost, nothing is lost; if health is lost, half is lost; but if character is lost, all is lost."

In 'Vaishnava Janato' composed by Narsi Mehta, a true Vaishnava—a man of God—is described as one who knows other's difficulties and miseries; who, without any sense of pride, does good to others; who does not speak ill of anybody; who remains firm in mind, speech and behaviour; who does not speak an untruth, and who keeps away from attachment and wrong perception. That is the Indian ideal of character. It is not easy to put this ideal into practice. But still a sincere effort in this direction is necessary if we are to succeed. It is one's efforts that count and matter. He must realise the importance of truth, the beauty of voluntary austerity, and the value of detachment.

(k) Seeking opportunity of coming in touch with his people, and of being of some service to them, should, therefore, be more the aim of the lawyer than the mere love of money. You should have no attraction for money as it sometimes may only make you do things unworthy of a member of the Bar. Loving service is the surest, and one of the sweetest experiences of this world. A supreme love of duty, allied to a genuine regard for our fellows, is the greatest single factor in the successes and joys of those who choose the legal profession. for, not for nothing, is it widely known as a noble profession.

Lawyer's duties towards country. (i) It is his duty to endeavour to make the laws, under which he lives, as perfect as possible and to suggest, and bring about changes in them to accord with the changes in social, political and economical life of the people.

(ii) It is his duty also to take an interest in public affairs, to discuss important issues, and to exert his influence for better, speedier, and economical administration of the law.

(iii) Our age is pre-eminently the age of planning. National planning is necessary to achieve the socialistic objectives. The modern conception is the conception of a planned Welfare State, in which it is the duty of every one of us to try to create a society of self-reliant and fearless people, living in peace and amity with one another, and working for the good and happiness of all. The meaning of Art. 38 of our Constitution is that the goal of India is the Welfare State—a State in which the public welfare is supreme, and which means welfare of the individual and welfare of the nation as a whole. Lawyers, as a class, can and should therefore take a leading part in the work of national planning, for they are endowed both with intelligence and capacity for work.

(iv) Every lawyer should zealously guard the liberty and freedom of the people. He should keep watch on the freedom of speech and expression guaranteed to every citizen under the Constitution, lest their benefits may be taken away by the executive authorities by their rule-making powers, or administrative orders. He should also guard them against Legislative encroachments. Similarly, he should guard the other fundamental rights also, not

only against the vagaries of the executive, but also against those of the Legislature. No less important is the need for keeping watch on the fundamental rights of equality, which include not merely rights of equal protection of laws, equality of opportunity in matters of public employment and abolition of untouchability, but also prohibition of discrimination on grounds of religion, caste, sex, or place of birth. We should remember, eternal vigilance is not only the price of liberty but it is the price of every other good thing.

(v) He can also set up Civil Liberties Committee to deal with questions relating to civil liberties, and the function of such a committee will be to watch and study the legislations, rules, notifications, and orders, relating to civil liberties. If there be breaches of the constitutional and legal rights and freedoms connected with speech, expression, and association, the Committee should take proper steps to attack unconstitutional laws and rules, and illegal notifications or orders.

(vi) He should also study the social and economic needs of the people and should not only keep watch on the social legislations and take interest in them, but also take initiative in formulating schemes of national reconstruction, and such legislations as are calculated to accelerate the advent of socialistic pattern of society in India.

Lawyer's duties towards community. (i) It should be the first duty of a member of the legal profession to compose family differences, and settle disputes, and controversies, by amicable settlement and thereby prove how mistaken is the popular notion that lawyers foment dissensions for their own ends.

(ii) Lawyers can play an important part in organising panchayats in villages on sound lines so that people may discharge their functions in an enlightened and responsible manner. They can instil into their minds respect for the rule of law, and inculcate that its maintenance in administration is of paramount importance for maintaining the democratic structure of the State. Under the Second Five-Year Plan, which has been described as the horoscope of Mother India by our Prime Minister, great stress is laid on village panchayat and Nyaya Panchayat in pursuance of the policy laid down in the directives in Art. 40 of our Constitution.

(iii) In the still wider field of autonomous bodies, the District Boards, municipalities and Corporations, there are serious problems to be tackled, several reforms to be introduced and social amenities to be added to our civic life in order to raise the general standard of our living. Such local institutions are the true institutions of Self-Government where people most easily learn their first lessons in the art of governing themselves. It is on the foundation of local institutions that the superstructure of the Welfare State can be built. A Welfare State has to grow from below. In Universities also the extension of education of our children, according to the changed conditions of our country, has to be tackled. Lawyers can very well focus the mind of the people to these problems and suggest suitable methods for their satisfactory solution.

(iv) There are many social ills from which people are still suffering. They have got to be eradicated. It is a colossal task. The entire mental make-up of the people has to be changed. Social ideas must undergo revolutionary changes. In this task lawyers may take a decisive part. They can educate the masses on right lines, and help them to get out of the old rut of thinking and behaviour.

(v) It is the duty of lawyers to establish Legal Aid Societies for the purpose of rendering legal assistance to really poor and deserving persons, free of any charge. In England, there is the Legal Aid and Advice Act, which enables people who cannot afford to pay a Barrister's full fee to draw on public funds. We know that the teeming millions of our country are poor. They cannot properly defend themselves against invasion of their rights and liberties due to heavy cost of litigations. Therefore legal aid or assistance in conducting or defending proceedings in law courts should be given to all such persons as are poor and cannot afford to plead their cases. People now consider law courts as their own. People now know that the Judge is their own man, but administration of justice is costly, and people are poor. It is, therefore, an obligation resting upon lawyers to see "that the poor man will have as nearly as possible an equal opportunity in litigation as the rich man". It is really the problem of making justice easily accessible to all, and lawyers can make valuable contribution in solving this much vexed problem to a very great and appreciable extent.

(vi) Similarly, they should set up committees, one for Social Welfare, and another for Land Reforms. These measures are now imperative in view of the advent of the modern planned Welfare State, in which the State takes a more positive part in provision of social Security and Social Welfare for the common man.

(a) The function of the Social Welfare Committee should be to assist in securing and promoting a social order in which justice, political, economic and social, will be assured to one and all. With this end in view the Committee will investigate the existing conditions of the people, particularly of the weaker elements, and formulate suggestions for raising their standard of living, by stepping up production and ensuring fair distribution among them. It will be also one of the functions of the committee to see that correct knowledge for improved health is disseminated among the people, and they are provided with proper medical aid and nutrition. The committee may also take up the important problem of unemployment, study it in all its ramifications and suggest ways and means of reducing and relieving the distress on account of the same.

(b) Likewise, the Land Reforms Committee should interest itself in agrarian reform, on which alone a strong edifice of social structure can be safely laid and built. There should be no tinkering with the problem. Legislation on agrarian reform should be comprehensive and conducive to national welfare, and should not be based on mere political expediency. The ultimate objective should be larger and larger production leading to all-round improvement in the society.

Lawyers should study legislations relating to agrarian reforms, and test them in the light of the Directive Principles of governance of a State, as set out in the Constitution itself, and examine them to see if they contribute to the fulfilment of the objectives envisaged. In this way lawyers can go a long way in ameliorating the conditions of the people, and in raising their moral and social stature.

Lawyer's duties towards client. (i) It is essential now, as at any time previously, to remember that the case on which an advocate is engaged is the important case for his client. He should give all the attention he is capable of giving to the case he is conducting for the time being. When he is engaged he must work wholeheartedly for the success of the cause he has espoused irrespective of monetary gain.

(ii) A lawyer is fully entitled to emphasise his argument in any matter of importance. He should not rest content merely with formulating his point, but should hammer out his ingenuity into the brains of the Judge, but only if there be need for it.

(iii) But at the same time he must take precaution against repetition. How baneful is the effect of repetition is borne out by the following anecdote: A Judge once remarked to eminent and energetic counsel, "The first time I hear an argument, I appreciate it; the second time it produces an impression upon me; but after the third time that impression is effaced." "Is it my Lord?" replied the learned counsel, "then I must repeat it a fourth time, in order that I may revive the first impression". His chance, however, is now gone; and impression which he created has completely disappeared by now because of his repetition.

There is another interesting anecdote on this point. Once a Judge observed, after counsel had developed his argument at considerable length, that time was passing, and he should cut short his arguments. At once came the sharp retort from the counsel who said: "Let it pass, my Lord". A little later the Judge said: "There are other cases in the list". The counsel replied: "Yes, my Lord, there are, but no one save this in which my client takes the slightest interest". This is, however, an extreme example which should never be followed. There is no use rubbing a point, if it has created no impression on the Judge so far. The client's interest is thereby harmed.

(iv) In the matter of giving opinion it should be definite as far as possible. It is the opinion of the lawyer that the client asks for, not his doubts. But having given his opinion, it is counsel's duty, in a doubtful case, to point out that there is another possible view, and that the state of the authorities makes the final result uncertain.

(v) A lawyer should not encourage foolish litigation, but at the same time he should avoid suffocating a good case by premature opinion. A lawyer tends to gain in the long run by advising caution, and drawing the client's attention to the possibly heavy financial implications of a case. Where the controversy admits of it, he will do well to seek to adjust the matter without litigation, if possible.

(vi) A lawyer owes a duty to his client not to make any admission in court about any point in the case without the client's knowledge and assent. Where counsel strongly believes that an admission of some kind ought to be made, and the client cannot be persuaded to agree, he will do well to withdraw from the case, rather make the admission on his own responsibility. This does not, however, prevent counsel from conceding certain facts, or law, or points of the case, in order to build up his arguments, or press them with effect on the Judge.

(vii) A lawyer is not entitled to refuse a brief which is offered to him on reasonable terms. Once he is engaged, or has started a case, he cannot retire from it without the consent of his client, or the permission of the Court. If the advocate discharges his duties with ordinary and reasonable diligence, care and prudence, he will not be liable for the consequences, because he is engaged for his advocacy, and not for his judgment.

(viii) A lawyer should avoid purchasing client's property sold in execution of the decree, and should account strictly for client's money. A lawyer is debarred from bargaining for a share in the property of his client.

(ix) He should represent his client with fidelity and not divulge his secrets or confidences—these are the duties which he owes to himself as much as to his clients. Lawyers occupy a position of trust. It carries with it all the obligations of a trustee, and implies fair dealing, the duty to account for money received, the duty never to disclose communications made to them in the course of their professional engagement even after the case is over. They should never take advantage of their position to make personal gain, and the standard of utmost good faith should be maintained by them in all their dealings with their clients.

Lawyer's duties towards Court. (i) A lawyer should be straightforward and respectful, and should not try to create breeze in Court. He should assist the Judge in the performance of his duty.

(ii) He should never try either to misstate facts or mislead the Court. His argument should be pointed, clear, precise and concise. He should try to win the confidence of the Court.

(iii) He should also have strong sense of humour, and pleasing manners to relieve the otherwise dull and drab atmosphere of law courts.

(iv) Oration has very little place in sound and able advocacy. It has the same place as the marked-down tag on a suite of clothes at a closing-out sale. It looks nice, but it means little. As in the past, so in the present, the Bar takes a direct and responsible part in the creation and development of our law by legal decisions. A lawyer should be regarded as a co-operator in the search for truth, and he may be, and ought to be, a powerful instrument for the administration of justice.

(v) He should always remember that precedents are more efficacious than arguments.... (*Validiora sunt exempla quam verba; et plenius opere docetur quam voce*). Even if there is any decision against him, it is the duty of the lawyer to disclose it. He may later on distinguish it on the facts of a particular case, or even contend that the decision does not lay down sound law. If he does so, he will win the esteem of the Judge.

(vi) Above all, he must be tactful. What exactly is meant by tact? Essentially it is thoughtfulness or consideration for others. It is that quality that steers us through life, hurting, humiliating, inconveniencing others as little as possible. Tactfulness is really a habit of mind, which can be developed. We shall become tactful as we remember to do, or refrain from doing certain things; for tact is simply that, practically speaking. Without doubt this subtle, desirable quality is the very lubricant of harmonious living.

Lawyer's duties towards colleagues. (i) Lawyers also owe a duty toward their colleagues. They should do everything to encourage the spirit of comradeship and brotherhood, and to avoid 'the barren graces of the *nil admirari*'. There is no profession which binds its members in closer fraternity than the profession of law. As Lord Macmillan said:

"It is not for nothing that in the law we call each other brethren If I have to seek for the explanation of the bond which binds in brotherhood the servants of the law throughout the world, I venture to think that I should find it in our common devotion to a great ideal, the promotion of the orderly progress of civilization."

This close relationship which exists between members of the Bar ought to be fostered by a spirit of service and of equality.

(ii) There should always be a readiness on the part of the members of the Bar to give help and advice to brother members. Any member of the Bar may find himself perplexed by difficulties. There may be matters of professional conduct, or a question between him and another member of the Bar. On all such occasions the services of any member of the Bar, however eminent, ought to be at the disposal of others. As a learned writer has put it:

"If an older member should allow the younger ones to lean a little on his knowledge and experience, now and then, when it is necessary, to keep them from falling, and give them a word of cheerful encouragement, they may be counted upon to say it with interest in many ways."

(iii) There is also the corresponding duty that lies on the younger members towards their seniors. No young man can prosper in his profession who is unmindful of due respect to his seniors at the Bar. He, that is so, breaks down his own safety and dignity should he live to be old—in respecting them he respects himself.

(iv) Lawyers should not pursue their profession in a spirit of competition or rivalry, with their brethren. It is as unprofessional to seek an engagement by offer to the client the temptation of an unduly low fee as it is to court introduction to a client by paying secret remuneration to a person having influence over him.

Members of the honourable profession of law must be, like Caesar's wife, above suspicion. Any efforts, direct or indirect, to encroach to any extent upon the business of another lawyer, are unworthy of those who should be brethren at the Bar. The trader is at liberty to take away his rival's customers if he can, but a lawyer must never entice, or endeavour to entice, another lawyer's clients.

The last general clause of the Tenth Commandment contains a special rule for lawyers:

"Thou shalt not covet thy neighbour's clients. Beware of all jealousies and despise every unfair device, which may promise to raise you at the expense of a brother lawyer."

(v) Whatever controversies may exist in Court between you and your learned friend, do not allow them to affect in the slightest manner your relations outside. Do not speak ill to your clients of the performance of opposing counsel. Remember that that would really detract from the credit due to you.

It is both morally and professionally wrong to mislead an opponent, or to hint at him on the wrong scent, regarding any point in the case.

(vi) Avoid all sharp practices.

(vii) The mutual relations between a junior and a senior, in connection with a cause in which both are engaged, may be expressed in the language at Sir Walter Scott used in another context, the junior should be "a walking-stick, not a crutch". While on the one hand, the senior should not feel himself in need of a crutch, the junior should not attempt to be more than walking-stick on the other. Both senior and junior must be absolutely equal to each other.

(viii) Last, but not the least, do not envy a professional brother, who by his learning and industry, or even by some happy chance, attains to position and rank, and earns large pecuniary emoluments. Where the success is deserved, strive to emulate him. Even if it be otherwise, do not seek to lessen his worth, or his qualities, remembering that law is, in a measure, a gamble, and that there is scope for much luck in it. To brood enviously over his successful career will do you more harm than good. It will be destructive to your tranquillity of mind to envy others what you have not, to want too many of the things you see around you and to dwell over much upon your own desires. True happiness emanates largely from the mental qualities of contentment, confidence, serenity and beneficence. Try to learn to live the happy life whose character is portrayed by Sir Henry Wotton in these words:

"Who envieth none, whom chance doth raise, or vice."¹⁴

45. Ten Golden Rules for Judges and Magistrates concerning the examination of witnesses:

1. *Have your eyes always on the witness.*
2. *Be not regardless of the voice of the witnesses.* Under Section 363, Criminal Procedure Code (now Section 280, Criminal Procedure Code, 1973), when a Magistrate has recorded the evidence of a witness, he must also contemporaneously record such remarks (if any) as he thinks material respecting the demeanour of such witness while under examination. The object of this section is to give the appellate court some aid in estimating the value of the evidence recorded by the Magistrate. Though in criminal cases the appellate court should be guided by the remarks under this section as to the demeanour of a witness yet it is bound to independently consider the facts of the case. But where a Sessions Judge of experience had in the most emphatic manner stated that the demeanour of a witness was evasive, that it inspired him with no confidence, the appellate court before accepting his testimony must be assured in the most positive and convincing manner that there was no ground for the Sessions Judge's criticism.
3. *Assure fairplay to every witness.* Every witness is entitled to fairplay and the Magistrate who presides over the Court should see that he gets it. It is a common practice for some not overscrupulous advocates to ask unfair questions. They should be promptly and severely admonished to give the witness fairplay. An eminent Indian Judge Mr. Justice P. R. Sundara Iyer writes: "I must confess that the standard of propriety adopted is often very loose in this respect. A witness is often asked whether he was not convicted by a Court, the cross-examiner knowing full well that he was acquitted on appeal. What is the relevancy of one Judge having considered that he was guilty when the appellate tribunal has pronounced that he was not guilty? The question is often asked whether he was not charged for a crime and was not kept in remand—a most improper question. Of course, the question may be relevant if the charge was made by a party to the cause which might show bias on his part. But this very often is not the case."¹⁵ It is also no unusual thing for unscrupulous advocates to assume that the witness had made a statement that he did not make and on this false assumption harass and confuse him. The Judge must promptly correct these assumptions and severely re-

14. Aiyar's Art of Cross-examination, Law Book Company, Allahabad.

15. Professional Ethics, p. 428.

buke the unscrupulous advocate. In examination-in-chief, as a general rule, leading questions should not be allowed to be asked but there are many exceptions to it and the whole matter rests in the sound discretion of the Court. So often witnesses are required to answer "yes" or "no" to a question which in form is single, but in fact is double. In such a case, it would be impossible for the witness in all fairness to answer "yes" or "no". It is then the duty of the presiding officer to have the question split up into its component parts and then require the witness to answer "yes" or "no" to each part. He must repress the tendency on the part of any advocate to examine witness in a bullying style. It is for the Judge and Magistrate to see that the witnesses are treated with fairness and courtesy. They must insist on the advocate using the honorific plural wherever it is the proper form of address.

4. *Do not allow questioning for question's sake.* This rule must be read with the next rule. The course of some of our ~~most~~ ^{most} ~~fossil~~ ^{fossil} courts is the proximity with which the examination of each witness is conducted—the expounding of the evident and the expatiating of the obvious. This is most often due to the timidity or the ignorance of the presiding Magistrate concerning the relevant portions of the Evidence Act. No attempt is made to restrict the enquiry to the facts in issue and facts relevant to the issue and irrelevant matters are allowed to go in under that much abused Section 11 of this Act. Still in *R. v. Parbhudas*,¹⁶ West, J., has said: "Section 11 of the Evidence Act is no doubt expressed in terms so extensive that any fact which can be a chain of ratiocination be brought into connection with another, so as to have a bearing upon a point in issue may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far-reaching that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral enquiries limited only by the patience and the means of the parties . . . That such an extensive meaning was not in the mind of the Legislature seems to be shown by several indications in the Act itself. The illustrations to Section 11 do not go beyond familiar cases in the English Law of Evidence."

Again, the limits of cross-examination are not properly understood and acted upon. The range of cross-examination is confined to the circumscribing limit that it must relate to relevant facts. The relevancy must be shown before the cross-examination is allowed to be proceeded with. Secondly, though as long as the cross-examiner confines his questions to the points of testing the veracity of a witness or discovering his status in life, there seem to be no limits to his power of putting questions when the cross-examiner undertakes the much more frequent task of impeaching the character of a witness, the following sections (Sections 148 to 152) give ample protection to a witness and impose wholesome restraints upon groundless assertions levelled against him.

In this connection a Full Bench of the Patna High Court observed :

"It is extremely common for advocates for the defence to argue that the prosecution story is an entire concoction on the part of the Police, and, in the vast majority of cases, no evidence whatever, whether elucidated in cross-examination or offered by the examination-in-chief is ever produced in support of this argument.

"Now either the contention is raised on the direct instructions of the client or it is deliberately raised by the advocate without any instructions at all. In the former case, the accused has added to the heinousness of the offence with which he is charged by baseless accusation of outrageous conduct on the part of the Police or other prosecutor.¹⁷

"In a clear case of this kind, the tribunal should take this into consideration as a circumstance of aggravation in awarding the sentence. In the latter case, that is to say, where the suggestion is made by the legal practitioner without reasonable cause, the legal practitioner is guilty of the grossest professional misconduct.

"Moreover, cross-examination on these lines is often grossly abused and it is the duty of the tribunal, if it has any suspicion when an advocate begins an attack upon a prosecutor or witness, by way of so-called suggestions involving dishonourable conduct, to demand from the advocate an assurance that he has good grounds for making the suggestions. If such assurance is not received, cross-examination on these lines should be stopped promptly. If assurance is given and if it should appear at the termination of the trial that no such grounds had existed, the tribunal should bring the conduct of the advocate to the notice of the High Court."

The Sedition Committee Report, 1918, alluding to the remarkable length of trials in India says: "All cases in India seem to be protracted by the multiple of points taken and by the cross-examination upon every sort of collateral matter of every witness, however unimportant to a degree unknown in England. A few instances may indicate the time it takes to dispose of a criminal case, though it is right to add that many of the cases to be cited would have been much more speedily dealt with, had the prosecution not included more prisoners than were ultimately convicted and extended their evidence to collateral matters really outside the course of proof.... In England such cases absorb the energies of a large and able staff. In India there is nothing to compare with it and it is no reflection upon the officers who have to do this work without the necessary training to say that the cases are not always presented as they should be." (Para 172).

In the Report of the Civil Justice Committee (Chap. IV, para 11) similar remarks are made: "The impressions created in the minds of those who are acquainted with the procedure in the English Courts of Law is that there is a tendency in India to overprove essential allegations. Such observers wonder at the extreme elaboration with which the examination-in-chief is conducted. Every sort of detail, however distant may be its bearing upon the value of the evidence of the witness, is brought out and much time is taken up in eliciting and recording unessential particulars to which no reference is usually made in argument and to which no reference can be made usefully.

"Even more surprising is the cross-examination. It is not too much to say that the cross-examination frequently extends over a period which is more than six times as long as is necessary to produce useful results. It is difficult to exaggerate the unnecessary labour and delay caused thereby."

17. Cf. Shakespeare, King Henry IV :—
"Cowards fight when they can fly no
further ;
So doves do peck the falcon's piercing
talons ;

So desperate thieves all hopeless o
their lives
Breathe out invectives against th
officers.'

Speaking of English Courts Diwan Bahadur C. V. Viswanatha Sastrigal (a former Judge of the Madras High Court) writes in his *Rambles in the West*: "I sat for more than an hour in two Courts where original suits were heard and was struck with the masterly way in which witnesses were examined. No unnecessary or vexatious questions were put. It is no wonder that in England very few fight shy of giving evidence in Court and everyone takes a delight in promoting law and order." (P. 19).

5. *Do not permit yourself to make uncalled for interruptions.* Lord Bacon in his essay on Judicature says: "Patience and gravity of hearing is an essential part of justice; and an overspeaking Judge is no well-tuned cymbal. It is no grace to the Judge to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting evidence or counsel too short, or to prevent information by questions though pertinent. The parts of a Judge in hearing are four: to direct the evidence, to moderate the length, repetition or impertinency of speech, to recapitulate, select and collate the material points of that which has been said; and to give the rule or sentence; whatsoever is above these is too much and proceedeth from glory and willingness to speak or of impatience to hear or of shortness of memory or of want of staid and equal attention."

On this point the following observations of Sir William David Evans may be noted: "The benefits of cross-examination are sometimes defeated by the interpolation of the Court, to require an explanation of the motive and object of the questions proposed or to pronounce a judgment upon their immateriality whereas experience frequently shows that it is only by an indirect and apparently irrelevant enquiry that a witness can be brought to divulge the truth which he has prepared himself to conceal. The explanation of the motives and the tendency of the question furnishes the witness with caution that may wholly defeat the object which might have been successfully attained if the gradual progress from immateriality to materiality was withheld from his observation. The importance of an enquiry may sometimes be strongly felt by an advocate and upon very reasonable grounds from his own instructions with respect to the bearing and circumstances of his cause, which the Judge acting only upon the impressions of what has already been disclosed cannot by any possibility anticipate. The full exposition of the motives can only be attained by a premature exposition of the case that is to be brought forward and even when that it often happens that counsel stand in need of such protection from the Court would have the common effort of an interruption in the regular course of enquiry and instead of assisting the accurate discussion of the question would in all probability terminate in confused and desultory altercation."

6. *If the witnesses are pert or forward, repress their assurance.*¹⁸ We have so far stated at some length that counsel should not be rude or unfair to the witness under cross-examination, that the witness stands often in need of protection from the Magistrate as against such attacks. It might also be noted that this can be done without prejudice to the party.

18. A witness must not ordinarily be allowed to volunteer evidence. In such cases counsel for the opposite party should be on his guard to prevent its introduction by objection. The

Judge who is trying the case may upon motion strike out the answers that are not responsive to the questions asked.

7. *See that every scrap of relevant evidence is brought out in the examination of witnesses and that justice is done.*¹⁹ It happens not unoften especially in cases launched on private complaints that both parties are interested in not bringing several scraps of relevant evidence to the notice of the Court. In such cases it is the duty of every criminal Court to get at the bottom of the case and see that every scrap of relevant evidence is brought before it and that justice is done. It may possibly be different in the case of a civil Court trying a civil suit where it is the duty of the parties to place their case as they think fit before the Court.

8. *See that your record of the examination of a witness is clear and in proper chronological order.* It is an unfortunate fact that the depositions of witnesses recorded by some Sub-Magistrates are most often confusing and obscure. It is due to the carelessness with which the witnesses are allowed to be examined and their evidence recorded. It is the duty of the Magistrate to see that a witness gives out his story clearly and in proper chronological order every relevant fact to which the witness can depose. This task is more difficult than may at first sight appear. But with experience, tact and attention, the habit of recording the evidence of a witness in a clear and correct form can be learnt. Until this is learnt the Magistrate will be but an imperfect asset to his profession.

9. *Examine each witness out of the hearing of the other witnesses.* It is essential to the discovery of truth that each witness should be examined out of the hearing of the other witnesses and what is of more importance, he should be deprived of the opportunity to converse with other witnesses until they have been examined. Generally a court-room has two verandahs on either side. One verandah should be reserved for the witnesses who have been examined and another verandah should be reserved for the witnesses who have not yet been examined. Besides keeping a vigilant eye that no communications take place between these two sets of people, a peon or clerk should invariably be detailed to attend to the work. The prosecuting staff or the defence should not be allowed to go out with suspicious frequency. They would do so, to coach up the succeeding witnesses, with reference to the cracks developed in the evidence of the witnesses under examination. If anyone contravenes these elementary precautions he will render himself liable to be punished for contempt of Court.

19. But it is not the province of the court to examine the witnesses unless the pleaders on either side have omitted to put some material question or questions and the court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 133 of the Evidence Act. Similarly the High Court has repeatedly condemned judicial cross-examination of the accused persons. For an interesting account of the evils of such cross-examination see "Best on Evidence", Book II, Part II, p. 558.

Cf. Unfortunately prosecuting counsel, from lack of experience and proper training, do not always realise the duty of bringing out everything favourable or unfavourable to the case

for the prosecution, and the gravity of withholding facts which may affect the credibility of their own witnesses. They seem to regard prosecution too much as a mere "struggle for victory".

Unfortunately too, many Session Judges, who have not practised at the Bar, do not think it their duty to try and clear up apparent inconsistencies, and to link up the evidence of two or more witnesses where gaps are apparent, while the witnesses are in the box. The practice of recalling a witness to clear up a doubtful point is hardly ever adopted, and the failure to do so constantly causes a great deal of trouble to the Court of Appeal. (Sir Cecil Walsh : Crime in India, p. 83).

10. *Carefully and conscientiously observe the provisions of Sections 353 to 361 of Chapter XXV, Criminal Procedure Code* (see now Sections 273 to 279 of the Code of Criminal Procedure, 1973). These ten new sections are very important and a Magistrate should know them by heart. They regulate the mode of taking evidence in enquiries and trials. Evidence must be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. As to when the presence of the accused may be dispensed with, see Section 205, Criminal Procedure Code (now Section 205 of the new Code). The manner of recording evidence outside presidency towns is dealt with in Section 355, Criminal Procedure Code [now Section 275 (1) and (2) of 1973 Code] (record in summons cases and in trials of certain offences by first and second class Magistrates). Section 356 (now Section 275 of the new Code) (record in other cases outside presidency towns). The language of record of evidence is described in Sections 357 and 358 (now Sections 277 of the new Code). The mode of recording evidence under Section 356 or 357 is dealt with in Section 359 (now Section 275 of the new Code). The procedure in regard to such evidence when completed is laid down in Sections 360 and 361 (now Sections 278 and 279 of the new Code). This is most important. The deposition must be read over to the witness and interpreted to him if necessary immediately after the examination of such witness is over. This should be done in the presence of the accused or if his attendance has been dispensed with, his pleader. This is generally not attended to carefully in subordinate courts. Magistrates do not realise that by reading out the depositions then and there a double benefit accrues to them: Mistakes, clerical errors, obscurities, etc., which have crept into the record may be corrected then and there saving much subsequent trouble and labour; and by hearing the deposition read out the facts narrated by a witness are fixed in time in a cogent form clearly impressed upon the mind of the Magistrate which will facilitate his easy writing of the judgment later. A careful and conscientious observation of the provisions of Sections 353 to 361 (now Sections 273 to 279 of the new Code), Criminal Procedure Code, is of primary importance as regards the examination of witnesses.²⁰

139. *Cross-examination of person called to produce a document.* A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

Cross-examination of person called to produce a document. To "become a witness" in its ordinary grammatical sense means giving oral testimony in Court. It may bear a wider meaning, namely, bearing testimony in Court or before a Court by a person accused of an offence, orally or in writing.²¹ To "become a witness" is not equivalent to furnishing evidence in its wider significance, that is, as including not merely oral or written statements but also production of documents. It means imparting knowledge in respect of relevant facts by an oral statement or statement in writing, made or given in Court or before a Court.²² If an accused produces a document, that does not offend Article

1. Magisterial and Police Guide by Justice Ramaswami, I.C.S., pp. 2260-2266.

2. State of Bombay v. Kathi Kalu, A. I.R. 1961 S.C. 1808 : (1961) 2 Cr. L.J. 856 : 1961 A.L.J. 936 ;

1961 A.W.R. (H.C.) 736 : 1961 B.L.J.R. 840 : (1961) 2 K.L.R. 378 : 1961 K.L.T. (S.C.) 74.

22. *Ibid.*, per Majority, S. K. Das, A. K. Sarkar and K. C. Das Gupta, JJ *contra*,

20, Clause (3) of the Constitution unless the document contains statements based on the personal knowledge of the accused.²³

This section has nothing to do with the proper custody mentioned in Section 90. It merely provides a machinery for the production of the documents summoned.²⁴ Any person may be summoned to produce a document without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons, if he causes such document to be produced instead of attending personally to produce the same.²⁵ This section is in accordance with the English practice by which if the witness be called under a *subpoena duces tecum* merely for the purpose of producing a document, which either requires no proof or is to be identified by another witness, he need not be sworn, and, if unsworn, he cannot be cross-examined.¹

When a person called upon to produce a document is sworn as a witness by mistake, and a question is put to him which he does not answer, the opposite party is not entitled to cross-examine him.² But, if he answers questions tending to prove the document, he becomes the questioner's witness and is liable to be cross-examined by the opposite party.³ In the case undermentioned,⁴ a witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the document, stating on oath that it was not in his possession. But the statement was disbelieved, and the Court fined him Rs. 75, under Sec. 174 of the former Code of Civil Procedure (Act XIV of 1882). It was held that the fine was illegally levied. The jurisdiction of the Court to punish under Sec. 174 of that Code existed only in the case of a witness, who not having attended on summons has been arrested and brought before the Court. Under the corresponding provisions of the present Code of Civil Procedure (Order XVI, rr 17, 18), the rules apply to anyone who, having attended in compliance with a summons, departs without lawful excuse or refuses to produce a document.

The case of a witness who having a document will not produce it, is provided for by Sec. 175 of the Indian Penal Code (Act XLV of 1860) and Sec. 480 (now Sec. 345 of the new Code) of the Code of Criminal Procedure (Act V of 1898). Where a witness denies on oath that he has the possession or means of producing a particular document, he can if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.

140. *Witnesses to character.* Witnesses to character may be cross-examined and re-examined.

23. State of Gujarat v. Shyamlal, A.I.R. 1963 Guj. 178 : 1963 Guj. L.R. 688, relying on State of Bombay v. Kathi Kalu, A.I.R. 1961 S.C. 1808 : (1961) 2 Cr. L.J. 856 : 1961 A.L.J. 936 : 1961 A.W.R. (H.C.) 736 : 1961 B.L.J.R. 840 : (1961) 2 K.L.R. 578 : 1961 K.L.T. (S.C.) 74 : Mohamed Dastagir v. State of Madras, (1960) 3 S.C.R. 116 : A.I.R. 1960 S.C. 756.
24. Raviappa v. Nilakanta Rao, A.I.R. 1962 Mys. 53, 58.
25. Civ. P. C. Order XVI, r. 6 : Cr. P. C., S. 94 (now section 91 of 1973 Code).

1. Steph. Dig., Art. 120 ; Summers v.

- Moseley, (1834) 2 Cr. & M. 477 ; Perry v. Gibson, (1834) 1 A. & E. 84 ; Rush v. Smith, (1834) 1 Cr. M. & R. 94 ; Taylor, Ev., S. 1429. That the other side cannot insist upon the person called being sworn; see Davis v. Dale, (1830) M. & M. 514.
2. Rush v. Smith, (1834) 1 Cr. M. & R. 94.
3. Onkar Bhikaram v. Balmukund Javarchand, 1957 M.B. 135 : 1950 M.B.L.R. (Civil) 754.
4. In re Premchand Dowlatram, (1887) 12 B. 68 ; see Wigmore, Ev., ss 1895, 1894.

Witnesses to character. According to English practice it is not usual to cross-examine, except under special circumstances, witnesses called merely to speak to the character of a prisoner; but there is no rule which forbids the cross-examination of such witnesses.⁵ Section 52, ante deals with the relevancy of character evidence in civil cases. The character of a party to a civil suit cannot be relevant to the decision of an issue arising in that suit. Sections 138, 140, 145 and 154 provide for impeaching the credit of a witness by cross-examination.⁶

Character is not defined either in the Indian Penal Code or in the General Clauses Act, 1897. The term occurs in the present section as well as in the Ninth Exception to Section 499 of the Indian Penal Code. Character is an expression of very wide import which takes in all the traits, special and particular qualities impressed by nature or habit serving as an index to the essential, intrinsic nature of a person. Character also includes reputation, but character and reputation are not synonymous.⁷

141. *Leading questions.* Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

A leading question should not be allowed in the examination-in-chief.⁸

142. *When they must not be asked.* Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

143. *When they may be asked.* Leading questions may be asked in cross-examination.

Taylor, Ev., ss. 1404-1405; Greenleaf, Ev., s. 434; Burr., Jones, 815; Best, Ev., ss. 641, 642, 643; Phipson, Ev., 11th Ed., 648 et seq; Norton, Ev., 325; Starkie, Ev., 167; Alison's Practice of the Criminal Law, 546; Wigmore, Ev., 765, et seq.

SYNOPSIS

1. Principle.
2. Leading questions :
—Meaning of.
3. In examination-in-chief and re-examination.

4. Distinction between Sec. 142 and Sec. 154.
5. Exceptions :
—Discretion of Judge.
6. Cross-examination.

5. Taylor, Ev., s. 1429; Best, Ev., s. 262.

6. G. Hussenaiah v. B. Yerraiah, 1954 Andh. 39 : (1954) 2 M.L.J. (Andh.) 39.

7. D. Rama Subba Reddy v. P. V. S.

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Rama Das, 1970 Cr. L.J. 83 (A.P.) (case under section 499, Ninth Exception I.P.C.).

8. Chakrapani Jagannath Prasad v. Chandoo Sahadeo A.I.R. 1959 M.P. 84 : 1958 M.P.L.J. 833.

1. Principle. Leading questions in examination or re-examination are generally improper, as the witness is presumed to be biased in favour of the party examining him and might thus be prompted. In cross-examination as the reason generally ceases, so does the rule.⁹

2. Leading questions. Meaning of. "A question", says Bentham, "is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner—while he pretends ignorance and is asking for information, is in reality giving instead of receiving it."¹⁰ It has often been declared that a question is objectionable as leading which embodies a material fact and admits of answer by a simple affirmative or negative.¹¹ While it is true that a question which may be answered by 'Yes' or 'No' is generally leading, there may be such questions which in no way suggest the answer desired and to which there is no real objection. On the other hand, leading questions are by no means limited to those which may be answered by 'Yes' or 'No'. A question proposed to a witness in the form whether or not, that is, in the alternative, is not necessarily leading. But it may be so, when proposed in that form, if it is so framed as to suggest to the witness the answer desired.¹² It would answer no practical purpose to cite the numerous decisions which determine whether particular questions are leading or not, as each case, as it arises, must be determined with reference to its own particular circumstances and to the definition contained in this section, namely, that a question is leading which suggests to the witness the answer which he is to make, or which put into his mouth words which he is to echo back. "Leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract—for the identical form of question which would be leading of the grossest kind in one case or state of facts, might be not only unobjectionable, but the very fittest mode of interrogation in another.¹³ If a question merely suggests a subject, which suggests an answer or a specific thing, it is not leading. A question is proper which merely directs the attention of the witness to the subject respecting which he is questioned.¹⁴ It follows from the broad and flexible character of the controlling principle that its application is to be left to the discretion of the trial Court.¹⁵ Evidence improperly obtained by leading questions without first declaring the witness hostile should not be considered.¹⁶

9. See *Profulla Kumar Sarkar v. Emperor*, 1931 Cal. 401 : I.L.R. 58 Cal. 1404 : 131 I.C. 575 (F.B.).
10. Bentham's *Rationale of Judicial Evidence*. Thus also a witness called to prove that A stole a watch from B's shop must not be asked, "Did you see A enter B's shop and take a watch?" The proper inquiry is What he saw A do at the time and place in question; Phipson 11th Ed., 648. "A question shall not be so propounded to a witness as to indicate the answer desired," per McLean, J. in *U.S. v. Dickinson*, 2 Mele 331 (Amer).
11. See *Taylor, Ev.*, s. 1401 ; *Greenleaf,*

- Ev.*, s. 434 : see *Dhannu Beldar v. King-Emperor*, 1921 Pat. 406 : 2 P.L.T. 757.
12. *Burr. Jones, Ev.*, s. 815 ; *Best, Ev.*, s. 641.
13. *Best Ev.*, s. 641.
14. *ib.*; *Nicholls v. Dowding*, (1815) 1 Stark, R., 81. "It is necessary, to some extent, to lead the mind of the witness to the subject of enquiry," per Lord Ellenborough.
15. *Wigmore, Ev.*, s. 770.
16. *Jagdeo Singh v. Emperor*, 1923 Pat. 62 : I.L.R. 7 Pat. 758: 71 I.C. 117; *Nirru Bhagat v. R.* 1922 Pat. 582 : 1 I.L.R. 1 Pat. 690: 71 I.C. 219.

It may not be improper to put some leading questions in a domestic inquiry from which too much legalism cannot be expected.¹⁷

If evidence has been admitted without objection, it must not be later on rejected on the theory that such evidence was obtained by questioning the witness in the leading form.¹⁸

3. In examination-in-chief and re-examination. Leading questions are here generally improper, because a witness is presumed to be biased in favour of the party calling him, who, knowing exactly what the former can prove, might prompt him to give only favourable answers. Such evidence would obviously be open to suspicion as being rather the pre-arranged version of party than the spontaneous narrative of the witness.¹⁹ The section says "if not objected to by the adverse party." In practice leading questions are often allowed to pass without objection, sometimes by express and sometimes by tacit consent. This latter occurs where the questions relate to matters which, though strictly speaking in issue, the examiner is aware are not meant to be contested by the other side; or where the opposing counsel does not think it worth his while to object. On the other hand, however, very unfounded objections are constantly taken on this ground.²⁰ If the objection is not taken at the time, the answer will have been taken down in the judge's notes and it will be too late to object afterwards on the score of having been elicited by a leading question. Sometimes the Judge himself will interpose to prevent leading questions being put; but it is the duty of the opposing counsel to take the objection, and (except in cases where, as abovementioned, the objection is advisedly not taken) it is only through want of practical skill that the omission occurs. At the same time it is to be observed that, if evidence is elicited by a series of leading questions unobjected to, the effect of evidence so obtained is very much weakened. It is advisable, therefore (except where permissible) not to put such questions, whether it be likely that objection be taken to them or not.²¹ The proper way to exclude evidence obtained by leading questions is to disallow the questions.²² A Judge is not bound to reject an interrogatory and answer merely because the question is a leading one, but may exercise a discretion as to excluding, or admitting the whole or part of the answer obtained by the leading question.²³ And the course followed in this case, where the Judge caused part of the interrogatory and part of the answer to be suppressed and the remainder, which appeared not affected by the context to be read in evidence, was held to be correct.

17. *Employers of Firestone Tyre and Rubber Co. v. Workmen*, (1968) 1 S.C.R. 307; (1968) 2 S.C.J. 83; (1968) 1 S.C.W.R. 58; (1968) 2 Andh. W.R. (S.C.) 29; 33 F.J.R. 51; 15 Fac. L.R. 462; 14 Law Rep. 433; 1968 Lab. I.C. 212; (1968) 2 M.L.J. (S.C.) 29; A.I.R. 1968 S.C. 236 (239).

18. *Howrah Trading Co., (P). Ltd., v. Fourth Industrial Tribunal W. B.*, 12 Fac. L.R. 80 (84); (1966) 2 Lab. L.J. 282.

19. *Best Ev.*, s. 641.

20. *Best Ev.*, s. 641; v. post.

21. *Norton, Ev.*, S. 515. It is often useful, in place of pressing the objection or when the objection is overruled, to

ask that the question appears upon the notes when the value of the answer will become apparent to the Appellate Court before which the case may again come for trial.

22. *Tukheya Rai v. Tupsee Koer*, (1871) 15 W.R. Cr. 23, 24; see observations in *R. v. Bishonath*, (1869) 12 W.R. Cr. 3; a witness when under examination-in-chief before the Court of Session should not have his attention directed to his deposition before the Magistrate; *R. v. Ram Chunder*, (1870) 13 W.R. Cr. 18.

23. *Small v. Naire*, (1849) 13 Q.B. 840.

4. Distinction between Sec. 142 and Sec. 154. It may be noted that Sec. 142 differs from Sec. 154 under which the Court may permit a person calling a witness to put any questions to him which may be put in cross-examination by the opposite party. A question put in a leading form is not necessarily tantamount to cross-examination, whereas most questions in cross-examination are leading questions. The distinction between the object of these two sections, is that Sec. 154 provides for the cross-examination of the witness by the adverse party for the purpose of contradicting answers given by the witness or to test the witness's veracity or to drag out the truth from him. Section 142 clearly does not deal with such a case. It merely deals with leading questions as defined by Sec. 141. Under Sec. 142 a party may put leading questions to his own witness if they are not objected to by the opposite party, but he cannot, without the permission of the Court, cross-examine the witness even if the opposite party does not object.²⁴ It is not open to the prosecution to put leading questions to its own witness without declaring him hostile and it is improper for the Court to allow the question.²⁵

5. Exceptions. As, however, the rule is merely intended to prevent the examination from being conducted unfairly,¹ the rule is subject to three specific exceptions mentioned in this section and in Sec. 154. These exceptions are :

(1) *Introductory and undisputed or sufficiently established matter.* The rule must be enforced in a reasonable sense, and must therefore not be applied to that part of the examination which is introductory to that which is material. If indeed it were not allowed to approach the points at issue by leading questions examinations would be most inconveniently protracted. To abridge the proceedings and bring the witness as soon as possible to the material point on which he is to speak, the examiner may lead him on to that point and may recapitulate to him the acknowledged facts of the case which have been already established.²

(2) *Adverse witness.* A witness who proves to be adverse to the party calling him may in the discretion of the Court be led, or rather cross-examined.³

(3) *Discretion of Judge.* Leading questions may be asked with the permission of the Court.⁴

The Court has a wide discretion with reference to leading questions, which is not controllable by the Court of Appeal,⁵ and the Judge will always relax the rule whenever he considers it necessary in the interest of justice, and it is always relaxed in the following cases :

(a) *Identification.* For this purpose a witness may be directed to look at a particular person and say whether he is the man. Indeed, wherever from the nature of the case the mind of the witness cannot be directed to the subject of enquiry without a particular specification of it, questions may be put

24. *Ammathayammal v. Official Assignee*, 1933 Mad. 137; 1 I.L.R. 56 Mad. 7; 144 I.C. 629.

25. *Jagdeo Singh v. Emperor*, 1923 Pat. 62; 1 I.L.R. 1 Pat. 758; 71 I.C. 117.

1. *See R. v. Abdullah*, (1885) 7 A 385, 397. "The objection to leading questions is not that they are absolutely illegal, but only that they

are unfair", per Petheram, C.J.

2. *Taylor, Ev.*, s. 1904; S. 142, Evidence Act.

3. S. 154, post; *Best, Ev.*, s. 642. See *Amrita Lal Hazra v. R.*, 1916 Cal. 188; 1 I.L.R. 42 Cal. 957; 29 I.C. 513.

4. S. 142, Evidence Act.

5. *Taylor, Ev.*, s. 1405.

in a leading form.⁶ Much, however, depends upon the circumstances of each particular case; and it is often advisable not to lead even where permissible. Thus in a criminal trial, where the question turns on identity, although it would be perfectly regular to point to the accused and ask a witness if that is the person to whom his evidence relates, yet if the witness can unassisted single out the accused, his testimony will have more weight.⁷

(b) *Contradiction.* Where one witness is called to contradict another as to the expressions used by the latter but which he denies having used, he may be asked directly: "Did the other witness use such and such expressions?" The authorities are, however, stated to be not quite agreed as to the reason of this exception; and some contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question.⁸ So, a leading question may be put when it is necessary to contradict a witness on the other side as to the contents of a paper which has been destroyed.⁹ The case last cited was an action on a policy of insurance of goods on board a ship. The defence was that the goods were not lost, and that the plaintiff himself had written a letter to his son stating that he had disposed of all his goods at a profit of 30 per cent. The son was called and cross-examined as to the contents of the letter. He swore it was lost, but it contained no intimation of the kind supposed and only said that plaintiff might have disposed of his goods at a great profit as he had been offered 5s. for a pair of cotton stockings he then wore. To contradict his testimony several witnesses were produced to depose that the letter had been read when received in London. One of these, having stated all that he recollected of it, was asked "if it contained anything about the plaintiff having been offered 5s. for a pair of cotton stockings." This being objected to as a leading question, Lord Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him which has been sworn to on the other side; otherwise it would be impossible ever to come to a direct contradiction.

(c) *Defective memory.* The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory.¹⁰ It is common practice, when a witness cannot recollect a circumstance, to refresh his recollection by a leading question, after the Court is satisfied that his memory has been exhausted by question framed in the ordinary manner.¹¹ So, where a witness stated that he could not remember the names of the members of a firm so as to repeat them without suggestion, but thought that he might recognise them if read to him, this was allowed to be done.¹² A question is not objectionable which merely directs the attention of the witness to a particular topic without suggesting the answer required. Thus, to prove a slander imputing that "A was a bankrupt whose name was in the bankruptcy list and would appear in the next Gazette," a witness who had only proved the first two expressions was allowed to be asked, "Was anything said about the Gazette?"¹³ Upon a similar principle the Court will sometimes allow a pointed or leading question to be put to a witness of tender years whose attention cannot otherwise be called to the matter under investigation.¹⁴

6. Taylor, Ev., S. 1405.

7. Best, Ev., s. 643.

8. Best, Ev., s. 642.

9. Courteen v. Touse, 1 Camp 43.

10. Best, Ev., s. 642.

11. Norton, Ev., S. 325.

12. Accro v. Petroni, (1815) 1 Stark 100; Taylor, Ev., s. 1405.

13. Nicholls v. Dowding, (1815) 1 Stark 81; Best, Ev., s. 641.

14. Taylor, Ev., s. 1405.

(d) *Complicated matters.* The rule will also be relaxed where the inability of a witness to answer a question put in the regular way arises from the complicated nature of the matter as to which he is interrogated.¹⁵

The above instances are mentioned as those in which the rule is generally and commonly relaxed, but it will be remembered that the Court has wide discretion to allow leading questions, not only in these but in any other cases in which justice or convenience requires that they should be put. As already observed very unfounded objections are constantly taken on this ground. In the case undermentioned, in which it was held that *prima facie* evidence of a partnership having been given, the declaration of one partner is evidence against another partner; a witness, called to prove that A and B were partners was asked whether A had interfered in the business of B, and it was held not to be a leading question, Lord Ellenborough observing as follows: "I wish that objections to questions as leading might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of enquiry. In general no objections are more frivolous than those which are made to questions as leading ones".¹⁶

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the section of action have been fixed, "it is generally the easiest course to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he had heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and the jury know as much of the matter as he does himself; because it has been the common topic of conversation in his own neighbourhood; and therefore, his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal; but, if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time."¹⁷ So also Mr. Alison says¹⁸: "It is often a convenient way of examining to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that state of proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent a more consistent and intelligible statement will generally be got than by putting separate questions, for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel."

6. Cross-examination. It has always been an admitted rule that leading questions may in general be asked in cross-examination. The reason why leading questions are allowed to be put to an adverse witness in cross

15. *Best, Ev.*, s. 642.

16. *Nicholls v. Dowding*, (1815) 1 Stark 81.

17. *Stark, Ev.*, 167.

18. *Practice of the Criminal Law*, Scotland, 546.

examination is that the purpose of a cross-examination being to test the accuracy, credibility and general value of the evidence given, and to sift the facts already stated by the witness, it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case, even though the facts so elicited may be entirely unconnected with facts testified to in an examination-in-chief.¹⁹ But there are some circumstances in which leading questions ought not to be put even in cross-examination. For though leading questions may (perhaps in England and certainly under the terms of this section) in strictness be put in cross-examination, whether the witness be favourable to the cross-examiner or not, yet where a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence to put the very words into the mouth of the witness which he is expected to echo back.²⁰ It is also to be remembered that questions which assume facts to have been proved which have not been proved, or that particular answers have been given which have not been given, will not, as being an attempt to mislead the witness, be at any time, or in any examination, permitted.²¹

144. *Evidence as to matters in writing.* Any witness may be asked, whilst under examination whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation. A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is whether A assaulted B.

C deposes that he heard A say to D—"B wrote a letter accusing me of theft, and I will be revenged on him." This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

s. 3 ("Document".)
s. 3 ("Court".)

ss. 91, 92 (Exclusion of oral evidence in case of document.)

SYNOPSIS

1. Principle.

2. Matters in writing.

1. Principle. See Note, post.

19. *Lalta Prasad v. Inspector-General of Police*, 1954 All 438 : I.L.R. (1954) 2 All 325 : 1954 A.L.J. 316.
20. *Phipson, Ev.*, 11th Ed., 650 ; *Tay-*

lor, Ev., s. 1431.
21. *Taylor, Ev.*, ss. 1404 1431 ; see notes to s. 138, ante ; *Wigmore, Ev.*, s. 771.

2. Matters in writing. This section merely points out the manner in which the provisions of Secs. 91 and 92, ante, as to the exclusion of oral by documentary evidence may be enforced by the parties to the suit.²² If the adverse party do not object, it is the duty of the Judge to prevent the production of inadmissible evidence notwithstanding the absence of objection.

145. *Cross-examination as to previous statements in writing.* A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

s. 155, Cl (3) (Previous verbal statement.) Cr. P.C. 1973 Sec. 172.

Taylor, Ev., ss. 1146—1451; Wharton, Ev., ss. 531, 68.

SYNOPSIS

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| 1. Principle. | with previous contradiction. |
| 2. Scope. | 8. "In writing or reduced into writing". |
| 3. "May be cross-examined". | 9. Relevant to matters in question |
| —Contradicting a witness. | 10. Previous statement must be of witness himself. |
| 3-A. "Statement", meaning of. | 11. "Opportunity to explain". |
| 4. Use of previous statement. | 12. "Attention must be called". |
| 5. Sections 145, 155 and 157—Relative scope—S. 155, if controlled by S. 145. | 13. Admissions. |
| 6. Previous statement must be inconsistent. | 14. Previous statements. |
| 7. Silence or omission if inconsistent. | 15. Depositions before committing Magistrate. |
| —Omissions in statements cannot be regarded as contradictions. | 16. First Information Report. |
| Omissions in previous statement when can be relied upon to contradict subsequent statement. | 17. Inquest Report. |
| Contradictions and omissions in F. I. R. Witness must be confronted with them. | 18. Depositions in previous trial. |
| Procedure for confronting witness | 19. Statements made to police. |
| | —Procedure for using previous statements. |
| | 20. Police diaries. |
| | 21. When document is lost or destroyed. |
| | 22. Inspection of document shown to witness. |

1. Principle. It is the furnishing of a test by which the memory and integrity of a witness can be tried. *See Note, post.*

2. Scope. This rule is in the nature of an exception to the general principle forbidding all use of the contents of a written instrument until the instrument itself be produced. The section re-enacts the provisions of Act II of 1855,²³ and is nearly the same as Sec. 24 of the Common Law Procedure Act of 1854²⁴ which altered the rule laid down in the Queen's

22. Cunningham, Ev., note to S. 144; see *The Queen's case*, (1820) 2 B. & B. 284.

23. See *R. v. Ram Chunder*, (1870) 13 W.R. Cr. 18; *Tukheva Rai v. Tupsee Koer*, (1871) 15 W.R. Cr. 23.

24. 17 & 18 Vict., c. 125, which, however, contained the following proviso, viz.

"Provided always that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection and he may thereupon make such use of it for the purposes of the trial, as he shall think fit." This proviso is, however, substantially contained in Sec. 165, post.

case,²⁵ namely, that the cross-examining party was obliged, when the statement was in writing, to show it to the witness and afterwards put it in as his own evidence; a rule which it has been remarked,¹ excluded one of the best tests by which the memory and integrity of a witness can be tried, it being clear that, if the object of the cross-examination was to test the witness's memory, this would be entirely frustrated by reading out the document to him before asking him any question about it.

Sections 138, 140, 145, 146 and 154 of this Act provide for impeaching the credit of a witness by cross-examination.² Section 155 deals generally with the impeaching of the credit of a witness and enumerates different methods of contradicting a witness. One of the methods mentioned in Sec. 155 of impeaching the credit of a witness is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. But it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing, when it is sought to be tendered in evidence for contradicting a witness, is provided in this section. In other words, Sec. 155 is controlled by it and is not independent of it.³ Section 155 (3) does not render nugatory the clear and explicit provisions of this section and in fact takes for granted the existence and binding effect of those provisions.⁴ The object of the section is to give the witness the chance of explaining or reconciling his statements before the contradiction can be used as evidence.⁵ The principle underlying this section is, that contradicting a witness by a previous inconsistent statement of his is a usual and even effective mode of discrediting him, and therefore, it has been provided that, if it is intended to contradict a witness, his attention must be drawn to that part of the previous statement by which it is intended to contradict him in order to enable him to explain the inconsistency between the statement in Court and the previous inconsistent statement. The section deals with the cross-examination of a witness and has no reference to a case where a person making the previous statement has not appeared as a witness and given evidence as such.⁶ Even an illiterate person is not immune from the process of law with regard to contradiction by a previous statement. It makes not the slightest difference whether the witness is literate or illiterate; attention can be drawn to any portion of a previous statement by reading the statement to the witness; he is not required to read it himself.⁷ If a statement is inadmissible, it cannot be put to an accused person in cross-examination.⁸ The section refers to a previous statement of a witness, be he a party or a stranger to the case, which has not already been proved on the record and which is sought to be proved for the purpose of contradicting the statement on oath of the

25. 2 B. & B. 284.

1. Taylor, Ev., s. 1447.

2. G. Hussenaiah v. B. Yerraiah, 1954 Andh. 39 : (1954) 2 M.L.J. (Andh) 39.

3. Copi Chand v. Emperor, 1930 Lah. 491 : I.L.R. 11 Lah. 460 : 126 I.C. 575 ; Mohammad Sarwar v. Emperor, 1942 Lah. 215 : 202 I.C. 340 : 44 P.L.R. 269.

4. Mahla Singh v. Emperor, 1931 Lah. 38 at 44 : 130 I.C. 410 : 52 P.L.R. 259.

5. Madari Sikdar v. Emperor, 1927 Cal. 514 : I.L.R. 54 Cal. 307 : 102 I.C. 550.

6. Firm Malik Desh Raj Faqir Chand v. Firm Piara Lal Aya Ram, 1946 Lah. 65 : 223 I.C. 579 : 47 P.L.R. 391 (F.B.) ; see also the cases cited therein.

7. Muzaffar Khan Sikandar Khan v. Emperor, 1939 Lah. 268 : I.L.R. 1939 Lah. 509 : 182 I.C. 935.

8. R. v. Treacy, (1944) 2 All E.R. 229.

witness. It has been held in the undernoted cases⁹ that it has no application to a previous statement which has already been proved on the record. Dubious statements made by a person have to be put to him before they can be used against him.¹⁰ There is no duty cast upon counsel, who wishes to cross-examine a witness by putting to him a previous statement, first to prove that statement. The section indicates that the attention of a witness may be called to the previous statement before the writing is proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statement thereafter to be proved. On the other hand, if the statement still requires to be proved that can be done later by calling the person before whom the statement was made.¹¹ A pure and simple reading of the section makes it clear that the rule laid down in it is only applicable when a witness is sought to be contradicted by his previous statement. Where, however, there is no statement in existence which could be contradicted by a previous statement, this rule does not apply and it is not necessary before it could be admissible in evidence to draw the attention of the witness to it.¹² And the rule with regard to the confrontation of the witness with his previous statement does not apply to admissions, as they are relevant facts in themselves. Nor does it apply where the witness himself has referred to some of the documents in his examination-in-chief, for, in such cases, it cannot be said that his attention was not drawn to them, and no pre-judice can be said to have been caused to him.¹³ Non-compliance with the provisions of the section is a grave irregularity and renders the previous statement inadmissible.¹⁴

In order to establish discrepancies or contradictions, it is essential according to this section that the attention of the witness must be drawn to the earlier statements said to be inconsistent with the later ones.¹⁵ Only such portions of the statement and not the whole of it can be considered for assessing the worth of his testimony in Court.¹⁶ When such passages of previous statement have not been so used to contradict the witness and his attention was not drawn to them, such passages have no relevancy at the trial.¹⁷ It is improper to put a composite question regarding several portions of previous statements of a witness, without inviting his attention to each portion.¹⁸

3. "May be cross-examined". The section says "may be cross-examined". A witness, when under examination-in-chief before the Court of Session, should not have his attention directed to his deposition before the

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| <p>9. <i>Ajodhya Prasad v. Bhawani Shanker</i>, 1957 All 1 : 1.L.R. (1956) 2 All 399 : 1957 A.L.J. 350 (F.R.) ; see also <i>Vinod Sagar v. Vishnubhai</i>, 1947 Lah. 388.</p> <p>10. <i>Irfan Hussain Khan v. Raisa Begam</i>, 1968 A.L.J. 454, following <i>Ajodhya Prasad v. Bhawani Shanker</i>, A.I.R. 1957 All 1 (F.B.).</p> <p>11. <i>Muzaffar Khan Sikandar Khan v. Emperor</i>, 1939 Lah. 268.</p> <p>12. <i>Ram Kishun v. Kausal Kishore</i>, 1958 Pat. 294 : 1957 B.L.J.R. 542.</p> <p>13. <i>Shiv Ram v. Shiv Charan Singh</i>, A.I.R. 1964 Raj. 126 : 1.L.R. 1964 Raj. 26 ; <i>Narayan v. Gopal</i>, (1960) 1 S.C.R. 778 : (1960) 2 S.C.A. 158 : 1960 S.C.J. 263 : A.I.R. 1960 S.C. 100.</p> | <p>14. <i>Ram Kishun v. Kausal Kishore</i>, 1958 Pat. 294 : <i>Emperor v. Ajit Kumar Ghosh</i>, 1945 Cal. 159 : 220 I.C. 237 ; <i>Emperor v. Ra-ul Bux</i>, 1942 Sind 122 : 1.L.R. 1942 Kar. 252.</p> <p>15. <i>Ramaswami v. Jagannadha Rao</i>, A.I.R. 1962 A.P. 94, relying on <i>Gangadhar v. Srinivasa Pandit</i>, A.I.R. 1915 P.C. 7.</p> <p>16. <i>Som Nath v. Union of India</i>, (1971) 2 S.C. Cr. R. 471 : (1971) 2 S.C. C. 387 : 1971 S.C.D. 1126 : 1971 Cr. L.J. 1422 : (1971) 3 Um. N. P. 568 : 1971 (Supp.) S.C.R. 848 : A.I.R. 1971 S.C. 1910.</p> <p>17. (1975) 2 Cr. L.T. 285 (H.P.).</p> <p>18. <i>Fateh v. State of Punjab</i>, (1972) 74 Punj. L.R. 387.</p> |
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Magistrate.¹⁹ The right to cross-examine a prosecution witness includes the right to cross-examine him as to any previous statement made by him in writing or reduced into writing and relevant to matters in question.²⁰ It is open to counsel for the accused to bring out discrepancies between the evidence of the witnesses as given in Court and the statements as made to the police with a view to throwing doubt on the credibility of their testimony.²¹

Contradicting a witness. A witness cannot be contradicted by first supposing that a certain thing must have taken place in a manner not deposed to by any witness and then to find that that was not consistent with the statement made by that witness.²² To contradict a witness, the procedure prescribed by this section must be followed. It provides, *inter alia*, that a witness can be contradicted, during his cross-examination, by his previous inconsistent statement, but, before doing so, it is essential to draw his attention to his previous writings which are said to be inconsistent. Thus, an alleged admission contained in a deposition made in a previous case by the defendant cannot be used against him unless it is put to him and an opportunity is afforded to him to explain it.²³

3-A. "Statement", meaning of. The section does not define the term 'statement', which term should not be construed narrowly. It contemplates a statement which is either written by the witness himself or reduced into writing by someone else. 'The record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the object of the section would be defeated'.²⁴ Even statements which are not recorded in full or statement under Sec. 162, Criminal Procedure Code which is recorded in the form of memorandum¹ or statement reduced into writing in the form of notes by a Court of Small Causes² falls within the ambit of the section. Thus the previous statement of a witness recorded in the form of notes by the Presiding Officer of a Court of Small Causes can be used to contradict that made by the same witness before a succeeding officer in a *de novo* trial.³ A statement recorded by a police officer under Sec. 161(3), Criminal Procedure Code, is a statement in the sense in which 'statement' is used in the section even though it is not signed. Neither Sec. 161, Criminal Procedure Code, nor the present section states that the person who records the statement must have authority to administer oath and that the statement should be on oath.⁴ State-

19. *R. v. Ram Chunder*, (1870) 13 W. R. Cr. 18.

20. *Muhammad Rahim v. Emperor*, 1935 Sind 13 : 154 I.C. 762 : 29 S.L.R. 92.

21. *Indar Singh v. Emperor*, 1943 Lah. 163 : 207 I.C. 447 : 45 P.L.R. 155; *Emperor v. Rasulbux*, 1942 Sind 122: I.L.R. 1942 Kar. 252.

22. *R. K. Dalmia v. Delhi Administration*, A.I.R. 1962 S.C. 1821.

23. *Charandasi v. Kanai Lal*, A.I.R. 1955 C. 206 : 58 C.W.N. 980; *Ram Pratap Kamalia Mills v. State*, A. I.R. 1963 Pat. 153.

24. *Tahsildar Singh v. State of U. P.*, (1959) Supp. (2) S.C.R. 875 : (1960) 1 S.C.A. 201 : 1959 S.C.J. 1042 : (1959) 2 Andh. W.R. (S.C.) 201 : 1959 A.W.R. (H.C.) 522 :

1959 Cr. L.J. 1231 : 1959 M.L.J. (Cr.) 759 : (1959) 2 M.L.J. (S. C.) 201 : A.I.R. 1959 S.C. 1012 (1025).

25. *Emperor v. Najibuddin*, A.I.R. 1933 Pat. 589.

1. *Emperor v. Aji Kumar Ghosh*, A. I.R. 1945 Cal. 159.

2. *President, Sishu Vihar Bhabini Mandal v. Yellaiah*, (1970) 1 Andh. W. R. 90 (92) : A.I.R. 1969 A.P. 148 (149).

3. *President, Sishu Vihar Bhabini Mandal v. Yellaiah*, (1970) 1 Andh. W. R. 90 : A.I.R. 1969 A.P. 148.

4. *Bhogilal Chunnilal Pandya v. State of Bombay*, A.I.R. 1959 S.C. 356 ; *K.P. Chogi v. Kocharakka*, 1969 K. L.T. 960 : 1969 K.L.J. 665.

ment of a prosecution witness recorded by a doctor as dying declaration,⁵ or statement of witness recorded under Section 512 of Criminal Procedure Code, 1898 (now Sec. 299 of Cr. P. C. 1973),⁶ or the statement of witness recorded by a Court whereafter a *de novo* trial is ordered,⁷ or statement of a witness taken on commission⁸ is previous statement within the meaning of this section. A doctor can be contradicted in cross-examination by his earlier medical report.⁹

4. Use of previous statement. A statement that is used under this section to contradict a witness is not to be used as positive evidence of the facts contained in it. Its only purpose is to prove that the contrary statement made by the witness in the Court is not reliable. The law in this section does not say that the previous statement will be accepted as the true statement.¹⁰ As their Lordships of the Privy Council observed in a case: "A statement under Sec. 164, Criminal Procedure Code can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under Sec. 164, Criminal Procedure Code, is true."¹¹ Even if the procedure under this section has been followed, the previous statement, unless relevant under Chapter II of this Act is not substantive evidence and is admissible only for the purpose of impeaching the credit of the witness.¹² As the Supreme Court put it, a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness.¹³ Thus, a previous letter written by a witness is not evidence of the facts therein stated.¹⁴ In a civil suit the previous statement of a witness in a Criminal Court cannot be used as

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5. *R. Singh v. State*, 1971 Cr. L.J. 1225 (All).
 6. I.L.R. (1974) 1 Delhi 277.
 7. *Brahma Naik v. Ram Kumar Agarwal*, 39 Cut. L.T. 934 : (1973) 2 Cut. W.R. 1542 : 1974 Cr. L.J. 567.
 8. *Abdul v. Rafiqan*, (1972) 1 Cut. W. R. 699 : A.I.R. 1972 Orissa 213.
 9. *State of Rajasthan v. Mathura Lal*, 1971 Cr. L.J. 1816.
 10. *Rameshwar Prasad Singh v. Rex*, 1951 A.L.J. 149 at 150 ; *Melappa v. Guramma*, 1956 Bom. 129 ; *Emperor v. Rahimuddin Mondal*, 1944 Cal. 323 : I.L.R. (1943) 2 Cal. 381 ; *Sansar Ali v. Emperor*, 1947 Cal. 342 : 222 I.C. 421 : 50 C.W. N. 206 ; *Das Mal v. Sundar Singh*, 1937 Lah. 480 ; *Nur Muhammad v. Emperor*, 1941 Sind 38 : I.L.R. 1944 Kar. 86 : 211 I.C. 403 : 45 Cr. L. J. 393 ; *Bishen Datt v. King Emperor*, 1927 All 705 : 105 I.C. 677 : 28 Cr. L.J. 965 : 25 A.L.J. 994 ; *Niamat Khan v. Emperor*, A.I.R. 1930 Lah. 409 : 127 F.C. 850 : 31 P.L.R. 411 ; *Ram Karan v. King-Emperor*, A.I.R. 1925 Lah. 483 : 92 I.C. 577 : 7 L.L.J. 371 : 26 P.L.R. 659 ; *Sanika Munda v. Emperor*, 1935 Pat. 19 : 152 I.C. 832 : 36 Cr. L.J. 195 ; *Emperor v. Ibrahim*, 1928 Lah. 17 : I.L.R. 8 Lah. 605 : 105 I.C. 807 : 28 Cr. L.J. 983 ; *Ponnuswami Goundan v. Kalyana Sundara Ayyar*, 1930 Mad. 770 : 125 I.C. 231 ; *Deorao v. Emperor*, 1946 Nag. 321 : I.L.R. 1946 Nag. 946 : 226 I.C. 377 : 47 Cr. L.J. 918 : 1946 N.L.J. 656.
 11. *Brij Bhusan Singh v. Emperor*, 1946 P.C. 38 : 73 I.A. 1 : I.L.R. 21 Luck. 176 : 222 I.C. 529 : 47 Cr. L.J. 336.
 12. *Baga Bharti v. Sarkar*, 1950 Raj. 10 : 51 Cr. L.J. 844.
 13. *Bharat Singh v. Bhagirathi*, (1966) 1 S.C.R. 606 : 1966 S.C.D. 153 : (1966) 2 S.C.J. 55 : (1966) 1 S.C. W.R. 74 : A.I.R. 1966 S.C. 405 ; *Makhea Kumbhar v. Jagu Kumbhar*, 1966 C.L.T. 1041 (1044) ; *Kanu Ambu Vish v. State of Maharashtra*, 1971 Cr. A.P.R. 181 (S.C.) : (1971) 1 S.C.C. 503 : (1971) Cr. L.J. 1547 : A.I.R. 1971 S.C. 2256 ; *B. B. Mohanty v. K. Das*, 39 Cut. L.T. 589 : (1973) 1 Cut. W.R. 351 : 1973 Ren. Cas. 375.
 14. *Judah v. Isolyne Shrojbhagini Bose*, 1945 P.Q. 174 : 221 I.C. 587.

substantive evidence.¹⁵ Previous statements, not otherwise admissible, may be used to contradict the witness under this section.¹⁶ Thus, the post-mortem report of a doctor, being his previous statement based on his examination of the dead body, can be used to contradict his statement in the witness-box under this section.¹⁷ And a confession made to an Excise Officer, though inadmissible as a piece of substantive evidence, may be used for the purpose of impeaching the credit of the confession when he is examined as witness in Court.¹⁸ So also, a statement of a prosecution witness before Commission, under the Commission of Enquiry Act (1952), can be used, as an earlier statement, to contradict a later statement in a criminal trial under the provisions of this section.¹⁹ But, before contradicting, the previous statement must be shown to have been made voluntarily.²⁰

It is unfortunate that the Indian Law does not admit of cross-examination of a defence witness in respect of his previous statement to the police under Sec. 162, Criminal Procedure Code.²¹

When a person is not examined as a witness in the case, his previous statement to the police in the course of an investigation in a case not against that witness, cannot be used either to contradict his evidence or corroborate it even if it is to be held that it is a statement coming under Sec. 154(1), Criminal Procedure Code (Code of 1973).²²

That which sets aside the credit of the witness and overthrows his testimony is "the repugnancy of his evidence...il what he says be contradictory, that removes him from all credit; for things totally opposite cannot receive belief from the attestation of any man."²³ Since it is "the repugnancy of his evidence" that discredits him, obviously the prior self-contradiction is not used assertively, *i.e.*, we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions by other witnesses). We simply set the

15. *G. M. Roadways Co. v. F. G. Industries Ltd.*, 76 Cal. W.N. 17 : 1972 A.C.J. 362 : A.I.R. 1971 Cal. 494.

16. See *Fazlur Rahman v. King Emperor*, 1927 Pat. 315 : I.L.R. 6 Pat. 478; 104 I.C. 100 : 28 Cr. L.J. 772 ; *Mt Choke v. Emperor*, 1933 Rang 119 : 144 I.C. 369 : 34 Cr. L.J. 781 ; *Nisar Ali Khan v. Muhammad Ali Khan*, 1929 Oudh 494 : 119 I. C. 337 : 6 O.W.N. 549 ; *Shiam Sunder v. King-Emperor*, 1923 All 469 : 76 I.C. 572 : 25 Cr. L.J. 204; *Malya Goundan v. The Crown*, 1922 Mad. 303 : 66 I.C. 326 : 23 Cr. L.J. 262 : 42 M.L.J. 278 ; *Emperor v. Pranshankar*, 1950 Bom. 14 : I.L.R. 1949 Bom. 581 : 51 Cr. L. J. 233 : 51 Bom. L.R. 671.

17. *Hadi Kirsani v. State*, A.I.R. 1966 Orissa 21 : I.L.R. 1965 Cut. 403 : 31 Cut. L.T. 823.

18. *Keriah v. Emperor*, A.I.R. 1934 Cal. 616 : I.L.R. 61 Cal. 967 : 150 I.C. 980 : 35 Cr. L.J. 1178 : 38 C.W.N. 1005.

19. *Sohanlal v. State*, I.L.R. 1964 B.

679 : A.I.R. 1965 B. 1 : 66 Bom. L.R. 353.

20. *Nayeb Shahana v. Emperor*, 1934 Cal. 636 : I.L.R. 61 Cal. 399 : 152 I.C. 44 : 35 Cr. L.J. 1479 : 38 C. W.N. 659.

21. *Laxman Kalunikaljee v. State of Maharashtra*, (1968) 3 S.C.R. 684; 1969 S.C.D. 364 : (1968) 2 S.C.J. 930 : (1968) 2 S.C.W.R. 557 : (1968) 2 Um N.P. 413 : 71 Bom. L.R. 244 : 1968 Cr. L.J. 1647 : 1969 M.L.J. (Cr.) 3 : 1969 Mah. L.J. 592 : A.I.R. 1968 S.C. 1390 (1992).

22. *Mohar Rai v. The State of Bihar*, (1968) 3 S.C.R. 525 : 1968 S.C.D. 584 : (1969) 1 S.C.J. 1 : I.L.R. 47 Pat. 693 : 1968 A.L.J. 1024 : 1968 Cr. L.J. 1479 : 1969 B.L.J.R. 35 : 1969 M.L.J. (Cr.) 31 : 1968 M.L.W. (Cr.) 200 : (1968) 2 Um N.P. 176 : A.I.R. 1968 S.C. 1281 (1286) relying on *Nisar Ali v. State of U. P.*, A.I.R. 1957 S.C. 366.

23. Chief Baron Gilbert, *Ev.*, ss. 147, 150.

two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other,—but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one. In short, prior statement is not primarily hearsay, because it is not offered assertively, *i.e.*, not testimonially.²⁴ Prof. Wigmore is of opinion that "it does not follow that prior self-contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal, because the only ground for doing so would be the hearsay rule," ... but here, "by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied. Hence, there is nothing to prevent the tribunal from giving such testimonial credit to the extra-judicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of court-rooms is in accord." But he admits that "the contrary view, however, is the orthodox one. It is universally maintained by the Courts that prior self-contradictions are not to be treated as having any substantive or independent testimonial value."²⁵

5. Sections 145, 155 and 157—Relative scope—Sec. 155, if controlled by Sec. 145. Section 155, Evidence Act, lays down that the credit of a witness may be impeached, *inter alia*, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted, but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing, when it is sought to be tendered in evidence for contradicting a witness, is provided in this section. Section 155 is controlled by this section and is not independent of it.¹ It would follow that so far as the Madras High Court is concerned, it does not appear that there was any other procedure.

The High Courts are unanimous on the point that, if it is intended to contradict a witness by the writing, his attention must, before the writing could be proved, be called to those parts which are to be used for the purpose of contradicting him. The proper procedure would, therefore, be to ask a witness first, whether he made such and such statement before the police officer. If the witness answers in the affirmative, the previous statement in writing need not be proved and the cross-examiner may, if he so chooses, leave it to the party who called the witness to have the discrepancy, if any, explained in course of re-examination. If on the other hand, the witness denies having made the previous statement attributed to him, or states he does not remember having made any such statement, and it is desired to contradict him by the record of the previous statement, the cross-examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contradictory to his statement in Court, or give him an opportunity to reconcile the same if he can. The best way of putting a statement is to put it in the actual words in which it stands recorded within quotation marks.²

6. Previous statement must be inconsistent. To contradict a witness by a previous statement of his, the previous statement must be inconsistent

24. Wigmore, *Ev.*, s. 1018.

25. Wigmore, *Ev.*, s. 1018.

1. *Mahla Singh v. Emperor*, 32 P.L.R. 259 : 130 I.C. 410 : 1931 Lab. 22

at 44.

2. *Sarabhai Rao*, in *re*, (1958) 2 Andh. W.R. 627 : 1958 M.L.J. (Cr.) 942 (case-law referred to).

with the statement in the witness-box. In the present mode of impeachment, there must, of course, be a real inconsistency between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement, because the witness has also made another statement which cannot at the same time be true. Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required.

Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But, it must appear *prima facie* before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done.³ Where, however, there is no statement in existence which could be contradicted by previous statement, this rule does not apply, and it is not necessary before it could be admissible in evidence to draw the attention of the witness to it.⁴

7. Silence or omission, if inconsistent. It is true that the Courts in India have been reluctant to act on the maxim *falsus in uno falsus in omnibus*; yet the disregard of the maxim cannot be pushed too far. The whole statement should be scrutinised and, if found unsatisfactory, it must be rejected.⁵ In a Madras case, Burn, J., observed: "Whether it is considered as a question of logic or of language, 'omission' and 'contradiction' can never be identical. If a proposition is stated, any contradictory proposition must be statement of some kind, whether positive or negative. To 'contradict' means to 'speak against' or in one word to 'gainsay'. It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but is not 'diction', and therefore it cannot be 'contradiction'."⁶ But this extreme view has not been subscribed to by other authorities. As Prof. Wigmore has pointed out, a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence. There may be explanations, indicating that the person had in truth no belief of that tenor, but the conduct is *prima facie* an inconsistency.⁷ Whether silence or omission amounts to an inconsistency depends upon the individual circumstances of each case. It must be left to the Court, in each particular case, to decide whether the omission proved amounts to a contradiction or not. Obviously, there may be omissions in the previous statement which make it inconsistent with and henceforth contradictory to the evidence given by the witness in Court.⁸ The test is, would it have been natural for the person to make the assertion in question.⁹ An omission from the record in a case diary of a statement is only of value, if it is of such importance that the witness would almost certainly have made it and the police officer would almost certainly have recorded it, had it been made.¹⁰ Where, in a murder case, a witness stated at the

3. Wigmore, Ev., s. 1040.

4. Ram Kishun v. Kausal Kishore, 1958 Pat. 294 : 1957 B.L.J.R. 542.

5. State of Madhya Pradesh v. Banshi-lal Bihari, 1958 Madh. Pra. 13 : 1957 M.P.C. 600 : 1957 M.P.L.J. 852.

6. Ponnusami Chetty v. Emperor, 1933 Mad. 372 (2) : 1 L.R. 56 Mad. 475 : 143 I.C. 424 : 34 Cr. L.J. 582 : 64 M.L.J. 519.

7. Wigmore, Ev., s. 1042.

8. Hazara Singh v. Emperor, 1928 Lah. 257 : 1 L.R. 9 Lah. 389 : 108 I.C. 167 : 29 Cr. L.J. 348 ; Mohinder Singh v. Emperor, 1932 Lah. 103 : 135 I.C. 209 : 33 Cr. L.J. 97 : 33 P.L.R. 891.

9. Wigmore Ev., s. 1042.

10. In re Guruvu Vannan, 1944 Mad. 385 : 1 L.R. 1944 Mad. 897 : (1944) 1 M.L.J. 253 : 57 L.W. 171 : 1944 M.W.N. 213.

trial that he saw the accused passing through the village on the evening of the day of occurrence but he admitted he did not make the statement to the Police, and the Police Sub-Inspector contradicted him, it was held that such a contradiction could be proved.¹¹

Omissions in statements cannot be regarded as contradictions. Strictly, an omission cannot be regarded as a contradiction, because there is no diction in the case of an omission. On the other hand, an omission implies absence of diction. Where there is a mere omission from the statements made by prosecution witnesses to the police during investigation, Sec. 162 of the Code of Criminal Procedure can be resorted to, which permits a limited use of a statement made to the police and what is permitted to be used is a portion of that statement which is found to be contradictory to the evidence given in the Court. Section 162 thus only permits the statement made to the police officer to be used for that limited purpose, and not the statements not made during the police investigation. An omission cannot be proved as a contradiction, because this section which deals with the procedure to prove a contradiction, deals with statements in writing, and requires the portion of the writing which is sought to be used for contradiction to be brought to the notice of the witness and the witness being questioned about it. Therefore, an omission in a previous statement cannot be used for the purpose of contradiction under this section. So, where a matter is not found in a police statement under Sec. 162, Criminal Procedure Code, it cannot be used under that section, nor can it be proved under this section. But this does not mean that a serious and glaring omission cannot be relied on. It may not be relied on as a contradiction as such, but it may be relied on as a relevant circumstance.¹²

Omission in previous statement when can be relied upon to contradict subsequent statement. In *Tahsildar Singh v. State of U. P.*¹³ the Supreme Court laid down the following test for ascertaining under what circumstances an alleged omission can be relied upon to contradict the positive evidence in Court. Their Lordships observed that, though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; such a fiction is permissible by construction only in the following cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement, (ii) a negative aspect of a positive recital is found in a statement; and (iii) and when the previous statement and that before the Court cannot stand together. So, where the witnesses in their statements before the police attributed a clear intention to the accused to commit murder, but before the Court they stated that the accused was insane and, therefore, he committed the murder, it was held that, in the circumstances, it was necessarily implied in the previous statement of the witnesses that the accused was not insane at the time he committed the murder; and, in this view, the previous statement of the witnesses before the police could be used to contradict their version in

11. *Iltaf Khan v. Emperor*, 1926 Pat. 362 : I.L.R. 5 Pat. 346 : 95 I.C. 396 : 27 Cr. L.J. 796 : 7 P.L.T. 634 : see also *King-Emperor v. Vithu Balukharat*, 1924 Bom. 510 : 83 I.C. 1007 : 26 Cr. L.J. 223 : 26 Bom. I.R. 965 : *Nanak v. Emperor*, 1931 Lah. 189 : 134 I.C. 583 : 32 Cr. L.J. 1205.

12. *State v. Md. Mir Ali*, A.I.R. 1963

Assam 151.

13. 1959 (Supp) 2 S.C.R. 875, 903 : A.I.R. 1959 S.C. 1012, 1026 : (1960) 1 S.C.A. 201 : 1959 S.C.J. 1042 (1959) 2 Andh. W.R. (S.C.) 201 1959 A.W.R. (H.C.) 522 : 1959 M.L.J. (Cr.) 759 : (1959) 2 M.L.J. (S.C.) 201 : 1959 Cr. L.J. 1231.

the Court.¹⁴ Every omission is not a contradiction but a material omission may amount to a contradiction.¹⁵ Where the witness in his statement before the police did not mention that he saw certain accused with the aid of light from a fire, it is at best an omission and is not available in law to be used as substantive pieces of evidence to belie his positive statement made at the trial.¹⁶

Attention may be drawn to the Explanation to Section 162 of the Criminal Procedure Code, 1973, which clears the doubt on the question whether an omission in a statement recorded by the police would amount to a contradiction. By the aforesaid Explanation such an omission 'may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact'.

Contradictions and omissions in F. I. R. Witness must be confronted with them. In the case of a first information report, if any contradictions or omissions are to be relied upon by the defence, the person whose statement is recorded as a first information report must be confronted in the course of the cross-examination with the contradictions; if that is not done, it cannot be said that the contradiction and the omissions in the statement have been properly proved. It would be the duty of the defence counsel whether a statement has been recorded as a first information report or is treated as a statement recorded in the course of the investigation contemplated under Sec. 162, Criminal Procedure Code (same section in 1973 Code), to confront the witness concerned with the omissions or contradictions from the statement.¹⁷ The first information report is not a substantial piece of evidence. It is an information of a cognizable offence under Sec. 154, Criminal Procedure Code [now Sec. 154(1) of the Code of 1973] and if there is any statement made therein it can be used only for the purpose of contradicting and discrediting a witness under the present section.¹⁸ It cannot be used to contradict witnesses other than the maker.¹⁹

Procedure for confronting witness with previous contradiction. The procedure for contradicting a witness by his previous statement made during investigation is that, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it

14. *Dahyabhai v. State*, A.I.R. 1964 S. C. 1563 : (1964) 1 S.C.W.R. 831 : (1964) 2 Cr. L.J. 472 : 1965 A.W. R. (S.C.) 740 : (1965) 2 S.C.J. 531 : (1964) 7 S.C.R. 361 : 1965 S.C.D. 44 : 1965 M.L.J. (Cr.) 773.

15. *Tahsildar Singh v. State of U. P.*, 1959 Cr. L.J. 1231 : A.I.R. 1959 S.C. 1012 : *Dandapani Samanta Rai v. Duryodhan Pradhan*, 1968 Cr. L. J. 1190 : A.I.R. 1968 Orissa 167 (168) (prosecution witness implicating in court certain accused in an assault but not naming him before the police—Clear contradiction) : *State v. Hadibandhu Mate*, (1973) 39 Cut. L.T. 619 : I.L.R. 1973 Cut. 601 : 1973 Cut. L.R. (Cr.)

241 : *Chaman Lal v. State*, 1976 Cr. L.J. 1310 (J. & K.).

16. *State v. Chaitu Kisan*, 1966 Cut. L. T. 695 (706) : see *Tahsildar Singh v. State of U. P.*, A.I.R. 1959 S. C. 1012.

17. *Mehr Vajsi Deva v. State*, I.L.R. 1964 Guj. 799 : A.I.R. 1965 Guj. 143.

18. *Nanhku Singh v. State of Bihar*, (1972) 1 S.C.W.R. 926 (931) : 1972 S.C.D. 793 : 1972 S.C. Cr. R. 400 : 1972 Cr. A.R. 234 : *Lanka Koteswara Rao v. State* 38 Cut. L.T. 971 (973) : 1968 All Cr. R. 8.

19. *Banamati Sahu v. State*, 1968 Cut. L.T. 126 (130).

which are to be used for the purpose of contradicting him. The proviso to Sec. 162, Criminal Procedure Code (same section in 1973 Code), only enables the accused to make use of such statement to contradict a witness in the manner provided by the present section. It would be doing violence to the language of the proviso if the said statement be allowed for the purpose of cross-examining a witness within the meaning of the first part of the section. The second part of the section cannot be invoked without putting relevant questions under the first part thereof.²⁰ Statement of a witness in Panchnama can only be used for contradicting his testimony in Court, and that too, by inviting his attention to that portion which is said to be contradictory to his statement in Court.²¹ A Public Prosecutor cannot, without going through the process of treating his own witness hostile, use the statement of a witness, made before the police in the course of investigation, at the trial.²² Reading this section and Sec. 162, Criminal Procedure Code (same section in 1973 Code), it is clear that the statement made by a witness in the course of investigation if duly proved may be used to contradict that witness and if it is intended to contradict the witness under this section, he should be confronted with the concerned portions of the writing.²³ As observed by the Supreme Court in *Bhagwan Singh v. The State of Punjab*,²⁴ compliance with these provisions must be in substance and not merely in form.²⁵ Where a witness is cross-examined and asked whether he made a previous statement and the witness denies it, the witness must be confronted with that statement. Resort to this section can only be necessary, if the witness denies that he made the former statement. In that event, his attention must be drawn to those parts which are to be used for contradiction. But this position does not arise when the witness admits the previous statement.¹

8. "In writing or reduced into writing". The section only relates to previous statements made in, or reduced into, writing. But the section does not lay down that the writing which is to be used for the purposes of cross-examination must be by a person having jurisdiction to reduce the statement to writing. Therefore, even statements recorded by a Magistrate, having no jurisdiction may be used under this section for the purpose of cross-examination.² The expression "writing", appearing in the section, refers to the tangible object that appeals to the sense of sight and that which is susceptible of being reproduced by printing, lithography, photography, etc. It is not wide enough to include a statement appearing on a tape which can be reproduced through

20. *Tahsildar Singh v. State of U. P.*, 1959 (Supp.) 2 S.C.R. 875 : (1960) 1 S.C.A. 201 : 1959 S.C.J. 1042 : (1959) 2 Andh. W.R. (S.C.) 201 : 1959 A.W.R. (H.C.) 522 : 1959 M.L.J. (Cr.) 759 : (1959) 2 M.L.J. (S.C.) 201 : A.I.R. 1959 S.C. 1012.
21. *Kanu Ambu Vish v. State of Maharashtra*, 1971 Cr. A.P.R. 181 (S.C.) : (1971) 1 S.C.C. 503 : 1971 Cr. L.J. 1547 : A.I.R. 1971 S.C. 2256 : I.L.R. (1974) Him. Pra. 509.
22. *G. Venkatayya v. State of A. P.*, (1968) 1 Andh. L.T. 249 (253, 254).

- State of Kerala, I.L.R. (1970) 2 Ker. 175 : 1970 M.L.J. (Cr.) 661 : 1970 K.L.R. 610, (615, 617) : 1971 K.L.T. 326 (330, 331).
24. A.I.R. 1952 S.C. 214.
25. *Velayudhan Pillai Krishnan Nair v. State of Kerala*, *supra* ; *Muthia Nadar*, In re 1971 M.L.J. (Cr.) 474 : (1971) 2 M.L.J. 114 (117) (On facts compliance substantial).
1. In re *Saibanna*, A.I.R. 1966 Mys. 248 ; *Tahsildar Singh v. State of U.P.*, A.I.R. 1959 S.C. 1012, *supra*.
2. *Ram Kishun Sao v. Emperor*, 1946 Pat. 82 : I.L.R. 24 Pat. 623 : 224 I.C. 23 : 47 Cr. L.J. 560 : 12 B.

the mechanism of tape-recorder.³ If, however, the previous statement has been verbal and not reduced to writing, it may also be proved to impeach the witness's credit, if such former statement be inconsistent with any part of the witness's evidence which is liable to be contradicted.⁴ The Act makes no express provision to the effect that the witness's attention must first be drawn to the previous verbal statement and the witness asked whether he made such a statement before his credit can be impeached by independent evidence; but there can be little doubt that here also circumstances of such previous statement, sufficient to designate the particular occasion, ought to be mentioned to the witness and he ought to be asked whether or not he made such a statement.⁵ The Section indicates the manner in which contradiction is brought about. The cross-examining counsel should put a part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another made in evidence. If the previous statement and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.⁶

It is a legitimate right of accused persons to defend themselves by proving that the prosecution witnesses had made different statements on previous occasions which were reduced into writing. The accused can make a grievance of it only if the prosecution, though in possession of the statements, does not make them available to the accused. If, on the other hand, the statements are in possession of a third party as in the instant case, it is for the accused to summon them from that person and no blame can be attached to the prosecution.⁷

9. Relevant to matters in question. This is to say, relevant under Chapter II of this Act. It cannot be said that "where the assertion desired to be contradicted had been made on the direct examination—i.e., had been 'volunteered', as the phrase went,—the witness had himself only to blame, if he was not prepared to support every statement thus volunteered; in short, that all assertions made on the direct examination could be contradicted and shown erroneous."⁸ There is nothing in the Act to show that a document, which is meant to contradict a witness or impeach his credit, must come from the custody of the person to whom it was addressed.⁹

10. Previous statement must be of witness himself. The previous statements must be really those of the witness. So, where A was employed by B to write up B's account-books, B furnishing him with the necessary information either orally or from loose memoranda, it was held that the entries so made could not be given in evidence to contradict A, as previous statements made by him in writing, the statements being really made not by A but by B,

3. *Rup Chand v. Mahabir Parshad*, 1956 *Punj.* 173 : *I.L.R.* 1956 *Punj.* 1551 : 58 *P.L.R.* 441 [as to tape-recordings, see *Paras Singh v. State of Punjab*, *A.I.R.* 1964 *S.C.* 72; *Sri Rama Reddy v. V. V. Giri*, 1970 *S.C.* 2097].

4. *S.* 155, cl. (3), post.

5. See *Taylor, Ev.*, §. 1451, and *Carpenter v. Wall*, (1840) 3 *P. & D.* 457, where *Parsons, J.*, said, "I like the broad rule that when you mean to give evidence of a witness's decla-

ration, for any purpose, you shall ask him whether he ever used such expression."

6. *Tahsildar Singh v. State of U. P.*, 1959 *S.C.J.* 1042 : *A.I.R.* 1959 *S.C.* 1012.

7. *Manilal Sahu v. State*, 35 *Cut. L.T.* 35 : 1969 *Cr. L.J.* 990 : *A.I.R.* 1969 *Orissa* 175 (178).

8. See *Wignore, Ev.*, §. 1007.

9. *Emperor v. Rajaram*, 1934 *Nag.* 36 : 148 *I.C.* 83 : 34 *Cr. L.J.* 1162 : 16 *N.L.J.* 196.

under whose instructions A had written them.¹⁰ To hold that the witness may be contradicted by previous inconsistent statements, not of himself but of a third party, would be against principle and opposed to this section.¹¹

Previous statements of a party can be used only to contradict him, not to contradict the witnesses whom he has called in his defence.¹² A first information report can be properly used only to corroborate or contradict the maker thereof. It cannot be used to contradict another witness.¹³ Where statements of two or more witnesses are recorded together in the Police Diary in such a way that it cannot be ascertained how much of the joint statement is the individual statement of any particular witness, the statement cannot be used to contradict any of the witnesses.¹⁴

11. "Opportunity to explain". It is an elementary rule of evidence that, if former statements made by a witness are to be used for the purpose of contradiction, he must be confronted with those statements and be given an opportunity of explaining any apparent discrepancies. It is also a rule of evidence that only those portions of the statements with which he has been confronted should be proved or relied upon for the purposes of contradiction.¹⁵ As their Lordships of the Privy Council observed in a case: "On general principles it would appear to be sound that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule, and where a witness's reputation and character are at stake, the duty of enforcing this rule would appear to be singularly clear."¹⁶ "A court is precluded, both on general principles and by the Indian Evidence Act, 1872, Section 145, from treating the oral testimony of a witness as rebutted by statements by him contained in documents in evidence, unless these statements have been put to the witness in cross-examination."¹⁷ When a previous statement made to the police is not put to the party making it and the party

10. *Munchershaw Bezouji v. The New Dhurumsey S.W. Co.*, (1880) 4 B. 576.

11. *B. Bhayamma v. B. Ramamma*, 1924 Mad. 587 : 78 I.C. 176 : 19 L.W. 205 : 1924 M.W.N. 270 : 34 M.L.T. 355.

12. *Basdevanand v. Shantanand*, 1942 All. 302 : 202 I.C. 458 : 1942 A.L.J. 561 : 1942 A.W.R. (H.C.) 205.

13. *Dharam Singh v. Emperor*, 1928 Lah. 507 : 108 I.C. 162 : 29 Cr. L.J. 343 ; *Emperor v. Raheemuddin Mondal*, 1944 Cal. 323 : I.L.R. (1943) 2 Cal. 381.

14. *Emperor v. Salik*, 1937 Oudh 201 : 166 I.C. 259 : 38 Cr. L.J. 165 ; 1936 O.L.R. 734 : 1937 O.W.N. 63 ; *Emperor v. Karimuddin Sheikh*, 1932 Cal. 375 : 139 I.C. 245 : 33 Cr. L.J. 725 : 36 C.W.N. 106 ; *Emperor v. Ajit Kumar Ghosh*, 1945 Cal. 159 : 220 I.C. 237 : 46 Cr. L.J. 692 : 78 C.L.J. 217.

15. *Government Advocate, N. W. F. P. v. Muqaddar Shah*, 1935 Pesh 148 :

158 I.C. 974 ; *Nathu Singh v. Is-har Dayal*, 1933 Pat. 702 ; *Rani Amrit Kunwar v. Gurcharan Singh*, 1934 All 226 : 147 I.C. 591 : 3 A.W.R. 11 ; *Raghuraj Singh v. Emperor*, 1934 All 956 : 152 I.C. 873 : 36 Cr. L.J. 188 : 4 A.W.R. 1 ; *Birey Singh v. State*, 1953 All 785 : 54 Cr. L.J. 1817.

16. *Bal Gangadhar Tilak v. Shrinivas*, 1915 P.C. 7 : 42 I.A. 135 : I.L.R. 39 Bom. 441 : 29 I.C. 639 : 13 A.L.J. 570 (P.C.) ; see also *Valubai v. Govind Kashi Nath*, I.L.R. 24 Bom. 218 : 1 Bom. L.R. 770 ; *Tara Singh v. State*, 1951 S.C. 441 : 1951 S.C.J. 518 : 1951 S.C.R. 729 : 52 Cr. L.J. 1491 : 1951 A.L.J. 640 : (1951) 2 M.L.J. 291 : 64 L.W. 996 : 1951 M.W.N. 757 ; *Hajce Sheikh Ali v. Mohammad Yusuf*, 1962 Orissa 111.

17. *Bal Gangadhar Tilak v. Shrinivas*, *supra* ; *Bai Nanda v. Patel Shiva-bhai Shankerbhai*, I.L.R. 1966 Guj. 500 : (1966) 7 Guj. L.R. 662 (674).

making it is not cross-examined under the present section, the said previous statement cannot be used to contradict the party making it.¹⁸

If the complainant when examined in court is not confronted with his previous inconsistent statement in the complaint petition as required by the section in order to give him an opportunity to explain the discrepancies or inconsistencies and to clear up the particular point of ambiguity, the defence is not entitled to take advantage of the inconsistency.¹⁹

12. "Attention must be called". The section does not say that the writing must be shown before the cross-examination, but that, if it is intended to put in such writing to contradict a witness, his attention must be called to those parts which are to be used for the purpose of so contradicting him. That is, not that he is to be allowed to study his former statement and frame his answers accordingly, but that, if his answers have differed from his previous statements reduced in writing, and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statements, if he can do so; and, if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence.²⁰ When a witness, who has filed a rent receipt in the course of his examination, is not cross-examined with respect to it, it is not admissible in view of the provisions of Section 145.²¹ In such a case, the witness should have been recalled for cross-examination with respect to the receipt under Order XVIII, Rule 17, Civil Procedure Code.²² A previous statement in writing cannot be used to contradict a witness unless that witness has had an opportunity of dealing with the statement and explaining it away, if possible.²³ The Supreme Court has set out what is substantial compliance

18. *Bai Nanda v. Patel Shivabhai Shankerbhai*, I.L.R. 1966 Guj. 500 : (1966) 7 Guj. L.R. 662 (574).

19. *Narasingo Maharana v. Chaitanya Sabu*, 1969 Cr. L.J. 432 : A.I.R. 1969 Orissa 59 (60).

20. *Tukheya Rai v. Tupsee Koer*, (1811) 15 W.R. Cr. 23, 24 ; *Krishnamachariar v. Krishnamachariar*, 1915 Mad. 815 : I.L.R. 38 Mad. 166 : 19 I.C. 452 : 24 M.L.J. 517 ; *Ramakka v. Nagesam*, 1925 Mad. 145 : I.L.R. 47 Mad. 800 : 92 I.C. 133 : 48 M.L.J. 89 ; *Amrit Kunwar v. Gurcharan Singh*, 1934 All. 226 : 147 I.C. 691 : 3 A.W.R. 11 ; *Thomas James Henry Arup v. Kedar Nath Ghosh*, 1925 Cal. 1017 : 91 I.C. 801 : 27 Cr. L.J. 129 ; *Rajarajeswara Sethu Pathi v. Kupamudal*, 1931 Mad. 206 : 131 I.C. 121 : 1930 M.W.N. 1235 ; *Tara Singh v. State*, 1951 S.C. 441 : 52 Cr. L.J. 491 : 1951 M.W.N. 757, *Gundadhar Das v. State*, 1952 Cal. 618 : 53 Cal. L.J. 1343 ; *Emperor v. Rahenuddin Mondal*, 1944 Cal. 323 : I.L.R. (1943) 2 C. 381 ; *Nathu Singh v. Ishar Dayal*, 1933 Pat. 702 ; *Emperor v. Ibrahim*, 1928 Lah. 17 : I.L.R. 8 Lah. 605 : 105 I.C. 807 : 28 Cr. L.J. 983 ; *Emperor v. Ajit Kumar Ghosh*, 1945 C. 159 : 220

I.C. 237 : 46 Cr. L.J. 692 : 78 C. L.J. 217 ; *Naba Kumar Das v. Rudra Narayan Jana*, 5 L.R. (P.C.) 25 : 28 C.W.N. 589 : 77 I.C. 141 : 45 M.L.J. 438 : 1923 M.W.N. 734 : A.I.R. 1923 P.C. 95 ; *Thanubuddi Venkatappa Reddi v. Copavarapu Brahmayya*, 1953 Mad. 1000 : (1952) 2 M.L.J. 448 : 1952 M.W.N. 692 ; *Saradamba v. Pattabhiramayya* 1931 Mad. 207 : I.L.R. 53 Mad. 952 : 129 I.C. 463 : 33 L.W. 20 ; *Birey Singh v. State*, 1953 All. 785 : 54 Cr. L.J. 1817.

21. See *Naba Kumar Das v. Rudra Narayan Jana*, A.I.R. 1923 P.C. 95 and *Awadh Behari Sharma v. State of M. P.*, A.I.R. 1956 S.C. 738.

22. *Kulumennisa v. Ahmadi Begum*, A.I.R. 1972 All. 219 (228) ; *Madhubhai Amthalal v. Amthalal Nandlal*, A.I.R. 1947 Bom. 156.

23. *Bijoy Chand Patra v. State*, 1950 Cal. 363 : 54 C.W.N. 447 ; *Emperor v. Zawar Rahman*, 51 Cal. 142 (F.B.) ; *Emperor v. Rahenuddin Mondal*, 1944 Cal. 323 ; *Emperor v. Ajit Kumar Ghosh*, 1945 Cal. 159 ; *Kashi Ram v. Emperor*, 1928 All. 280 : 109 I.C. 120 : 26 A.L.J. 139 ; *Deorao v. Emperor*, 1946 Nag. 334 : 226 I.C. 377 ; *Salig Ram v. State*

with the conditions of Section 145 regarding the drawing of witness's attention to every part of his previous statement which is intended to be used for contradiction and the effect of non-compliance in two decisions.²⁴

All that the section requires is that the attention of the witness must be drawn to that particular part of his previous statement which is sought to be relied upon. If that is done in any manner, it is unnecessary to confront him with that portion of the statement over again. It is his own duty to explain it, if he wants. And, if his previous statement falls within purview of Section 21 of this Act, and the document which contains it is admitted, it requires no further proof. It is substantive evidence and it is not obligatory on the part of the party to draw the attention of the witness to that admission in cross-examination. When a document containing an admission of the witness has already been admitted by the other party, it can be used to contradict the testimony of such witness without drawing his attention to that admission.²⁵ But, a different view has been taken by a Division Bench of the Allahabad High Court and it has been held that where a document is admitted by the counsel of a party "subject to all just exceptions", a statement contained in such document cannot be used to contradict the maker who enters into the witness-box, if the statement is not put to him, for the admission of the document by the counsel does not do away with the requirements of this section.¹

The section requires that the witness must be confronted with those parts of the earlier statement on which the defence relies for the purpose of contradicting him. The statement, being one made to a police officer, cannot be used by the defence by reason of the prohibition contained in Section 162 (1), Criminal Procedure Code. The defence can rely only on those parts of the statement with which the witness, the maker of the statement, was confronted by virtue of the proviso to Section 162 (1), Criminal Procedure Code.²

Where a witness is not contradicted, by his attention being called to particular parts of his previous report, it cannot be said that the statement made by him on matters other than those which were put to him was unreliable merely because the details rendered by him in Court are different from those mentioned by him in his previous report.³ Again, if the witness is not confronted with his previous statement, that does not vitiate his subsequent prosecution for perjury.⁴

Before the previous statement can be used, the procedure under this section must be observed strictly. The witness should be informed of the part of his statement which is to be used to contradict him and he should be

of U. P., 1956 All 138 : 1955 A.L.J. 857 : 1955 A.W.R. (H.C.) 603; *Gajadhar Tewari v. Nand Lal Pandey*, 1934 Pat. 55 (2) ; 150 I.C. 841 ; *Abdul Gafoor v. Kali Charan*, 1934 Rang 273 : 152 I.C. 425 ; *Naba Kumar Das v. Rudra Narayan Jana*, 1923 P.C. 95; *Firm Malik Des Raj Fakir Chand v. Firm Piara Lal Aya Ram*, 1946 Lah 65 : 223 I.C. 579 : 47 P.L.R. 391 (F.B.) .

24. *Tara Singh v. State*, A.I.R. 1951 S.C. 441 : 1951 S.C.J. 518 : 1951 S.C.R. 729 ; 1951 A.L.J. 640 and *Bhagwan Singh v. State of Punjab*,

A.I.R. 1952 S.C. 214 : 1952 S.C.R. 812 : 1952 S.C.J. 284 : 1952 S.C.A. 513.

25. *Venkatal v. Kanhiyalal*, A.I.R. 1963 M.P. 155 : 1962 Jab. L.J. 796.

1. *Vidheshwar v. Budhiram*, A.I.R. 1964 A. 345 : 1963 A.L.J. 680.

2. *Pangi Jogi Naik v. The State*, 1966 Cut. L.T. 456 (461, 462).

3. *Baga Bharti v. Sarkar*, 1950 Raj 10 : 51 Cr. L.J. 844.

4. *Ishar Chand v. State*, 1951 Punj 131 : 53 P.L.R. 122.

given an opportunity of explaining what he meant by that portion of his statement.⁵ Failure to act as required under this section is a fatal defect.⁶ The procedure to be followed would seem to be first, to ask the witness whether he made the previous statement. If the witness returns the answer in the affirmative, the previous statement in writing need not be proved and the cross-examiner may, if he so chooses, leave it to the party who called the witness to have the discrepancy, if any, explained in the course of re-examination. If, on the other hand, the witness denies having made the previous statement attributed to him or states that he does not remember having made any such statement and it is desired to contradict him by the record of the previous statement the cross-examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contradictory to his statement in Court and give him an opportunity to reconcile the same, if he can. It is only when the cross-examiner has done so, that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner permitted by law.⁷ As their Lordships of the Supreme Court observed in a case⁸: "Resort to Sec. 145 would only be necessary if the witness 'denies' that he made the former statement. In that event, it would be necessary to prove that he did, and 'if the former statement was reduced to writing', then Sec. 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case, all that is necessary is to look to the former statement of which no further proof is necessary, because of the admission that 'was made.'" Where the Sessions Judge allowed the witness to be put question after question regarding what he had, or had not stated to the investigating officer and recorded the answers, it was held that the statement under s. 162, Criminal Procedure Code, could be used only to contradict the witness and before the witness could be contradicted, his attention ought to have been drawn to the contradictory portion of the statement as required under this section and that the particular part of the statement which contradicted the deposition of the witness ought to have been read over to the witness and exhibited.⁹ If the writing is produced after the examination of the witness, it may be recalled for further cross-examination.¹⁰ It is, therefore, necessary that parts of the writing should be put to the witness for contradicting him with a view to displace his present evidence. It is a question of fact, in each case, whether the procedure followed is in substantial compliance with what this section requires. The test is to ascertain whether the witness is treated fairly and is afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable

5. *Raghuraj Singh v. Emperor*, 1934 All 956 : 152 I.C. 873 ; *Emperor v. Rehanuddin*, 1944 Cal. 323 ; *Government Advocate v. Muquddar Shah*, 1935 Pesh 148 : 158 I.C. 974.
6. *Tara Singh v. State*, A.I.R. 1951 S.C. 441 : 1952 S.C.A. 458 : 1951 S.C.J. 518 : 1951 S.C.R. 729 : 52 Cr. L.J. 1491 : 1951 A.L.J. 640.
7. *Gopi Chand v. Emperor*, 1930 Lah. 491 : I.L.R. 11 Lah. 460 : 126 I.C. 573 ; *Mohendra Singh v. Emperor*, 1932 Lah. 103 : 135 I.C. 209 : 33 P.L.R. 891 ; *Muzaffar Khan Sikandar Khan v. Emperor*, 1939 Lah. 268 : I.L.R. 39 Lah. 509 :

182 I.C. 935 : 41 P.L.R. 775 ; see also *Iqbal Ahmad v. Emperor*, 1943 All 49 : 204 I.C. 495 : 1942 A.L.J. 637.

8. *Bhagwan Singh v. State of Punjab*, 1952 S.C. 214 at 217 : 1952 S.C.A. 513 : 1952 S.C.J. 284 : 1952 S.C.R. 812 ; see also *In re Gurram Konda Chianabba*, 1958 Andh. Pra. 443 : 1959 Andh. L.T. 90.
9. *Birey Singh v. State*, 1953 All 785 : 54 Cr. L.J. 1817 ; see also *Tara Singh v. State*, A.I.R. 1951 S.C. 441.
10. *Naba Kumar Das v. Rudra Narayan Jana*, 1923 P.C. 95.

manner.¹¹ As their Lordships of the Supreme Court observed: "There can be no hard and fast rule. All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions, after his attention has been drawn to them in a fair and reasonable manner. . . . The matter is one of substance and not of mere form."¹² In accordance with the logical Principle of Relevancy, the impeached witness may always endeavour to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore, that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end, it is both logical and just that the explanatory circumstances, if any, should be received.¹³ But whether additional testimony may be introduced as to the correctness of the explanation given by the witness is doubtful, as a matter precedent; convenience would seem usually to require its exclusion.¹⁴

This section in express terms applies to previous statements in writing or reduced into writing only, and does not apply to statements not in writing or not reduced to writing. It does not, therefore, control Sec. 155, and hence questions proposed to be put to prosecution witnesses about oral statements made to them by other witnesses are legally admissible, although the Court may refuse to place any reliance on them on the ground that they had not been put to these witnesses for explanation. English law places statements in writing and oral statements at par when such statements are used for the purpose of contradicting a witness in cross-examination. The position of the law as laid down by this Act is different from the position in English law on this point and the principles of English law cannot be followed when they are inconsistent with the express text of the law, as contained in this Act.¹⁵

When a document like the First Information Report is intended to be used for corroborating, and not contradicting, a witness, no question of showing that document to him in the manner contemplated by Sec. 145 arises at all.¹⁶

Impeaching the credit of a witness either under this section (written statements) or under Sec. 155, post (oral statements) can be done by drawing his attention to those statements, whether oral or written.¹⁷

If a witness in the Sessions Court confronted with his statement *in extenso* made in the committal court, admits it to be a true record but states that it was false and was given under 'police pressure', there is sufficient compliance

11. In re Gurram Konda Chinnabba, 1958 Andh. Pra. 443 ; 1959 Andh. L.T. 90.

12. Bhagwan Singh v. State of Punjab, 1952 S.C. 214 at 218 ; Vema Reddi v. Gangi, A.I.R. 1958 A.P. 571 ; 1958 Andh. L.T. 580.

13. Wigmore, Ev., s. 1044.

14. Wigmore, Ev., s. 1046.

15. Muktawandas Ajab Das v. Emperor, 1939 Nag. 13 ; I.L.R. 1939 Nag. 109 ; 180 I.C. 602 ; Ram Ratan v.

State, 1956 Raj. 196 ; 1956 Raj. L. W. 319, dissenting from Mst. Mist v. Emperor, 1934 Sind 100 ; 151 I.C. 437 ; 35 Cr. L.J. 1832 ; see also notes to Sec. 155 (3), post.

16. Hakam Mahomed Jainwala v. The State of Maharashtra 74 Bom. L.R. 117 (124) ; 1972 Mah. L.J. 389.

17. Doman Mehton v. Surajdeo Prasad 1970 B.L.J.R. 926 ; 1970 Cr. L.J. 350 ; A.I.R. 1970 Pat. 95 (96)

with the section. It would have been pointless to draw his attention to each sentence and ask his explanation because the explanation would have been the same that it was false and given under police pressure.¹⁸

13. Admissions. In *Firm Malik Desraj Fakirchand v. Firm Piara Lal Aya Ram*,¹⁹ a Full Bench of the Lahore High Court, relying on certain observations made by Lord Shaw in *Bal Gangadhar Tilak's case*,²⁰ held that admissions of a party on a material issue in the case made antecedent to the suit cannot be used as legal evidence to pronounce a finding on that issue, if the person making the admission has made a statement on oath in the witness-box which is inconsistent, directly or indirectly, with the previous admission, unless that admission is put to him in the witness-box and he is given an opportunity to deny it or to explain it. But, after an exhaustive review of the case-law on the subject, a Full Bench of the Allahabad High Court has dissented from this view and held that where in a civil suit a party produces documents containing admissions by his opponent, which documents are admitted by the opponent's counsel, and the opponent enters the witness-box, it is not obligatory on the party who produce these documents to draw in cross-examination the attention of the opponent to the said admissions before he can be permitted to use them for the purpose of contradicting the opponent, provided that the admissions are clear and unambiguous; but where the statements relied on as admissions are ambiguous or vague, it is obligatory on the party who relies on them to draw in cross-examination the attention of the opponent to the said statements before he can be permitted to use them for the purposes of contradicting the evidence on oath of the opponent. The party producing these documents can be permitted under Sec. 21 of this Act to use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions.²¹ There is no doubt a general principle of fairness according to which a witness's statement on oath may not be contradicted by his previous statement unless such previous statement was specifically put to him and he was offered an opportunity of tendering such explanation as he might desire to offer. But this rule of fairness can have no application when a clear and unambiguous statement of a party has been already proved on the record and the party appearing as a witness already knows that his previous statement is relied upon by his opponent in support of his own case. Where, however, a statement of a party is ambiguous or vague so that it cannot be said that he has notice that such statement is being relied upon by his opponent as his admission the rule of fairness comes into play and such party's oral evidence will not be allowed to be contradicted by his vague and ambiguous previous statement,

18. *State of Rajasthan v. Kartar Singh*, (1971) 1 S.C.R. 56 : (1970) 2 S.C.C. 61 : 1970 S.C. Cr. R. 499 : 1970 S.C.D. 724 : (1971) 1 S.C.J. 165 : 1971 M.L.J. (Cr.) 113 : 1970 Cr. L.J. 1144 : A.I.R. 1970 S.C. 1305 (1306).

19. 1946 Lah. 65 at 70 : 223 I.C. 579.

20. 1915 P.C. 7 : 42 I.A. 135 : I.L.R., 39 Bom. 441 : 29 I.C. 639.

21. *Ajodhia Prasad Bhargava v. Bhawani Shankar Bhargava*, 1957 All 1 : I.L.R. (1956) 2 All 209 : 1957

A. L. J. 350 : 1956 A. W. R. (H.C.) 866 (F.B.) ; see also the cases cited therein and *Lal Singh Didar Singh v. Guru Granth Sahib*, 1951 Pepsu 101 ; *Channeo Mahto v. Jang Bahadur Singh*, 1957 Pat. 295 : 1956 B.L.J.R. 197 ; *Veerasavavadhya v. Devotees of Lingadagudi Mutt*, A.I.R. 1973 Mys. 280 (286) dissenting from *Firm Malik Des Raj Faqir Chand v. Firm Piara Lal Aya Ram*, A.I.R. 1946 Lah. 65 (F.B.).

unless it was specifically put to him while he was in the witness-box so that he might tender an explanation regarding the statement, and, in these circumstances, though such statement may have been admitted under Sec. 21, it will be deemed to have been disproved by a contrary statement on oath of the party making the admission.²² The Supreme Court²³ has ruled that admissions are substantive evidence by themselves, though they are not conclusive proof of the matters admitted, that the admissions duly proved are admissible evidence, irrespective of whether the party making them appeared in the witness-box or not and whether that party, when appearing as witness, was confronted or not with those statements in case it made a statement contrary to those admissions. Their Lordships pointed out that the purpose of contradicting the witness under this section is very much different from the purpose of proving the admission. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence. Admission duly proved is substantive evidence and it is not necessary to draw the attention of the witness to it when he appears in the witness-box.²⁴

Since this section applies only to a previous statement made in writing or reduced to writing, where a party makes an oral admission to a witness who deposes to the fact of making such admission, the admission can be used as legal evidence against the party making the admission, even though it was not put to him. The admission having been established, it lies on the party to explain it, and if he does not say anything about it in his examination-in-chief, there is no obligation on the opposite party to confront him with the admission.²⁵ (See also Note 15 under Sec. 17 *ante*).

14. Previous statements. A witness can be contradicted only by a previous statement made by him. A subsequent statement in another proceeding cannot be taken into consideration by the Appellate Court as contradicting the witness.¹ Where a witness is dead, his prior depositions may be admissible as substantive evidence under Sec. 33, but, if he is alive and is examined as a witness, his prior deposition is not available as substantive evidence, but can only be used to contradict or corroborate his present statements.² A replication under Order VI, Rule 5 of the Civil Procedure Code, which has been rejected, cannot be treated as a pleading, but it can be used as a previous statement under the section.³ Where the writer of a letter has appeared as a witness in Court, the contents of that letter amount to a previous statement of the witness and can also be used for the purpose of corro-

22. Per Agarwalla, J., in *Ajodhia Prasad Bhargava v. Bhawani Shankar Bhargava*, 1957 All 1 : I.L.R. (1956) 2 A. 399 (F.B.).

23. *Bharat Singh v. Bhagirathi*, A.I.R. 1966 S.C. 405 : (1966) 1 S.C.R. 606 : (1966) 2 S.C.J. 53 : 1966 S.C.D. 153 : (1966) 1 S.C.W.R. 53; *Biswanath Prasad v. Dwarka Prasad*, A.I.R. 1974 S.C. 117.

24. *Arjun Mahto v. Monda Mahatain*, A.I.R. 1971 Pat. 215; *Firm Ram Chand Bhagirath v. Ganpat Ram*, 1972 W.L.N. 1116 (Raj.) : (1972) 38 Cut. L.J. 161; *Bhartiya Sanskrit Vidya-*

pith v. Parthasarthy, (1977) 1 Karn. L.J. 87 : A.I.R. 1977 Karn. 113 : I.L.R. (1977) 1 Karn. 275.

25. *Paras Ram v. Champa Lal Sawan Sukha*, 1957 M.B. 118.

1. *U Po Saiag v. G Kvi Maung*, 1927 Rang 247 : 104 I.C. 377.

2. *Ponnuswami Goundan v. Kalyanasundara Ayyar*, 1930 Mad. 770 : 125 I.C. 231 ; see also *Samser Ali v. Emperor*, 1947 Cal. 342 : 222 I.C. 421 : 47 Cr. L.J. 450 : 50 C.W.N. 206.

3. *Behari Lal Sud v. Emperor*, 1939 Lah. 529 : 185 I.C. 588 : 41 P.L.R. 632.

borating his testimony in Court under Sec. 157.⁴ As the whole of the evidence of a witness who is re-summoned under Sec. 350,⁵ of the Code of Criminal Procedure is to be recorded again, his previous deposition before another Magistrate cannot be treated as substantive evidence in the case, but it may be used for contradicting any fresh evidence given by him under this section.⁶ Statements in the petition of complaint filed by a witness can be used to contradict the witness under Sec. 145 or to impeach his credit under Sec. 155 as well as to corroborate him under Sec. 157.⁷ A statement made by an approver to the Police before he was tendered pardon would be a previous statement of his when he appears as a witness and it can be used either to corroborate him or to contradict him.⁸

Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness.⁹

A statement of a witness under Section 164, Criminal Procedure Code, is not substantive evidence but is a former statement before an authority legally competent to investigate the fact. Such a statement can be used either for the corroboration of the testimony of a witness under Section 157, post or for contradiction thereof under the present section.¹⁰

Where a court is to disallow a question on the basis that the accused or the prosecution cannot be allowed to cross-examine a witness on account of the limitation contained in the proviso to Section 162, Criminal Procedure Code, the court must record a speaking order if it is of the view that the question pertains to an omission. It would be sufficient merely to express that the objection on behalf of either of the parties was being upheld.¹¹

Resort to the section would only be necessary if the witness denies that he made the previous statement.¹²

15. Depositions before Committing Magistrate. The section applies to both criminal and civil cases; and its provisions are therefore applicable at trials before the Court of Session to depositions taken before the Committing Magistrate.¹³ And the statement of a witness in the committing Court

4. Bala Bhadra Misra v. Nirmala Sundari Devi, 1954 Orissa 23 : 1 L.R. 1953 Cut. 531 ; 19 C.L.T. 402 ; Judah v. Isolyne Sarojbhashini Bose, 1945 P.C. 174 : 221 I.C. 587.
5. Now Section 326 of the 1973 Code.
6. Empero v. Pran Shankar, 1950 Bom. 14 : 1 L.R. 1949 Bom. 581 : 51 Cr. L.J. 233 : 51 Bom. L.R. 671.
7. Abdul Latif v. Emperor, 1941 Cal. 533 : 196 I.C. 439 : 42 Cr. L.J. 871 : 45 C.W.N. 763.
8. Hazara Singh v. Emperor, 1928 Lah. 257 : 1 L.R. 9 Lah. 389 : 103 I. C. 167 : 29 Cr. L.J. 343.
9. Bharat Singh v. Bhagrathi, (1966) 1 S.C.R. 606 : 1966 S.C.E. 153 : (1966) 2 S.C.J. 53 : 1966) 1 S.C. W.R. 53 : A.I.R. 1966 S.C. 405 (410).
10. Bisipati Padhan v. State, 1 L.R. 1969 Cut. 505 : 35 Cut. L.T. 362 : 11 Orissa J.D. 71; 1969 Cr. L.J. 517;

- A.I.R. 1969 Orissa 289 ; see also Ranjit Singh v. State, 1966 Cr. L. J. 336 (337) (Orissa).
11. Amarnath v. State, 1971 Cr. L.J. 1335, 1340 (Delhi).
12. Tahsildar Singh v. State of U. P., (1959) 2 S.C.R. 875 : (1960) 1 S.C.A. 201 : 1959 S.C.J. 1042 : (1959) 2 Andh. W.R. (S.C.) 201; 1959 A.W.R. (H.C.) 522 : 1959 Cr. L.J. 1231 : 1959 M.L.J. (Cr.) 759 : (1959) 2 M.L.J. (S.C.) 201; A.I.R. 1959 S.C. 1012 ; M. Kashaiah v. The State of A.P., (1972) 1 Andh. W.R. 33.
13. As to statements recorded under S. 164, Cr. P.C. see Puttu v. R., 1914 Oudh 388 : 27 I.C. 196 : 16 Cr. L.J. 132 : 17 O.C. 363 : 1 O.L.J. 753 ; Bishen v. R., 1927 All 705 : 1 L.R. 50 All 242 : 105 I.C. 677 : 28 Cr. L.J. 995 : 25 A.L.J. 994.

can be treated as evidence in the Sessions Court, subject to the witness being confronted with the statement under this section.¹⁴

Under Sec. 288¹⁵ of the Code of Criminal Procedure, the evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of this Act. The deposition of a witness before the Committing Magistrate can be treated as evidence only if the conditions required by that section are satisfied.¹⁶ If the conditions are satisfied, the evidence given before the Committing Magistrate may be treated as substantive evidence.¹⁷ It can be used "for all purposes" and not only for the purpose of cross-examination.¹⁸ But it can be so treated only subject to the provisions of this Act.¹⁹ There was some difference of opinion as to whether the expression "subject to the provision of this Evidence Act" attracts the provisions of this section.

One line of reasoning is that this section is not attracted because it relates to previous statements in writing which are to be used for the purpose of contradiction alone. Statements of that kind do not become substantive evidence, and though the evidence given in the trial can be destroyed by a contradiction of that kind, the previous statements cannot be used as substantive evidence and no decision can be grounded on them. But, under Sec. 288, Criminal Procedure Code²⁰ the previous statement becomes evidence for all purposes and can form the basis of a conviction. Therefore, according to this line of reasoning, this section is not attracted. Judges who hold that view consider that the provisions of this Act referred to are those relating to hearsay and matters of that kind which touch substantive evidence.²¹ The other line of reasoning is that Sec. 288 makes no exception to any provision in this Act, and therefore, this section

14. *Mingular Mallik v. State*, *A.I.R.* 1967 Orissa 24 : 32 *Cut. L.T.* 1011; *In re Narain Pillai*, 1971 *Cr. L.J.* 160 (Ker.).

15. No corresponding section in the Code of 1973.

16. *Thommen v. State of Kerala*, 1958 *Ker. 74* : *I.L.R.* 1957 *Ker. 955* : (1957) 1 *M.L.J.* (Cr.) 839 : 1957 *Ker. L.J.* 739.

17. *Paitha v. Emperor*, 1946 *Lah. 48* : 221 *I.C.* 638 : 47 *Cr. L.J.* 232 ; *Raja Ram v. Emperor*, 1935 *All 691* : 155 *I.C.* 657 : 36 *Cr. L.J.* 823 : 1935 *A.L.J.* 668 : 1935 *A.W.R.* 696 ; *Sham Behera v. State of Orissa*, 1953 *Orissa 308* : *I.L.R.* 1953 *Cut. 453* : 54 *Cr. L.J.* 1713 : 19 *C.L.T.* 310 ; *Tika Ram v. State*, 1957 *All 755* : 1957 *Cr. L.J.* 1200 ; (1974) 1 *Cr. L.J.* 338 (Delhi) ; *Ghanshyam v. State of U. P.*, 1974 *All Cr. R.* 119 : 1974 *All W.R.* (H.C.) 167 ; *In re Muthian Nadar*, 1971 *Co. L.J.* 730 (Mad.) ; *S. I. Singh v. Manipur Administration*, 1972 *Cr. L.J.* 395.

18. *Fakira v. King-Emperor*, 1937 *P.C.*

119 : *I.L.R.* 1937 *Bom. 711* : 64 *I.A.* 148 : 167 *I.C.* 790 : 38 *Cr. L.J.* 498 : 1937 *A.L.J.* 1055 (P.C.).

19. *S. 288, Cr. P.C. 1898* (no corresponding section in *Cr. P.C.*, 1973).

20. It may be noted that there is no corresponding section in the Code of 1973.

21. See *Zila Singh v. State*, 1954 *Punj. 182* : 55 *Cr. L.J.* 1258 : 56 *P.L.R.* 139 ; *Sham Behera v. State of Orissa*, 1953 *Orissa 308* ; *Mohammad Saiwar v. Emperor*, 1942 *Lah. 215* : 202 *I.C.* 340 : 43 *Cr. L.J.* 828 : 44 *P.L.R.* 269 ; *Rano v. Emperor*, 1944 *Sind 178* : *I.L.R.* 1944 *Kar. 75* ; *Basappa v. Emperor*, 1925 *Bom. 266* : 86 *I.C.* 145 : 26 *Cr. L.J.* 705 : 27 *Bom. L.R.* 113 ; *Bahadur v. Emperor*, 1925 *Sind 289* : 88 *I.C.* 7 : 26 *Cr. L.J.* 1063 ; *Amir Zaman v. Emperor*, 1925 *Lah. 452* : *I.L.R.* 6 *Lah 199* : 88 *I.C.* 861 : 26 *P.L.R.* 361 ; *Hanuman Prasad v. The Crown*, 1949 *Nag. 254* : *I.L.R.* 1949 *Nag. 493* : 50 *Cr. L.J.* 597 : 1949 *N.L.J.* 456 : 1950 *A.W.R.* (Supp) 20.

cannot be excluded. As this section is one of the provisions of the Act, the statements are subject to its provisions as well. All that Sec. 288 does is to import into the law of evidence something which is not to be found in this Act, namely, to make a statement of this kind substantive evidence, but only when all the provisions of the Act have been duly complied with.²² But now their Lordships of the Supreme Court have definitely held that the second line of reasoning is to be preferred and that the evidence in the committal Court cannot be used in the Sessions Court unless the witness is confronted with his previous statement as required by this section. Of course, the witness can be cross-examined about the previous statement and that cross-examination can be used to destroy his testimony in the Sessions Court. If that serves the purpose of the prosecution, then nothing more is required, but if the prosecution wishes to go further and use the previous testimony to the contrary as substantive evidence, then it must confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only can the matter be brought in as substantive evidence under Sec. 288.²³ The previous contradictory statement of a witness can only be used to show that the witness is not trustworthy, but it cannot be used to show that other witnesses too are not reliable, unless the previous statement was transferred to the record of Sessions Court as substantive evidence under Section 288 of the old Code (which has now been omitted in the new Code).²⁴ There may be cases in which there are two conflicting versions given in the examination-in-chief and in the cross-examination of a prosecution witness at the trial. In such a case, the prosecution has a choice; it is entitled to use the previous statement before the Committing Magistrate, either to contradict what is said in cross-examination or to corroborate what is said in the examination-in-chief. In either event, Sec. 288²⁵ of the Criminal Procedure Code, could be used to make the former statement substantive evidence because what the section says is "subject to the provisions of the Evidence Act", and not subject to any particular section in it. Section 157 is as much a provision of the Evidence Act, as Sec. 145, and if the former statement can be brought in under Sec. 157 it can be transmuted into substantive evidence by the application of

22. Nanhu Mahto v. Emperor, 1930 Pat. 338 : 129 I.C. 666.

23. Tara Singh v. State, 1951 S.C. 441: 1951 S.C.J. 518 : 1951 S.C.R. 729: 52 Cr. L.J. 1491 : 1951 A.L.J. 640: (1951) 2 M.L.J. 291 ; see also Mst. Purnia v. Emperor, 1947 Pat. 146 : I.L.R. 25 Pat. 356 : 229 I.C. 592: 48 Cr. L.J. 412 ; Emperor v. Rahe-nuddin Mondal, 1944 Cal. 323 : I. L.R. (1943) 2 C. 381 ; Emperor v. Ajit Kumar Ghosh, 1945 Cal. 159: 220 I.C. 237 (Only those passages in the previous statements before the committing Magistrate should be proved which clearly contradict some portion of the testimony of the witness before the Judge) ; Sardar v. Emperor, 1929 Lah. 111 : 112 I.C. 471 : 29 Cr. L.J. 1047 : 10 L.L.J. 407 ; Gunadhar Das v. State, 1952 Cal. 618 : 53 Cr. L.J. 1343. (If the whole deposition is being put in with a view to establishing contradictions then the whole

of the depositions must be put to the witness as required by Sec. 145, Evidence Act) ; Ram Dayal v. State, 1954 Assam 157 : I.L.R. 1953 Assam 341 ; Inder Deo v. State, A.I.R. 1959 All 238 ; Muthia Nadar, In re, 1971 M.L.J. (Cr.) 474 : (1971) 2 M. L. J. 114 (117) : (1974) 1 Cr. L.J. 338 (Delhi) ; Ghanshyam v. State of U. P., 1974 All Cr. R. 119 : 1974 All W.R. (H.C.) 167 ; S. I. Singh v. Manipur Administration, 1972 Cr. L.J. 395.

24. Jit Singh v. State of Punjab, A.I.R. 1976 S.C. 1421 : 1976 S.C.C. (Cr.) 341 : 1976 Cr. L.J. 1162 : (1976) 2 S.C.C. 836 : 1976 Cr. L.J. (Cr.) 119 : 1976 Cr. L.R. (S.C.) 220 : I.L.R. 1976 Kant. 1335 : 1976 Cr. A.R. (S.C.) 211.

25. It may be noted that there is no corresponding section in the Code of 1973.

Sec. 288.¹ The case of *Tara Singh v. State*² is to be distinguished because there were no two versions in the course of the same testimony. The witness's question was hostile from the start in the Sessions Court and the whole purpose of resorting to Sec. 288 (omitted from the new Code) was to contradict what he said there and no question of corroboration arose. The prosecution had no choice there of using the former statement either to contradict or corroborate. In any case, the depositions before the Committing Magistrate Court admitted in the Sessions Court under Sec. 288, Criminal Procedure Code, 1898 (now omitted from new Cr. P. C.), cannot be used for the purpose of contradicting the witnesses without following the procedure laid down in Sec. 145, Evidence Act.³

In England the settled practice in Criminal Courts is now as follows. A witness may be cross-examined as to what he said before the Magistrate. The Counsel cross-examining may show the witness the deposition and ask him whether he still adheres to the statement he made, without the counsel reading the deposition or putting it in evidence, but he is then bound by the answer of the witness unless the deposition is put in to contradict him, as it is not admissible to state that the deposition does contradict him unless it is so put in.⁴

In the undermentioned case,⁵ one of the witnesses for the prosecution was asked if he had made a certain statement before the Magistrate; but Wilson, J., held it was unnecessary to ask this question, as the deposition showed what the witness had said before the Magistrate, and added that to the attention of the jury might be called to differences in the witness's statement without putting in his previous deposition. But the correctness of this rule has been doubted and afterwards overruled,⁶ it being held that if it is intended to contradict a witness by his previous depositions, such passages of it as are used for this purpose should be put to the witness and tendered in evidence, though this, as has been already pointed out, was held by the Calcutta and Bombay High Courts under the Code of 1882 to give to the prosecutor the right of reply. The Judge himself should compare the statements of the witnesses recorded by the Magistrate with the evidence of the same witnesses at the Sessions, with a view to put questions in cross-examination, the answers to which may perhaps clear up discrepancies or possibly elicit facts favourable to the prisoners.⁷ A Judge is bound to put questions to the witnesses whom he proposes to contradict by their statements made before the Committing Magistrate, the whole or such portion of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements, and so forth.⁸ The depositions taken by the Committing Magistrate are always shown up and are with the Sessions Judge during the trial. The accused can, if

1. *Bhagwan Singh v. State of Punjab*, 1952 S.C. 214 : 1952 S.C.A. 513 : 1952 S.C.J. 284 : 1952 S.C.R. 812 (no such provision in Cr. P.C. 1973).
2. 1951 S.C. 441 : 1951 S.C.J. 518 : 1951 S.C.R. 729 : 52 Cr. L.J. 1491 : 1951 A.L.J. 640 : (1951) 2 M.L.J. 291.
3. *Deorao v. Emperor*, 1946 Nag. 321 ; *Nanhu Mahton v. Emperor*, 1930 Pat. 338 ; *Inder Deo v. State*, A.I.R. 1959 All 238 : 1958 All L.J. 885.

4. *R. v. Riley*, (1866) 4 F. & F. 1445 ; *R. v. Wright*, (1866) 4 F. & F. 1445-1450.
5. *R. v. Hari Charan*, (1880) 6 C.R. 390.
6. *R. v. Zawar Rahman*, 31 C. 1 (1902) 6 C.W.N. eccli (F.B.).
7. *R. v. Bindabun Bowree*, (1866) W.R. (Cr.) 54. The section Cr. P.C. relating to right of reply has been amended.
8. *R. v. Dan Sahai*, (1885) 7 C.R. 362.

wishes, have a copy of these depositions.⁹ He or his counsel or pleader, can herefore inform himself of what the witnesses said before the Magistrate, and s in a position to question any witness who varies in the Court of Session rom his former statement. The Sessions Judge ought, if asked, to allow the original deposition to be used for this purpose. Where the Sessions Judge himself noticed the discrepancy, and it was material, there can be little doubt that in using the original deposition for the same purpose himself, he would be acting wholly within the scope of his duty as indicated by the provisions of the Evidence Act and of the Code of Criminal Procedure.¹⁰ Although previous statements made by witnesses may be used under this section or the purpose of contradicting statements made by them subsequently at he trial of an accused person, they cannot if they have been made in the bsence of the accused, be treated as independent evidence of his guilt or nnocence; nor will Sec. 288 of the Criminal Procedure Code (omitted from he new Code) avail anything for this purpose.¹¹

16. First Information Report. In some cases it has been held that t can be used only for corroborative purposes.¹² On the other hand, in a ase it has been held that the statement in the first information report can e used for the purpose of contradicting the person who gave that report under ec. 145 of the Evidence Act in case he is examined as a witness, but cannot e used for the purpose of corroborating the testimony of the giver of the eport as the statement was not made to someone else which appears to be ecessary from the very language of Sec. 157 of the Evidence Act, before e section can be attracted.¹³ In *Azimoddy v. Emperor*,¹⁴ it was pointed out y the Chief Justice of the Calcutta High Court that the first information eport, putting aside wholly the question of its use under Sec. 145, Evidence ct, or Sec. 155, Evidence Act, if proved, may be of value as one of *res estae*.¹⁵ But now it is settled law that a first information report is not a ubstantive piece of evidence and can only be used to corroborate the state- ent of the maker under Sec. 157, Evidence Act, or to contradict it under ec. 145 of that Act.¹⁶ It cannot be used as evidence against the maker at

9. See Cr. P.C., s. 548 [now s. 363 (5) of 1973 Code].

10. See observations in *R. v. Arjun Mehga*, (1874) 10 Bom. H.C.R. 281, 282.

11. *Alimuddin v. R.*, (1895) 23 C. 361; see also *Brij Bhushan Singh v. King-Emperor*, 73 I.A. 1 : 1 I.L.R. 1946 K.P.C. 45 : 1 I.L.R. 21 Luck. 176 : A.I.R. 1946 P.C. 38 wherein the statements of two witnesses recorded under S. 164 Criminal Procedure Code, were in question.

12. *Wari, Khan v. Emperor*, 1940 Oudh 209 : I.L.R. 15 Luck. 429 : 1940 A.W.R. 92 : 1940 C.W.N. 177 ; *Panchu Sheikh v. Emperor*, 1943 Cal. 612 : 210 I.C. 17 : 45 Cr. L.J. 170.

13. *Abdul Hamid v. State of Tripura*, 1958 Tripura L.

14. 1927 Cal. 17 : 44 C.L.J. 253.

15. See also *Mahla Singh v. Emperor*, 1931 Lah. 38 : 130 I.C. 410 : 32 Cr. L.J. 522 : 32 P.L.R. 259 ; *Dhirendra Nath v. State*, 1952 Cal.

621 : 53 Cr. L.J. 1427.

16. *Aghmoo Nagesia v. State of Bihar*, (1966) 1 S.C.R. 134 : (1965) 2 S.C.A. 367 : 1966 S.C.D. 243 : (1966) 1 S.C.J. 193 : (1965) 2 S.C.W.R. 750 : 1965 A.W.R. (H.C.) 648 : (1966) 1 Andh. L.T. 430 : 1965 B.L.J.R. 865 : 1966 Cr. L.J. 100 : 1966 M.P.L.J. 49 : 1966 M.L.J. (Cr.) 134 : 1965 M.W.N. 215 : A.I.R. 1966 S.C. 119 (123) ; *Nankhu Singh v. State of Bihar*, 1972 Cr. L.J. 1204 : (1972) 1 S.C.W.R. 926 : 1972 Cr. App. R. (S.C.) 234 : 1972 S.C. Cr. R. 400 : 1972 S.C.D. 793 : 1973 U.J. (S.C.) 14 : (1972) 3 S.C.C. 590 : A.I.R. 1973 S.C. 491 ; *Hasib v. State of Bihar*, 1972 Cr. L.J. 233 : A.I.R. 1972 S.C. 283 ; *Shankar v. State of U.P.*, 1975 Cr. L.J. 634 : A.I.R. 1975 S.C. 757 ; I.L.R. (1974) Him. Pra. 948 (D.B.) ; *Mallar Rout v. R.K. Rout*, (1971) 37 Cut. L.T. 306.

the trial, if he himself becomes an accused, nor to corroborate or contradict other witnesses. It may be put in evidence under Sec. 157, Evidence Act, to corroborate only the testimony of the person who gave the information incorporated in the General Diary or the first information report and not for the purpose of corroborating the evidence of any one else.¹⁷ When an eye-witness gives the earliest report, it can be used for his corroboration and in certain respects for contradiction as well. But when there is no first information which can be used for corroboration on details, as when it is given by somebody other than an eye-witness, the case has to be considered on the evidence available without any bias.¹⁸ In a hurt case a report lodged by an eye-witness is expected to contain important details of the incident, but such is not the case in respect of a report of using a forged lottery ticket.¹⁹

17. Inquest Report. It is questionable how far an inquest report is admissible except under Sec. 145 of the Evidence Act.²⁰

18. Deposition in previous trial. Where a trial was set aside and a retrial ordered on the ground that the depositions of the witnesses had not been read over to them in the presence of the accused, it was held that, in the subsequent trial, the depositions recorded in the first trial could be put to the witnesses under this section for the purpose of contradicting them.²¹ The statements of prosecution-witnesses recorded by a predecessor Assistant Sessions Judge are former statements of those witnesses who were subsequently examined after the *de novo* trial though in the same proceeding. These statements can be used for contradiction under this section. Because there was a *de novo* trial, the former statements cannot be treated as non-existent or inadmissible.²²

19. Statements made to police. Statements made to the police provide important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate breakdown of the whole of his evidence.²³ Ordinarily accused persons are entitled to challenge the testimony of witnesses examined in Court with reference to the statements said to have been made by them before the investigating police officer. State-

17. Nisar Ali v. State of U. P., 1957 S.C. 366 : 1957 S.C.A. 312 : 1957 S.C.C. 128 : 1957 S.C.J. 392 : 1957 S.C.R. 657 : 1957 Cr. L.J. 550 ; Tika Ram v. State, 1967 All 755 : 1967 Cr. L.J. 1200 ; see also Kalu Mandal v. State, 1950 Cal. 412 : 51 Cr. L.J. 1507 : 85 C.L.J. 196 ; Emperor v. Rehenuddin, 1944 Cal. 323 : I.L.R. (1943) 2 C. 381 ; Mahadeo v. Ram Kuber, 1945 Oudh 451 : 209 I.C. 114 : 1945 O.W.N. 319 : 1945 A.W.R. (C.C.) 88 ; Nga Tun Hling v. Emperor, 1934 Rang. 60 : 148 I.C. 876 : 35 Cr. L.J. 808 ; Shankaralinga Tevan v. Emperor, 1930 Mad. 632 (2) : I.L.R. 53 Mad. 590 : 124 I.C. 506 : 31 L.W. 451 ; Gajadhar v. Emperor, 1932 Oudh 99 : I.L.R. 7 Luck. 552 : 137 I.C. 79 ; Asimoddy v. Emperor, 1907 Cal. 17 : I.L.R. 34 Cal. 237 : 99 I.C. 227 ; State of Gujarat v. Hira Lal, A.I.R. 1964 Guj. 261 : I.L.R. 1964 Guj. 376.
18. In re Kalu Singh, A.I.R. 1964 M. P. 30.
19. I.L.R. (1975) 1 Punj. 327.
20. Pandurang v. State of Hyderabad, 1955 S.C. 216 : 1955 S.C.A. 228 : 1955 S.C.J. 108 : (1955) 1 S.C.R. 1083 ; I.L.R. 1974 Him. Pra. 509.
21. Fazlur Rehman v. Emperor, 1927 Pat. 315 : I.L.R. 6 Pat. 478 : 104 I.C. 100 ; Brahma Naik v. Ram Kumar Agarwal, 39 Cut. L.T. 934 : (1973) 2 Cut. W.R. 1542 : 1974 Cr. L.J. 567.
22. Brahma Naik v. Ram Kumar Agarwal, (1973) 39 Cut. L.T. 934 (938) : (1973) 2 C.W.R. 1542.
23. Pulukuri Kotteya v. Emperor, 1947 P.C. 67 : I.L.R. 1948 Mad. 1 : 14 P.A. 89 : 222 I.C. 138.

ments made by prosecution-witnesses before the investigating police officer, being the earliest statements made by them with reference to the facts of the occurrence, are valuable material for testing the veracity of the witnesses examined in Court, with particular reference to those statements which happen to be at variance with their earlier statements; but the statements made during police investigation are not substantive evidence.²⁴ Refusal of permission to cross-examine a prosecution witness with reference to an important point in his earlier statement to police, has this effect that the testimony of that witness would not be allowed to be used for corroborating the testimony of other prosecution witnesses.²⁵

A statement under Sec. 162, Criminal Procedure Code, can be used only to contradict the witness, and before the witness can be contradicted, his attention ought to be drawn to the contradictory portion of the statement as required under this section.¹ It is open to Counsel for the accused to bring out discrepancies between the evidence of the witness as given in Court and the statements as made to the police with a view to throwing doubt on the credibility of their testimony.² It can be used only to contradict the statement of the witness, if he be examined as a prosecution witness. It can be used to contradict the statement of a prosecution witness examined by the complainant or on behalf of the State.³ If the same person be not examined as a prosecution-witness but examined as a defence witness, then that statement cannot be used. Any other use of the statement is forbidden.⁴ So also, it cannot be used if the witness is called by the Court.⁵ Before the amendment of Sec. 162 of the Criminal Procedure Code by the Amendment Act XXVI of 1955, it was held that only the accused could use the statement,⁶ but now under the amended section the statement can be used by the prosecution, if the Court grants permission to do so. Same is the position under Sec. 162 of new Cr. P. C. of 1973. The statement cannot be used by the witness to refresh his memory.⁷ It has been held that the Judge may look

24. *Baladin v. State of U. P.*, 1956 S. C. 181 at 187; 1956 Cr. L.J. 345; *State of Orissa v. Rabindra Nath*, 1973 Cr. L.J. 1686.
25. *Badri v. State of Rajasthan*, 1975 Cr. L.R. (S.C.) 678; (1975) U. J. (S.C.) 940; 1975 W.L.N. 724; 1976 S.C.C. (Cr.) 60; (1976) 1 S.C.C. 442; 1976 S.C. Cr. R. 17; 1976 Cr. App. R. (S.C.) 52; A. I.R. 1976 S.C. 560.
1. *Birey Singh v. State*, 1953 All 785; *Lakhan Vaish v. State*, 1958 All 445.
2. *Indar Singh Tara Singh v. Emperor*, 1943 Lah. 168; 207 I.C. 447; 44 Cr. L.J. 657; 45 P.L.R. 155.
3. *Madhav Rao v. Mohammad Abdul Matin*, 1977 (2) Kant. L.J. 261; I.L.R. (1977) 2 Kant. 1403; 1978 Cr. L.J. 295.
4. *Sheo Shanker v. State*, 1953 All 652; 1953 A.L.J. 720; *W. K. Wesley v. Emperor*, 1938 All 571; 178 I.C. 183; 1938 A.W.R. 505; *Ganga v. Emperor*, 1930 Oudh 60; I.L.R. 4 Luck. 726; 124 I.C. 444; *Shapur L. E.*—448
- ji Sorabji v. Emperor*, 1936 Bom. 154; I.L.R. 60 Bom. 148; 162 I.C. 399; 38 Bom. L.R. 106; *Bhagirathi Chowdhury v. King-Emperor*, 1926 Cal. 550; 92 I.C. 174; 30 C. W.N. 142.
5. *Gurdiitta Shah v. Emperor*, 1927 Lah. 713; 104 I.C. 444; see also *Devi Das v. Emperor*, 1930 Lah. 318 (2); I.L.R. 10 Lah. 794; 122 I.C. 93; 31 Cr. L.J. 343; 31 P. L.R. 712.
6. *W. K. Wesley v. Emperor*, 1938 All 571; 178 I.C. 183; *Cheta v. Emperor*, 1948 Lah. 69; 228 I.C. 334; 48 Cr. L.J. 200; *Dwarka Singh v. Emperor*, 1947 Pat. 107; 225 I.C. 552; 47 Cr. L.J. 780; 12 B.R. 631.
7. *Superintendent and Remembrancer of Legal Affairs, Bengal v. Zahiruddin*, 1946 Cal. 483; 223 I.C. 408; 47 Cr. L.J. 564; see also *Zahiruddin v. Emperor*, 1947 P.C. 75; 74 I.A. 80; 231 I.C. 86; 41 Cr. L.J. 679; 1947 A.L.J. 379.

into the police diaries *suo motu* and himself use the statement of a person examined by the police recorded therein for the purpose of contradicting such person when he gives evidence in favour of the Crown as a prosecution-witness. The Judge may do this, or he may make over the recorded statement to the lawyer for the accused so that he may use it for this purpose.⁸ Under Sec. 172 (2), Criminal Procedure Code (same section in 1973 Code), a Court referring to such diaries is entitled to use them not as evidence in the case but to aid in such enquiry or trial. Sometimes, it has been argued and is apparently thought that mere referring to the diary is irregular. This is not so, but facts found in the diary, it must be emphasised, are not to be used unless or until they are properly brought on the record through the evidence of a witness.⁹ But the Court has no right to use statements made to the police in order to show that the evidence of witnesses did not introduce any new matter,¹⁰ or for any other use in contravention of the section.¹¹ A statement made by a witness to a police investigating officer can be used by the accused only for the purpose of contradicting such witness under Sec. 145, Evidence Act and not for any other purpose, such as corroborating a prosecution-witness or contradicting a defence witness. It cannot be used as substantive evidence.¹² A statement recorded by the police under Sec. 162, Criminal Procedure Code, can be used for one purpose and one purpose only and that of contradicting the witness. Therefore, if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in Court that a certain fact existed but had stated under Sec. 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed, it is a case of conflict between the deposition in the Court and the statement under Sec. 162 and the latter can be used to contradict the former. But, if he had not stated under Sec. 162 anything about the fact, there is no conflict and the statement cannot be used to contradict him. In some cases, an omission in the state-

8. Emperor v. Lal Mia, 1943 Cal. 521: I.L.R. (1945) 1 Cal. 543 : 209 I.C. 206 : 45 Cr. L.J. 99 : 47 C.W.N. 336 ; but see Keramat Mandal v. King-Emperor, 1926 Cal. 147 : 27 Cr. L.J. 277 : 92 I.C. 453.
9. Deo Lal Mahton v. Emperor, 1933 Pat. 440 : 145 I.C. 426 : 34 Cr. L.J. 948 : 14 P.L.T. 396 ; see also Ramasrup Singh v. Emperor, 1930 Pat. 515 : I.L.R. 9 Pat. 606 : 32 Cr. L.J. 72 : 128 I.C. 121.
10. Emperor v. Girdhari, 1940 Pat. 605: 188 I.C. 429 : 41 Cr. L.J. 587.
11. Sita Chandra Dutta v. Emperor, 1942 Cal. 495 : 202 I.C. 153 : 43 Cr. L.J. 797 : 46 C.W.N. 775 ; Gahar Sheikh v. Emperor, 1947 Cal. 345: 226 I.C. 476 : 47 Cr. L.J. 755.
12. Jit Singh v. The Crown, 1949 E.P. 334 : 51 P.L.R. 65 ; Sheo Shanker v. State, 1953 All 652 : 54 Cr. L.J. 1400 : 1953 A.L.J. 720 : 1953 A.W.R. (H.C.) 264 ; Shiam Sunder v. King-Emperor, 1923 All 469 : 76 I.C. 572 : 25 Cr. L.J. 204 ; Emperor v. Girdhari, 1940 Pat. 605 : 188 I.C. 429 : 41 Cr. L.J. 587 ; Zeta Narsingh v. State, 1952 M.B. 79 : 53 Cr. L.J. 700 : In re Packirisami

Pillai, 1942 Mad. 288 (2) : 199 I.C. 833 : 43 Cr. L.J. 582 : 55 L.W. 771 : 1942 M.W.N. 591 ; Emperor v. Ajit Kumar Ghosh, 1945 Cal. 159 : 220 I.C. 237 : 46 Cr. L.J. 692 : 78 C.L.J. 217 ; Magan Lal Radhakishan v. Emperor, 1946 Nag. 173 : I.L.R. 1946 Nag. 126 : 226 I.C. 245 : 47 Cr. L.J. 851 ; Das Ram Gehla Ram v. Emperor, 1941 Lah. 471 : 197 I.C. 801 : 43 P.L.R. 600 ; Emperor v. Najibuddin, 1933 Pat. 589 : 147 I.C. 142 : 14 P.L.T. 543 ; King-Emperor v. Vithu Bala Kharat, 1924 Bom. 510 : 83 I.C. 1007 : 26 Cr. L.J. 223 : 26 Bom. L.R. 965 ; but see Emperor v. Wahiduddin No 2. 1930 Bom 158 : I.L.R. 54 Bom. 528 : 126 I.C. 333 : 31 Cr. L.J. 1003 : 32 Bom. L.R. 327 (Statement before a Bombay Police Officer may be used for corroboration). Pritam Singh v. State, 1972 All Cr. R. 332: 1972 All L.J. 744 : 1972 All W.R. (H.C.) 521 ; (1974) 1 Cr. L.T. 233 (Delhi) ; I.L.R. (1971) Cut. 752 ; Fateh v. State of Punjab, (1972) 74 Punj. L.R. 367.

ment under Sec. 162 may amount to contradiction of the deposition in Court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence. If the statement under Sec. 162 can be reconciled with the deposition in court and can stand with it, there is absolutely no conflict.

Unless, therefore, a deposition in Court cannot be reconciled with what is stated under Sec. 162, Criminal Procedure Code, the statement under Sec. 162 cannot be used to contradict the witness. The test to find out whether an omission is a contradiction or not is to see whether one can point to any sentence or assertion which is irreconcilable with the deposition in Court.¹³

It cannot, however, be overlooked that Sec. 145 is controlled by Sec. 162, Criminal Procedure Code, and hence what is prohibited by Sec. 162 of the Code could not be brought in under Sec. 145 of the Evidence Act, for the purpose of contradicting the witness, even though he be a court witness.¹⁴ In other words, the omission must refer to a detail which if it really existed could not have been missed by the witness as being an essential link in the chain of events; and, before the contradictory statement can be used as evidence, the attention of the witness has to be drawn to the particular omission and his explanation sought.¹⁵ Sometimes such omission is of great importance and even if the eye-witness is not cross-examined about such omission, the Court cannot ignore it. Effect of omission on the value of statement will depend on the totality of facts and circumstances.¹⁶

Procedure for using previous statements. The proper procedure to be followed is first of all, when Counsel asks for them, to furnish to the defence copies of the statements made by the witnesses to the investigating officer. In many cases this will have been done in the Court of the inquiring Magistrate; if then a defence Counsel wishes to make use of those statements in cross-examination, he should ordinarily, when he gets a reply which he thinks is inconsistent with a statement made by the witness in the course of investigation, ask the witness whether he made such and such statement. If the witness admits having made that statement, the most convenient method for the Court is to include the actual words found in the diary as part of the admission which has to be recorded. If the witness denies having made such a statement, the actual words which are to be subsequently proved must be shown to the witness and the passage which will ultimately have to be proved

13. Rambali v. State, 1952 All 289 : 53 Cr. L.J. 600 ; see also Deo Lal v. Emperor, 1933 Pat. 440 : 145 I.C. 426 : 34 Cr. L.J. 948 ; Ponnuswami Chetty v. Emperor, 1933 Mad. 382 (2) : I.L.R. 56 M. 475 : 143 I.C. 424 ; In re Gurava Vennan, 1944 Mad. 385 : I.L.R. 1944 M. 897 (unless statement is such that it would not have been omitted if made, statement under Sec. 162 cannot be used for proving omission) ; Sagarmal v. Emperor, 1944 Pat. 390 ; Yusuf Mia v. Emperor, 1938 Pat. 579 : 173 I.C. 934 : 5 B.R. 185 ; Emperor v. Ajit Kumar (Jhose), 1945 Cal. 159 : 220 I.C. 237 : 46 Cr. L.J. 692 ; Hazara Singh v. Emperor, 1928 Lah. 257 : I.L.R. 9 Lah. 389 : 108 I.C. 167 : 29 Cr. L.J.

348 ; Sakhawat Imani v. Emperor, 1937 Nag. 50 : 1 L.R. 1937 Nag. 277 : 167 I.C. 61 : 38 Cr. L.J. 330.

14. Vajralakoti Reddi, In re, (1959) 1 Andh. W.R. 419 : A.I.R. 1960 A. P. 76.

15. State of M.P. v. Kalu, A.I.R. 1959 M.P. 391 : 1959 Cr. L.J. 1340.

16. Laxman v. State of Maharashtra, 1974 M.P. L.J. 227 : 1974 S.C.C. (Cr.) 228 : (1974) 3 S.C.C. 704 : 1974 Mah. L.J. 229 : 1974 Cr. L.R. (S.C.) 36 : 1974 Chand. L.R. (Cr.) 234 : (1974) 2 S.C.J. 371 : 1974 Mad. L.J. (Cr.) 571 : 1975 Mad. L.W. (Cr.) 87 : (1974) 2 S.C.R. 505 : 1974 Cr. L.J. 369 : A.I.R. 1974 S.C. 308.

should be marked and given a number. When in due course the Sub-Inspector is called as a witness, he may be asked to refer to his diary, compare the statement recorded there with the copy and prove that the statement which has been put to the witness was made by that witness in the course of the investigation. If this procedure is not followed, contradictory statement in a diary **cannot** be referred to in argument by Counsel or relied upon by a Court.¹⁷ It is not sufficient to ask a witness whether he did or did not make a certain statement to the Sub-Inspector, unless the witness in answer to that question admits that he made such a statement. In that case, if the statement is contradictory of something else which the witness had said, it is the duty of the cross-examiner to give the witness an opportunity of reconciling his statement. But if the cross-examiner does not do so, the counsel for the prosecution may, on re-examination, give that opportunity or the Court itself should do so. If the witness denies having made such a statement, the defence cannot make any use of the statement which he is alleged to have made unless they take steps to bring the former statement on to the record. In that case, the actual words recorded in the former writing must be put to the witness, if only to make him fully aware of the fact that those words are on record and that it is open to the side which is cross-examining him to have those words proved.¹⁸ The only way a witness can be contradicted by a statement made to the police under the provisions of Sec. 162 of the Criminal Procedure Code is to prove that portion of his statement to the police which contradicts his evidence and to put it to him under this section so that the witness may be given an opportunity of explaining the contradiction; statements made to the police cannot be used at a trial in any other way.¹⁹ The statement, by which it is sought to contradict the prosecution witness under Sec. 162 of the Criminal Procedure Code, must be either proved by the investigating officer, or must be admitted by the witness in his cross-examination, or must be proved in some other way before it is put to the witness under this section.² It is to be noted that under this section proof of the statement follows the putting of it to the witness. It is curious that Sec. 162 of the Code of Criminal Procedure should say that a previous statement to the police can be used to contradict a witness, "if duly proved" and at the same time refer, for the mode of contradiction, to this section which seems to place use for the purpose of contradiction before the proof of the statement. The only way in which the two sections can perhaps be reconciled is by taking 'contradiction' under both the sections to mean, not contradiction in the course of the cross-examination by way of putting the statement of the witness as against his evidence in Court, but subsequent use by way of contradiction when assessing the value of his evidence.²¹ This section does not help the accused to obtain copies of the statements, though it would enable him to make use of the statements, if he happened to be in possession of them.²² This section is a self-comple-

17. *Iqbal Ahmad v. Emperor*, 1943 All 49 : 204 I.C. 495 : 1942 A.L.J. 637 ; *Tarseem Singh v. State*, A.I. R. 1978 J. & K. 53.

18. *ib.*, see also *Ram Bali v. State*, 1952 All 289 : 53 Cr. L.J. 600 ; *Shao Shanker v. State*, 1953 All 652 ; *Bircy Singh v. State*, 1953 All 785 ; *Muzaffar Khan v. Sikandar Khan*, 1939 Lah. 268 ; *Sunil Chandra Roy v. State*, 1954 Cal. 305 : 57 C.W.N. 962.

19. *R. v. Ibrahim*, 8 Lah. 605 : A.I. R. 1928 Lah. 17. By virtue of sub-sections (4) and (5) of Section 173,

Cr. P.C., inserted by Act 26 1955, the accused is entitled to furnished, free of charge, copy statement of prosecution witness.

20. *R. v. Vithu*, 1924 Bom. 510 : I.C. 1007 : 26 Bom. L.R. 962 ; *Shaikh Usman v. R.*, 1928 Bom. 1 I.L.R. 52 Bom. 195 : 107 I.C. 29 Bom. L.R. 1581.

21. *Sunil Chandra Roy v. State*, 19 Cal. 305 : 57 C.W.N. 962.

22. *Purushottam Jethanand v. State Kutch*, 1954 S.C. 700 : 55 Cr. L. 1751 ; *Jhumarlal v. State*, 1957 R 185.

section and the formalities prescribed in Sec. 163, Evidence Act, for calling for and inspecting a document from the possession of the other side are not attracted to it. Were it so, the very purpose for which the section was enacted would be rendered nugatory. In suitable cases the Magistrate can order the granting of such copies under the provisions of this section read with Sec. 165 of this Act without making the accused go through the formalities of Sec. 163.²³

It may be noted that in respect of the record of the previous statement of a witness, such portion of it only would be relevant as is actually used for the purpose of contradicting under this section or corroboration under Sec. 157 of this Act.²⁴

The statements recorded by a police officer under Sec. 162 of the Code of Criminal Procedure can be used in a civil proceeding under this section.²⁵

The Supreme Court has held that compliance with Sec. 162, Criminal Procedure Code and the present section must be in substance and not merely in form.¹

20. Police diaries. A police diary cannot be used as containing entries which can of themselves be taken as evidence of any date, fact or statement; but, it can be used to assist the Court, by suggesting means of elucidating material points.² Only the police officer who kept such a diary can be confronted with it.³ If a police diary is used by the officer who made it to refresh his memory; or if the Court uses it for the purpose of contradicting such police officer, the provisions of Sec. 161 or 145 of this Act, as the case may be, shall apply.⁴

If the special diary is used by the Court to contradict the police officer who made it, the accused person or his agent has a right to see that portion of the diary which has been referred to for this purpose. That is to say, the particular entry which has been referred to, and so much of the diary as is necessary to the full understanding of the particular entry so made, but no more.⁵

21. When document is lost or destroyed. The Act is silent upon the case where the document has been lost or destroyed, and upon the question whether in these or in any other cases a copy can be used instead of the originals. It has, however, been stated that, in such a case, the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. In such a case, the cross-examining party

23. *Natabar Jana v. State*, 1955 Cal. 138 : 59 C.W.N. 729.

24. *ib.*

25. *Surya Rao v. Janakamma*, A.I.R. 1964 A.P. 198 : (1963) 2 Andh. W. R. 485.

1. *Bhagwan Singh v. The State of Punjab*, 1951 S.C.R. 332 : 1951 S. C.J. 285 : 1951 A.L.J. (S.C.) 74 : I.L.R. (1951) 2 Cal. 91 : 64 L. W. 525 : 2 Raj. L.W. 305 : A.I.R. 1952 S.C. 214 ; *Velayudhan Pillai Krishnan Nair v. State of Kerala*, (1970) I.L.R. 2 Ker. 175 : 1970

K.L.R. 610 (615, 617) : 1970 M.L. J. (Cr.) 661.

2. *Dal Singh v. Emperor*, 1917 P.C. 25 : 44 I.A. 137 : 39 I.C. 311 ; approving *R. v. Mannu*, (1897) 19 A. 390 (F.B.).

3. *ib.*

4. *Cr. P. C.*, S. 172 ; and see *Dadan Gazi v. R.*, (1906) 33 Cal. 1023 : 10 C.W.N. 890.

5. See *ib.*, *R. v. Mannu*, (1897) 19 A. 390 (F.B.) ; see also as to police diaries *R. v. Jadab Das*, (1899) 4 C.W.N. 129.

may interpose evidence out of his turn to prove the events, such as loss, etc., relating to the document and to furnish secondary evidence thereof.⁶

22. Inspection of document shown to witness. The decisions upon the question, whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent, are somewhat conflicting. On the whole, however, the practice seems to be, that if the cross-examining Counsel, after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity, his adversary will have no right to see the document; but that if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents, or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite Counsel. But such opposing Counsel has no right to read such a document through, or to comment upon its contents, till so used or put in by the cross-examining Counsel.⁷

146. *Questions lawful in cross-examination.* When a witness is cross-examined, he may in addition to the questions hereinbefore referred to, be asked any questions which tend—

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life,
or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

This section, Sections 148 and 155 seem to disclose that the credit of a witness is shaken only, if it is shown that he is not a man of veracity. The fact that he is of bad moral character is irrelevant.⁸ If the witness denies the suggestion to impeach his credit made in cross-examination, his evidence has to be accepted if evidence is not adduced to discredit him.⁹

A previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in court but also to contradict the evidence given before the court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of matters under Sec. 146(1), Exception 2 to Sec. 153 and Sec. 155(3) of the Act.¹⁰ Clause (1) deals with questions to test the veracity of a witness but Section 153 deals with a different aspect, viz., to contradict him on the answers given by him to show that he is not an impartial witness.¹¹

6. [Taylor, Ev., s. 1447.

7. Taylor, Ev., s. 1452; Jarat Kumar Dassi v. Bissessur Dutt, (1911) 39 C. 245; Peck v. Peck, (1870) 21 L.T.R. 670.

8. Chari v. State, A.I.R. 1959 A. 149: 1959 Cr. L.J. 268.

9. Jaggu v. Badri, A.I.R. 1978 J. & K. 50; 1978 Kash. L.J. 132.

10. N. Sri Rama Reddy v. V. V. Giri, (1971) 1 S.C.R. 399; (1971) 1 S.C.A. 394; 1970 S.C.D. 646; (1971) 1 S.C.J. 483; 1970 U.J. (S.C.) 804; 1970 K.L.T. 390; 1971 M.L.W. (Cr.) 75; A.I.R. 1971 S.C. 1162 (1169).

11. Ibid.

When a cross-examiner puts a question to a witness which is really two questions loaded into one and is therefore composite and ensuring, from the answer to one of the questions, an answer to the other cannot be inferred.¹²

Though under clause (3) of the section the lawyer is entitled to put questions to shake the credit of a witness by injuring his or her character, there must be some reasonable ground for thinking that the imputation conveyed by the question is well founded.¹³ Clause (3) permits the putting of questions to a witness to show his *mala fides*, immorality, dishonesty or falsehood. Even indecent and scandalous questions can be put if those have bearing upon a fact in issue. Such questions should not be disallowed on the ground that these are irrelevant from the point of view of prosecution.¹⁴ But all sorts of irrelevant questions are not within the purview of Section 146 (3) and questions which tend to harass or embarrass a witness are impermissible.¹⁵

147. *When witness to be compelled to answer.* If any such question relates to a matter relevant to the suit or proceeding, the provisions of Sec. 132 shall apply thereto.

148. *Court to decide when question shall be asked and when witness compelled to answer.* If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the court shall have regard to the following considerations :

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;
- (2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

12. *Rani Bala v. Ram Krishna*, (1969) 73 C.W.N. 751 (763).

13. *Deepchand v. Sampathraj*, 1970 Cr. L.J. 260 (262) ; 18 Law Rep 235: (1969) 1 Mys L.J. 606 ; 1969 M. L.J. (Cr.) 1504 ; A.I.R. 1970 Mys. 34.

14. *Prakash Raja Ram v. State of Maharashtra*, 1974 Mah. L.J. 416 : 1975 Cr. L.J. 1297 (Bom) .

15. *Babu Rao Patel v. Bal Thackrey*, 1979 Mah. L.J. 11 : 1977 Cr. L.J. 1637.

- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;
- (4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

ss. 137, 138 (Cross-examination.)
 s. 132 (Incriminating questions.)
 s. 3 ("Court.")

s. 165 Prov. 2 (This section is binding upon judge.)

O. R. 36, 38; Taylor, Ev., ss. 1426, 1427, 1445, 1459—1462; Phipson, Ev., 11th Ed. 648 *et seq*; Markby, Ev., 106, 107; Norton, Ev., 328; Taylor, Ev., ss. 1460—1467.

SYNOPSIS

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|--|---|
| <ol style="list-style-type: none"> 1. Principle. 2. Questions in cross-examination. 3. Previous convictions, impeaching credit by. 4. Indecent and scandalous questions. | <ol style="list-style-type: none"> 5. Character, questions relating to :
 —Section 148.
 —Clauses (1) and (2).
 —Clause (3).
 —Clause (4). |
|--|---|

1. Principle. The credibility of the witness is always in issue, it being necessary to ascertain the value and weight to be attached to the medium through which the proof is presented to the Court. But at the same time it is necessary to protect the witness against improper cross-examination.

2. Questions in cross-examination. Sections 132, 146—148 together embrace the whole range of questions which can properly be addressed to witness.¹⁶ The words in Sec. 146 "in addition to, etc." refer to the second paragraph of Sec. 138, *ante*.

In addition then to the questions which may be asked in cross-examination under the provisions of Sec. 138, a witness may be further asked the question mentioned in Sec. 146, which latter section extends the power of cross-examination far beyond the limits of Sec. 138, which in terms confines the cross-examination to relevant facts, including, of course, facts in issue. The language of Sec. 146, coupled with that of Secs. 138—147, makes it appear as if the "additional facts spoken of in Sec. 146 were considered as not relevant". But, of course, this cannot be the case. As is indicated in Sec. 146 the facts are relevant as tending to show how far the witness is trustworthy and the only object of classing these facts apart from other relevant facts is in order that special rules may be laid down as to when they may be contradicted and when a witness may be compelled to answer them.¹⁷ None but relevant questions can be asked; but relevancy is of a twofold character: it may be directly relevant in its bearing on the very merits of the point in issue, or it may be relevant collaterally to the issue, as in the case of facts relating to the character of a witness, which are always relevant.¹⁸ The questions which may be put under the provisions of Sec. 146 may relate to matters which are either directly relevant to the suit,¹⁹ or relevant only as affecting the credibility of the witness. As a general rule, all questions as to facts re-

16. *R. v. Gopal Doss*, (1881) 3 Mad. 271, 279 (F.B.).

17. *Markby, Ev.*, s. 406.

18. *Norton, Ev.*, s. 328.

19. This means the same as relevant "matters in issue" in S. 132, as in *R. v. Gopal Doss*, (1881) 3 Mad. 271 (F.B.).

vant in the first mentioned sense must be answered whether or not the answer will criminate the witness.²⁰ The provisions of Sec. 132, ante, are by Sec. 147 declared applicable to such questions and evidence will be admissible to contradict his answers.²¹ If, on the other hand, the facts to which the questions relate are relevant only as tending to impeach the witness's credit, it lies in the discretion of the Court to compel the witness to answer or not, dealing with the matter not under the rule contained in Sec. 132, but under the provisions of Secs. 148—152.²² Evidence in such a case will not be admissible to contradict the answer when given, unless in the case provided for by the exceptions to Sec. 153, post. When there is a question asked to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character. In the former case, if the question is insisted on, the Court will compel the witness to answer it; in the latter, it will determine whether or not, in reference to the rules which are to guide its decision, it should or should not compel the witness to answer.²³ Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box, so as to show that his evidence for or against the relevant issue is untrustworthy. It is most relevant in a case where everything depends on the Judge's belief or disbelief in the witness's story.²⁴ Section 147 empowers a Court to compel a witness to reply to a relevant question, and it follows, therefore, that if he refuses to answer a question, immediate action should be taken against him in the interest of a fair trial. If the Court fails in its duty, it hampers the course of justice and brings the tribunal into disrepute.²⁵ Sections 155 and 146 are not in conflict with each other. Sections 138, 140, 145, 148 and 154 provide for impeaching the credit of a witness by cross-examination. In particular, Sec. 146 permits questions injuring the character of a witness to be put to him in cross-examination. Section 155 lays down a different method of discrediting a witness by allowing independent evidence to the adduced.¹

3. Previous convictions, impeaching credit by. A witness may be discredited because he has been convicted for one of the two reasons: (1) because the offence that he has committed shows a certain amount of moral obliquity; or (2) because it has resulted in the witness having spent some time in jail in company with men presumably of bad character, which association may very possibly have contaminated him. Convictions under the Motor Vehicles Act, resulting in fines, are not such as suggest that the offender is untruthful or of a depraved character. A conviction for adultery in this country is very much the same as appearing as a respondent or co-respondent in the Divorce Court in England, and is not generally regarded as carrying with it the suggestion that the man is unreliable as a witness with regard to matters entirely unconnected with that particular matrimonial offence.²

20. *Sa.* 132, 147.

21. *R. v. Gopal Doss*, (1881) 3 Mad. 271 (F.B.).

22. *R. v. Pramatha Nath Bose*, (1910) 37 C. 575 : 6 I.C. 782 : 14 C.W. N. 957.

23. *R. v. Gopal Doss*, (1881) 3 Mad. 271 (F.B.).

24. *Bombay Cotton Manufacturing Co. v. N.B. Mill Lal Shival*, 1918 P.

L. E. 440

C. 1 : 42 I.A. 110 : I.L.R. 39 Bom. 386 : 29 I.C. 229 : 17 Bom. L.R. 455.

25. *Shive Sharnagat v. State*, 1953 Bhopal 21 : 53 Cr. L.J. 946.

1. *G. Hussenaiah v. B. Yerraiah*, 1954 Andh. 39 : (1954) 2 M.L.J. (Andh.) 39.

2. *Gafoor v. Emperor*, 1936 Rang. 87A 164 I.C. 677.

4. Indecent and scandalous questions. Indecent and scandalous questions may be put either to shake the credit of a witness, or as relating to facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, though they may have some bearing on the question before the Court. But, if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no jurisdiction to forbid such questions, though they may be indecent or scandalous.³

No question respecting any fact irrelevant to the issue can be put to a witness for the mere purpose of contradicting him, it being only with regard to relevant matters that a witness can be contradicted by proof of previous statements inconsistent with any part of his evidence.⁴ The provisions of Secs. 148–150, 153, are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by injuring his character, whereas some of the additional questions enumerated in Sec. 146 do not necessarily suggest any imputation on the witness's character. Nevertheless, it is believed to have been the intention of the Act, as also the practice, to consider all the questions covered by Sec. 146 to be governed by the provisions of Secs. 148–150 and 153.⁵

5. Character, questions relating to. In determining the relevancy of character as affecting the credit to be given to a witness, the first question is: What kind of character is relevant? Since the argument is to be against or for the probability of his now telling the truth upon the stand, it is obvious that the quality or tendency which will here aid is his quality or tendency as to truth-telling in general, i.e., his veracity, or, as more commonly and more loosely put, his character for truth. This must be, and is universally conceded to be, the immediate basis of inference. Character for truth is always and everywhere admissible. Moreover any other trait or quality, or combination of them, is relevant only so far as involving, necessarily, or probably, the presence or absence of this quality as to truth-telling.⁶ As to relevancy of evidence relating to character, see Secs. 52 to 55, ante. A witness cannot be treated as discredited, merely because the cross-examining counsel asked some questions impeaching his character when the answers to those questions were quite satisfactory.⁷

Section 148. Section 148, together with Secs. 149–152, was designed to protect the witness against improper cross-examination (v. post).⁸ Sections 148, 149 are as binding upon the Judge as upon the parties.⁹ Under the first mentioned section, when a question is relevant only as affecting credit, the

3. *Mahomed Mian v. Emperor*, 1919 Pat. 515 : 52 I.C. 54 ; *Prakash Raja Ram v. State of Maharashtra*, 1974 Mah. L.J. 416 : 1975 Cr. L. J. 1297 (Bom.). But see I.L.R. (1970) 2 Delhi 854, as to when such questions are impermissible. Also see comments on Section 149.

4. v. ante, notes on "cross-examination" in S. 138, and post, S. 153, cl. (3).

5. *Markby*, Ev., s. 107.

6. *Wigmore*, Ev., s. 922.

7. *Ragho Prasad v. Emperor*, 1929 Pat. 180 : 118 I.C. 333.

8. It is said with reference to S. 148,

"if the witness either of his own accord or being compelled by the Court, answers a question which is irrelevant or which is relevant only in so far as it affects his credit, and if such question criminate him or expose him to a penalty or forfeiture, is he entitled to the protection afforded by S. 132 ante? It would appear that he is not. But it is submitted that the protection should be extended to such a case," see notes to S. 132, ante.

9. S. 165, post, Prov. (2),

Court has a discretion (for the exercise of which certain rules are laid down) as to compelling an answer; and Sec. 153, post, enacts that where such a question has been answered, the usual rule as to the inadmissibility of evidence to contradict answers to irrelevant questions shall apply save and except in two cases; but that, if the witness answers falsely, he may afterwards be charged with giving false evidence. The Court should confine questions as to character asked in cross-examination to questions which are relevant to the case, and disallow questions which are unnecessary, provocative or merely harassing.¹⁰

Clauses (1) and (2). Under the first and second clauses of Sec. 148, the fact asked must be such as, if true, would really and seriously affect the credibility of the witness on the matter to which he testifies. The abuse of examination against which these clauses are directed is illustrated by the incident in the Tichborne case, where a witness, an elderly man who was called to disprove the identity of the claimant with the real Roger Tichborne, was most improbably asked in cross-examination whether in early life he had not had an intrigue with a married woman. Questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, should be checked.¹¹ "If a woman", says Sir J. F. Stephen in his General View of the Criminal Law of England, "prosecuted a man for picking her pocket, it would be monstrous to enquire whether she had not had an illegitimate child ten years before, though circumstances might exist which might render such enquiry necessary." For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason.¹² A Magistrate, it was held, should have disallowed upon the principle embodied in this section, a question as to previous conviction thirty years old put to an intended surety, on the ground that it related to matter so remote in time that it ought not to influence his decision as to the fitness of such surety.¹³ "Where the facts which form the subject of the question are comparatively recent, they are more important as bearing upon the moral principles of the witness than when they are of remote date, because a man may reform and become in later years incapable of conduct to which in earlier life he was prone. The interests of justice can seldom require that the errors of a man's life since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant."¹⁴

Clause (3). The third clause declares it to be improper to make serious accusations against a witness who is called to prove some comparatively unimportant fact in the case.

Clause (4). With reference to the fourth clause, read Illust. (h) to Sec. 114, ante, and also the other matters which may be considered in connection with the same illustration. It has been sometimes stated that if the witness declines to answer, no inference of the truth of the fact can be drawn from this. But this general statement is open to question. It is going too far, to

10. *S. Pillai v. G. S. T. Shaikh Thumby Sahib*, 1940 Rang. 113 : 189 I. C. 705. Such as that he is a black-marketeer, *R. R. Ghari v. State*, A.I.R. 1959 All 149 : 1959 Cal. L.J. 268.

11. *Taylor, Ev.*, s. 1460.

12. See *Staines v. Stewart*, (1861) 2 S. & T. 330, 332 want of chastity is not always a ground for discrediting a witness, per Sir C. Cresswell.

13. *R. v. Ghulam Mustafa*, 29 A. 371 at p. 374 : 1904 A.W.N. 52.

14. *Taylor, Ev.*, s. 1460.

say that the guilt of the witness must be implied from his silence, but it is in consonance with justice and reason that the Court should (as it indeed can scarcely help doing) consider that circumstance, as well as every other, when deciding on the credit due to witness.¹⁵

Where a party gave evidence in his own case, it was held by a majority of two out of three Judges that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not previously been brought against him in respect of a similar claim, upon which he had given evidence, and the verdict of the jury was notwithstanding against him, and this, without producing the record of the proceedings in the previous case.¹⁶

But though, as was done in the case last mentioned, evidence may be of facts, as that the witness has brought or defended actions which have been dismissed or decreed against him; that the witness gave his evidence in such actions; that he made false charges and so forth, yet evidence of the particular opinion formed by a Judge in another case of the credit to be attached to the testimony of witness who is cross-examined in a subsequent trial, is inadmissible.¹⁷

No weight ought, in general, to be attached to the evidence of a witness, who himself deposes to his own turpitude.¹⁸

149. *Questions not to be asked without reasonable grounds.* No such question as is referred to in Sec. 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is a *dakait*. This is a reasonable ground for asking the witness whether he is a *dakait*.

(b) A pleader is informed by a person in Court that an important witness is a *dakait*. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a *dakait*.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a *dakait*. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a *dakait*.

15. Taylor, Ev., s. 1467.

16. Henman v. Lester, (1862) 31 L.J. C.P. 366.

17. In re Pasumarty Jaggappa, 4 C.W.N. 684, following Seaman v. Netherclift, (1876) L.R. 2 C.P.D. 53 : 46 L.J. C.P. 128 : 35 L.T. 784 : 25 W.R. 159 ; Mir Jawali v. Emperor, 1936 Pesh 106 : 162 I.C. 300 and distin-

guishing Henman v. Lester, (1862) 31 L.J.C.P. 366 and see Chandreshwar v. Bisheshwar, 1927 Pat. 61 : I.L.R. 5 Pat. 777 : 101 I.C. 289 : 8 P.L.T. 510.

18. See Kali Chander v. Shib Chunder, (1870) 6 B.L.R. 501, 507 : 15 W. R. 12 (P.C.).

The combined effect of Section 146, ante and this section is that though it is permissible for a lawyer to put a question in cross-examination of a witness to shake his credit by injuring his character, nevertheless, the lawyer must be satisfied that there are reasonable grounds for thinking that the imputation which it conveys is well-founded.¹⁹

Scandalous, vexatious and cantankerous questions put with a view to delay the progress of the case or which do not advance the cause of justice but which elicit irrelevant or inadmissible answers should not be allowed to be put to a witness in cross-examination.²⁰

150. *Procedure of Court in case of question being asked without reasonable grounds.* If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

For the ends of justice the Judge trying a case can and should himself put questions to clarify matters which one or both parties have left vague.²¹

151. *Indecent and scandalous questions.* The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

The Section enacts that the Court may forbid any questions which it regards as indecent or scandalous although such questions may have some bearing on the questions before the Court, unless—

(a) they relate to facts in issue, or

(b) to matters necessary to be known in order to determine whether or not the facts in issue existed.

However even when indecent or scandalous questions do not relate to facts in issue, if the Court is satisfied that they have a bearing upon a fact in issue, the same should not be forbidden. It is no criterion for disallowing such questions that those are not relevant from the point of view of the prosecution,²² but all sorts of irrelevant questions which tend to harass or embarrass a witness are not to be allowed.²³ Scandalous, vexatious and cantankerous questions which do not advance the cause of justice and which elicit irrelevant or inadmissible answers and which are put with a view to delay the progress of the case should not be allowed.²⁴

19. Deepchand v. Sampathraj, 1970 Cr. L.J. 260 : 18 Law Rep 235 : (1969) 1 Mys. L.J. 606 : 1969 M.L.J. (Cr.) 504 : A.I.R. 1970 Mys. 34 (36).

20. I.L.R. (1970) 2 Delhi 854.

21. *Ibid.*

22. Prakash Raja Ram v. State of Maharashtra, 1975 Cr. L.J. 1297 (Bom.).

23. Babu Rao Patel v. Bal Thackeray, 1979 Mah. L.J. 11 : 1977 Cr. L.J. 1637.

24. I.L.R. (1970) 2 Delhi 854.

The advocate owes a bundle of duties, that is, duty to his client, duty to his opponent, duty to the Court, duty to the profession and duty to the public and the State. But, primarily, he owes a duty to his client to represent in whose case he is engaged. His is a position of difficulty; he does not speak of that which he knows, but he has to support a thesis which it is for him to contend for; but he has to do this in such a way as not to degrade himself. An advocate in the discharge of his duties to his client must not be hampered by any fear of offending the opposite party or any witness. There may be cases in which questions will have to be asked which may appear to be scandalous but what is relevant cannot be scandalous. He can put such questions, if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.²⁵

152. *Questions intended to insult or annoy.* The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

s. 148 (Questions affecting credit.)

s. 3 ("Court.")

s. 3 ("Fact in issue.")

s. 165 (Questions by Judge.)

Markby, Ev., 107; Steph., Dig., pp. 159, 160; Taylor Ev., s. 949; Powell, Ev., 9th Ed., 227 and see authorities cited in last section and in s. 138, ante.

SYNOPSIS

1. Principle.

2. Questions in cross-examination.

1. Principle. See Notes, post.

2. *Questions in cross-examination.* Sections 149—152 together with Sec. 148, ante, were intended to protect a witness against improper cross-examination—a protection which is often very much required. It has, however, been said that the protection afforded by Sec. 148 is not very effectual, because an innocent man will be eager to answer the question, and one who is guilty will by a claim for protection nearly confess his guilt, and that the threats contained in Secs. 149, 150, do not carry the matter much further.¹ These latter sections were substituted while the Bill was in committee for certain other sections in the original draft to which much objection was taken and the discussion with reference to which will be found in the Proceedings in Council.² Speaking of the substituted sections including Secs. 146—152, Sir J. F. Stephen, said: "The object of these sections is to lay down in the most distinct manner the duty of Counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles, according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth,

25. In re G. Vasantha Pai, I.L.R. 1959 M. 958 : A.I.R. 1960 M. 73 : 72 L.W. 585 ; K. Saraswathi alias R. Kalpana v. P. S. S. Somasundaram Chettiar, 83 M.L.W. 42 : (1970) 2 M.L.J. 119 (124).

1. Markby, Ev., 107.

2. See Proceedings of the Legislative Council Supplement to the *Gazette of India*, 30th March, 1872, pp. 233,

238. With reference to Ss. 149, 150 it may be observed that an advocate cannot be proceeded against either civilly or criminally, for words uttered in his office as advocate ; Sullivan v. Norton, (1886) 10 M. 28. As to the extent of the privilege of speech accorded to advocate, see R. v. Kasheerath Dinkur, (1871) 8 Bom. H.C.R. Cr. 142—146.

in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public." Section 165, post, further prohibits the Judge himself from asking any question which it would be improper for any other person to ask under Secs. 141—149. But whatever doubts there may be as to the efficacy of Secs. 148—150, Secs. 151 and 152 ought to prove effectual. For in cases where it will be, for the reasons mentioned, of little use for the witness to decline to answer, the Judge may at once interpose and stop the question.³ "The exclusions provided in sub-sections (2) and (3) in Sec. 148 and in Secs. 151 and 152 indicate with more distinctness than is to be found in the English law, the principles on which the court should proceed in protecting witnesses from reckless and unjustifiable interrogation. A witness is not to have his whole past life raked up and dragged into publicity merely because he comes forward in obedience to the law to give evidence in Court; no serious a private inconvenience can be justified only by a real necessity; and it is not so justified when either the imputation, if true, would not affect the witness's credibility, or when the injury to the witness's character is very serious, while the importance of the evidence very small."⁴ With reference to Sec. 151, it may be observed that "indecent evidence is no objection to its being received where it is necessary to the decision of a civil or a criminal right".⁵

The Court cannot forbid indecent or scandalous questions, if they relate to facts in issue,⁶ or to matters necessary to be known in order to determine whether or not the facts in issue existed. If they have, however, merely some bearing on the question before the Court, the latter has a discretion and may forbid them. Where a question is intended to insult or annoy or, though proper in itself, appears to the Court needlessly offensive in form, the Court must interpose for the protection of the witness. It is unfortunate, however, that in this country owing, very often, to timidity of Courts and a desire not to become unpopular with the bar, cross-examination is allowed to be carried to the extent which can only be described as scandalous with the result that Courts are avoided by respectable people and the administration of justice suffers thereby and the Bar gets into greater and greater disrepute and becomes unpopular with the public and the Judges become objects of contempt.⁷ It is the duty of the Court to see that not only such questions should not be answered but that they should not be asked; for the moment such a question is asked half the mischief is done though no answer is compelled.⁸

A woman, who in some question of petty quarrel, is asked: "Did you, twenty years ago, have an illegitimate child?" has a right to be protected on the ground, first, that if she had, it does not affect her truthfulness;

3. Markby, Ev., 107.

4. *Mst Ayesha Bi v. Peer Khan Sahib*, 1954 Mad. 741 : 55 Cr. L.J. 1239.

5. *Da Costa v. Jones*, (1778) 2 Cowp. 729, 734; per Lord Mansfield; Steph., Dig., pp. 159, 160; Taylor, Ev., Sec. 949; Powell, Ev., 9th Ed., 227.

6. See *Rozario v. Ingles*, (1893) 18 B. 468, 470; *Mahomed Mian v. Emperor*, 1910 Pat. 515 : 52 I.C. 54; *Subala Das v. Indra Kumara Haz-*

zura, 1923 Cal. 315 (2) : 65 I.C. 692; *Prakash Raja Ram v. State of Maharashtra*, 1975 Cr. L.J. 1297 (Bom.).

7. See the opinions of eminent Indian lawyers—Mahatmaji, Pandit Motilal Nehru, President Rajendra Prasad collected in *Ramaswami's Magisterial and Police Guide*, Vol. I.

8. *Mst Ayesha Bi v. Peer Khan Sahib*, 1954 Mad. 741 : 55 Cr. L.J. 1239.

and second, that it is not worthwhile to endanger her reputation for so trifling a cause.⁹ There is, however, one limitation on the exercise of this power by Courts because it is not desirable that the Court should be interposing frequently and asking the advocate to explain the line of his defence. This will force the hand of the advocate to prematurely disclosing his object in putting the questions and this would put the witness on guard and the effectiveness of cross-examination will be completely destroyed.¹⁰ We must not forget that in many cases as pointed out by Lord Birkenhead,¹¹ "the issues are of such a nature that severe and even very wounding cross-examination is required. Justice in such cases could not be elucidated without the most searching, offensive and exasperating cross-examination."

In a Calcutta case it was held that counsel asking defamatory questions cannot protect himself by showing that these were according to his instructions.¹² But in a subsequent case of the same Court, it has been held that where a pleader asks a question in cross-examination in his client's interest under instructions, he cannot be convicted under Sec. 500, Penal Code, especially when the complainant admits that the pleader has no malice or grudge against him.¹³ Considering the provisions of Secs. 146 and 148, and bearing in mind the fact that unlike in England the privilege of a counsel in this country is qualified, there can be no question that a counsel or advocate, provided he has instructions, has a large amount of discretion in the matter of putting questions in cross-examination. In the interest of his client, in the interest of justice and in order to discredit the witness he is cross-examining, the advocate is entitled to put questions within the limits his good sense might dictate or indicate.¹⁴ There is a presumption of good faith on his part.¹⁵ It is the duty, therefore, of a Court, when a complaint is made against an advocate or legal practitioner for defamation that it should presume that the remark was made on instructions and in good faith; and unless circumstances clearly show that it was made wantonly, or from malicious or private motives, the complaint should not be entertained—even if the circumstances suggest recklessness or malice further enquiry should be made and an opportunity, if possible, should be given to a legal practitioner to offer an explanation before summons is issued.¹⁶ The immunity which an advocate or a pleader enjoys

9. Ibid at p. 750.

10. *Harnam Singh v. Emperor*, 131 I.C. 138 : A.I.R. 1931 Sind 38 ; *Abbas Ali v. Emperor*, A.I.R. 1933 Lah. 667 : 143 I.C. 479.

11. *Law, Life and Letters*, Vol. I, p. 242.

12. *Weston and others v. Peary Mohan Das*, 1914 Cal. 396 : I.L.R. 40 Cal. 898 : 23 I.C. 25 : 18 C.W.N. 185 (S.B.).

13. *Narayan Chandra Ganguli v. Harish Chandra*, 1933 Cal. 185 : 144 I.C. 995 : 34 Cr. L.J. 865.

14. *Rev. Father P. Mesaric v. Ramani Mohan Banerjee*, 1938 Cal. 766 : 178 I.C. 253 : 42 C.W.N. 1113 (S.B.).

15. *Nikunja Behari Sen v. Harindra Chandra*, 1914 Cal. 255 (1) : I.L.R. 41 Cal. 514 : 20 I.C. 1008 : 14 Cr. L.J. 528 : 18 C.W.N. 424 ; *Muhammad Taqi v. M.A. Ghani*, 1945 Lah. 97 : 210 I.C. 46 : 46 Cr. L.J. 580 ; *Mat Ayoncha Bi v. Peer*

Khan Sahib, 1954 Mad. 741 : 55 Cr. L.J. 1239 ; *Fakir Prasad Ghose v. Kripasindhu Pal*, 1927 Cal. 303 : I.L.R. 54 Cal. 137 : 101 I.C. 600 : 28 Cr. L.J. 472 ; *M. Banerjee v. Emperor*, 1927 Cal. 823 : I.L.R. 55 Cal. 85 : 104 I.C. 717 : 28 Cr. L.J. 877 ; *Shiva Kumari v. Becharam*, 1921 Cal. 525 (2) : 66 I.C. 604 : 25 C.W.N. 835 ; *U. Pike v. Ma Khin Thein*, 1940 Rang. 77 : 187 I.C. 463 : 41 Cr. L.J. 480 ; *Narayan Chandra Ganguli v. Harish Chandra Saha*, 1933 Cal. 185 : 144 I.C. 935 : 34 Cr. L.J. 865 ; *Varadaraja Iyer v. Venkatarama Iyer*, 1927 Mad. 378 : 99 I.C. 625 ; see also notes to S. 138, ante.

16. *T.F.R. McDonnell v. King-Emperor*, 1925 Rang. 345 : I.L.R. 3 Rang. 524 : 92 I.C. 737 ; followed in *U. Pike v. Ma Khin Thein*, 1940 Rang. 77 : 187 I.C. 466 : 41 Cr. L.J. 480.

in a criminal proceeding for words uttered or written in the performance of his functions as an advocate is not in the nature of an absolute, but of a qualified privilege and it is for the prosecution to prove absence of good faith.¹⁷ Questions may be asked for which there are any reasonable grounds for thinking that imputations contained in them are well-founded and that it is by no means necessary before the question is asked that the person asking it should be in a position to establish the truth of the imputations beyond all doubt.¹⁸ A counsel is entitled to accept the instructions of his client. He is not supposed to go hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. But where questions to credit are material, questions, however damaging, may be put and must be answered, but counsel must always safeguard himself by being able to show that he had reasonable ground for believing in the charges which he in his cross-examination makes against a witness. It has been held in an Allahabad case that no questions attacking a witness's honour should be put, unless and until counsel by inquiry has satisfied himself that the damaging fact is well-founded and this he ought to do before he comes into Court.¹⁹ Questions on *mala fides*, immorality dishonesty or untruthfulness of a witness can all be put, provided there is necessity and foundation for the same. Questions even scandalous and indecent directly relating to the facts in issue can be put. But questions which are intended to insult or annoy a witness and which are offensive in form can be forbidden by Court.²⁰ Such questions put with a view to delay the progress of the case and to elicit irrelevant or inadmissible answers should not be put.²¹ Irrelevant questions which tend to harass or embarrass a witness should not be allowed.²² A counsel's privilege to test the veracity of a witness is not unfettered. He should not act to the dictates or wishes of his client. The client should instruct his counsel to put defamatory questions to a witness only when he had materials to substantiate such imputations : otherwise, he runs the risk of being run down for defamation.²³ In a Madras case, where in the course of cross-examination the witness was asked a question suggesting a serious charge of dishonesty which was not substantiated, White, C. J., observed : "My own view is—(we have no authority in the matter and it is only my 'pious opinion')—that in all the circumstances and having regard to the character of the litigation and the parties to the suit, the imputation ought to have been withdrawn."²⁴ It is the duty of the tribunal, if it has any suspicion, when an advocate begins an attack upon a prosecutor or a witness by way of so-called "suggestion", involving dishonourable conduct, to demand from the advocate an assurance that he has good grounds for making the suggestions. If the assurance is not received, the cross-examination on these lines should be stopped promptly. If the assurance is given, and if it should appear at the termination of the trial that no such

17. L. Genden Lal v. Rex, 1948 All 409 : 49 Cr. L.J. 701 : 1948 A.L.J. 540 ; Satish Chandra Chakravarti v. Ram Dayal De, 1921 Cal. 1 : 1.L.R. 48 Cal. 388 : 59 I.C. 143 : 22 Cr. L.J. 31 (S.B.) ; see also Re Nagariji Trikamji, 1.L.R. 19 Bom. 340 ; Emperor v. Ganga Prasad, 1.L.R. 29 All 685 : 6 Cr. L.J. 197.
18. Miss Rebecca Mondal v. Emperor, 1947 Cal. 278 : 228 I.C. 13 : 48 Cr. L.J. 15 : 50 C.W.N. 545.
19. Per Mehta, C. J., in A. Vakil, in the matter of, 1925 All 641 : 1.L.R. 47

- All 729 : 88 I.C. 179 : 26 Cr. L.J. 1091 : 23 A.L.J. 469.
20. Prakash Raja Ram v. State of Maharashtra, 1975 Cr. L.J. 1297 (Bom.).
21. 1.L.R. (1970) 2 Delhi 854.
22. Babu Rao Patel y. Bal Thackrey, 1979 Mah. L.J. 11 : 1977 Cr. L.J. 1687.
23. Mohammad v. Kh. Lassa Manni, 1969 Kash. L.J. 27.
24. Crompton & Co. v. Secretary of State, 1915 Mad. 421 (2) : 26 I.C. 610 : 26 M.L.J. 549.

ground had existed, the tribunal should bring the conduct of the advocate to the notice of the High Court.²⁵ Sections 151 and 152 empower a Court to forbid indecent and scandalous questions and questions intended to insult or annoy or needlessly offensive in form. The Court has got ample powers, not only to prevent the putting of such questions which if answered or unanswered could have brought about the mischief which was intended to be created, but also to hand up the offending practitioner to the High Court and other appropriate authorities for disciplinary action.¹ The Court has a duty to put such questions which are meant to clear the ambiguities left by the parties.²

153. Exclusion of evidence to contradict answers to questions testing veracity. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1. If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2. If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty.

He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

25. *Bans Lochan Lal v. Emperor*, 1930 Pat. 195 : 1 L.R. 9 Pat. 31 124 I.C. 396 : 91 Cr. L.J. 641.

1. *Mst. Ayesha Bi v. Peer Khan Sahib*, 1954 Mad. 741 : 55 Cr. L.J. 1239.
2. 1 L.R. (1970) 2 Delhi 854.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a bloodfeud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

s. 146 (Questions to credit.)

Taylor, Ev., ss. 1436, 1437, 1439, 1440—1442, 1444, 1490; Stewart Rapalje's Law of Witnesses, ss. 208—210; Markby, Ev., 108; Roscoe N. P. Ev., 182; Steph. Dig., Art. 130; Roscoe, Cr. Ev., 16th Ed., 103-104; Norton, Ev., 332.

SYNOPSIS

- | | |
|---|---|
| 1. Principle. | 5. Exception 2—Questions impeaching impartiality. |
| 2. Scope. | 6. Questions impeaching credit. |
| 3. Exclusion of evidence to contradict. | |
| 4. Exception 1—Previous conviction. | |

1. **Principle.** The reason of this rule, which restricts the right to give evidence in contradiction, is that it is an object of primary importance to confine the attention of the Court as much as possible to the specific issues. Without some such rule so many collateral questions of fact might be raised in the course of a long trial that the specific questions to be determined might be lost sight of and the trial itself inordinately lengthened.³ The exceptions refer to two matters which are easily susceptible of proof and are so important as to strike at the very root of the witness's trustworthiness, while no great expenditure of time need be involved in ascertaining how the facts stand.⁴

2. **Scope.** This Section and Sec. 155 must be strictly construed and narrowly interpreted, if the Courts governed by the statute are to be spared the task in many suits of prosecuting, on most imperfect material, issues which have no bearing upon that really in contest between the parties.⁵ "A party may not, in general, impeach the credit of his opponent's witnesses by calling witnesses to contradict him on collateral matters, and his answers thereon will be conclusive."⁶

3. **Exclusion of evidence to contradict.** Where a fact which is relevant as having a direct bearing on the issue is denied by a witness, it may of course be proved *aliunde*, and his answer may thus be contradicted by independent evidence.⁷ So, the statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he

3. Kazi Ghulam v. Aga Khan, (1869) 6 Bom. H.C.R. 93, 96; Taylor, Ev., s. 1439; Bhogi Lal v. Royal Insurance Co., Ltd., 1928 P.C. 54; I. L.R. 6 Rang. 142; 108 I.C. 1; 26 A.L.J. 377.

4. Cunningham, Ev. s. 153.

5. Bhogi Lal v. Royal Insurance Co., Ltd., 1928 P.C. 54.

6. Phipson, 11th Ed., p. 659.

7. See Illust. (c) and Taylor, Ev., s. 1438, where the rule is stated to be that: "If the questions relate to

relevant facts, the answers may be contradicted; if to irrelevant, they cannot, and enquiries respecting the previous conduct of a witness will almost invariably be regarded as irrelevant, if not connected with the cause of the parties." It is said that such a rule may be implied. The express provisions of S. 5, ante, however, renders unnecessary this recourse to an implied rule; see S. 155, post.

was and saw the accused person, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point.⁸ But evidence to contradict a witness as to the reasons for his being at the place of occurrence at the time when it took place is not admissible as the evidence is not on a matter relevant to the issue.⁹ If a question in cross-examination affects only the credit of the witness and is not relevant to the matters actually in issue, the witness's answer cannot be contradicted by other evidence except in certain exceptional cases.¹⁰ Where the fact inquired after is only collaterally relevant to the issue (as in the case with the character of the witness), Counsel must be content with the answer which the witness chooses to give him. If he denies the imputation, the answer is conclusive for the purposes of the suit,¹¹ and the matter cannot be carried further at the trial except in the two cases provided by this section, which, however, does not appear to be very accurately expressed, as there is at least one other common case where the witness may be contradicted (see Sec. 155, post). The only redress which a party has, is to charge the witness with giving false evidence, and to try him for it. To this general rule there are, however, as already observed, two exceptions contained in the above section and taken from English law. Unless the case falls under these two exceptions the answers of the witness to questions tending to shake his credit cannot be contradicted.¹²

The rule limiting the right to call evidence to contradict witnesses on collateral questions excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute; the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence.¹³ "The object of Sec. 153 is to prevent trials being spun out to an unreasonable length. If every answer given by a witness upon the additional facts mentioned in Sec. 146 could be made the subject of fresh inquiry, a trial might never end. These matters are after all not of the first importance beyond what is comprised in the exceptions."¹⁴

4. Exception 1: Previous conviction. Under the terms of the first Exception above referred to when a witness denies that he has been previously convicted his previous conviction may always be put in to refute him.¹⁵ Section 511 of the Criminal Procedure Code (now Sec. 298 of the new Code) declares the manner in which the previous conviction may be provided in an inquiry, trial or other proceeding under that Code. In the absence of any special provision, the only medium of proof is the record of conviction.¹⁶ But it is only a question relating to his previous conviction which could be put in evidence. Where, however, a witness was asked whether he was an active criminal and whether he was not under police surveillance, and he denied

8. *R. v. Sakharam Mukhundji*, (1874) 11 Bom. H.C.R. 166; *Illusts.* to the section.

9. *Ram Bali v. State*, 1952 All 289; 53 Cr. L.J. 600.

10. *Piddington v. Bennert & Wood Proprietary, Ltd.*, 63 C.L.R. 533 (a Canadian case) followed in *Rambali v. State*, 1952 All 289; 53 Cr. L.J. 600.

11. See *Illusts.* (a) and (b).

12. *Ayesha Bi v. Peer Khan Sahib*, 1954

Mad. 741; 55 Cr. L.J. 1239.

13. *Kazi Ghulam v. Aga Khan*, (1869) 6 Bom. H.C.R.O.C.J. 93, citing *Att.-Genl v. Hitchcock*, (1847) 1 Ex. 91, 99.

14. *Markby, Ev.*, 108.

15. A similar rule prevails in England, see *Taylor, Ev.*, s. 1437; *Att.-Genl v. Hitchcock*, (1847) 1 Ex. 91, 99.

16. *R. v. Watson*, (1817) 2 Stark 116; see *Ss. 76, 77, ante*.

both, it was held by the Calcutta High Court that evidence to contradict him, would be inadmissible because it had nothing to do with his previous conviction, but was only meant to impeach his character.¹⁷

5. Exception 2: Questions impeaching impartiality. Though the language of this Exception is *prima facie* wide enough to permit questions tending to impeach the impartiality of the witness where the evidence has been reduced to writing, it is undesirable to permit the putting of such questions and for several reasons. If the witness is replying from his memory alone, there is little value in what he may say. If he is refreshing his memory by looking at the diary, the procedure is outside the scope and intent of Sec. 159, Evidence Act.¹⁸ Whether the evidence referred to in the second Exception can be given has been the subject of doubt in England. The Legislature has here answered the question in the affirmative, taking that view of the matter which was laid down by the Judges in the case of the *Attorney-General v. Hitchcock*.¹⁹ Facts showing that the witness has been bribed,²⁰ has suborned other witnesses, has expressed hostility and the like, can be shown, if the witness denies them.²¹

The distinction made between cases coming within the section and those within the second Exception is exemplified in the undermentioned case.²² There a person named Yewin was indicted for stealing wheat. The principal witness against him was a boy of the name of Thomas, his apprentice. The Judge allowed the prisoner's Counsel to ask Thomas, in cross-examination whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged on him and would soon fix him in Monmouth gaol? He denied both. The prisoner's Counsel then proposed to prove that he had been charged with robbing his master and had spoken the words imputed to him. The Court ruled that his answer must be taken as to the former, but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness.

Care must be taken to distinguish between contradiction of answers touching credit only, which is generally disallowed, and contradiction of answers concerning facts directly relevant. In the latter case, such answers may always be contradicted, even if they have been given by the party's own witness, for the object is to show the true facts, not merely to discredit the witness. The rule is thus expressed in American cases. Although a party may

17. *Kamla Kanto Das v. State*, A.I.R. 1959 Cal. 342 : 1959 Cr. L.J. 694.

18. *Kahi Ram v. Emperor*, 1928 All 280 : 109 I.C. 120 : 29 Cr. L.J. 472 : 26 A.L.J. 139.

19. (1847) 1 Ex. 93 ; see *Taylor, Ev.*, ss. 1440—1442.

20. See S. 155, cl. (2) post ; *Att.-Gen v. Hitchcock*, ante.

21. *Norton Ev.*, s. 332 ; *Taylor, Ev.*, s. 1440 ; *Stewart Rapalje's op. cit.* 346, 347 ; e. g., that the witness is the kept mistress of the party calling her [*Thomas v. David*, (1836) 7 C. & P. 350], or that the witness has suborned false witnesses against the opposite party [*Queen's case* (1820)

2 B. & B. 284 ; *Att.-Gen v. Hitchcock*, ante] ; or has had quarrels with or expressed hostility towards him [*R. v. Shaw*, (1888) 16 Cox. 503] ; see *Roscoe, N.P. Ev.*, 182 ; *Steph., Dig.*, Art. 130 ; *Roscoe, Cr. Ev.*, 16th Ed., 103-104 ; *Taylor, Ev.*, s. 1490, *et seq.* Moreover if a plaintiff's witness denies a material fact and states that persons connected with the plaintiff have offered him money to assert it, the plaintiff may call those persons, not only to prove the fact but to disprove the attempt at subornation [*Melhuish v. Collier*, (1850) 15 Q.B. 878].

22. *R. v. Yewin*, (1811) 2 Camp 638n.

not discredit his own witness by testimony as to his general character, he may give evidence to contradict any particular and material fact to which the witness has testified. He may show that the witness is mistaken, or that the facts are different from the version he gives of them, i.e., for the purpose of upholding his cause of action or defence (not for the purpose of impeaching the witness) he may show how the fact really is. If he calls a witness to prove a particular fact and fails in establishing it by him (or if he disproves it), the fact may nevertheless be proved by another witness, or the first one's account shown to be incorrect. A party may always correct his own witness, even though by directly contradicting him. If such evidence were to be excluded, the consequences would be most injurious to the administration of justice as well in criminal as in civil cases.²³

The provisions of Section 153 must be strictly construed. Exception 2 to Section 153 deals with an aspect different from that dealt with in clause (1) of Section 146 under which questions to test the veracity of witness may be put, but under the exception to Section 153 a witness may be contradicted with respect to his answer to a question tending to show that he is not an impartial witness. It is only Clause (3) of Section 146 and not the entire Section 146 that can be read along with Section 153. A previous statement of a witness recorded on tape cannot only be used to corroborate but also to contradict his testimony as well as to judge the veracity of the witness and to show that he is not an impartial witness. Such evidence is admissible under Section 146 (1), Exception 2 to Section 153 and Section 155 (3).²⁴

6. Questions impeaching credit. There is a difference between impeaching the impartiality of a witness and impeaching his credit. If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted: but, if he is questioned about his character only with the object of shaking his credit, no evidence to contradict him would be admissible, unless his evidence can be brought within either of the two exceptions mentioned in this Section.²⁵

154. Question by party to his own witness. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

s. 3 ("Court.")

ss. 115-163 (Questions in cross-examination.)

s. 143 (Leading questions.)

Taylor, Ev., ss. 1401, 1426; Starkie Ev., 167, 168; Ph. & Arn., Ev., 462, 524-540; Wharton, Ev., ss. 500, 549, *et seq.*; Stewart Rapalje's Law of Witnesses, ss. 242, 211-216; Burr. Jones, Ev., 857-862; Best, Ev., ss. 642, 645, pp. 627, 629.

23. Stewart Rapalje's Law of Witnesses, ss. 355, 356; see also Alexander v. Gibson, (1811) 2 Camp 556; Friedlander v. London Assurance Co., (1831) 1 B. & Ad. 193; Bradley v. Ricardo, (1831) 8 Bing 57; Phipson, Ev., 11th Ed. 659; Best, Ev., s. 645; Taylor, Ev., s. 939n. 4.

24. N. Sri Rama Reddy v. Shri V. V.

Giri, 1970 Ker. L.T. 390 : 1970 S.C.D. 646 : (1970) 1 S.C.W.R. 872 : 1971 Mad. L.W. (Cr.) 75 : (1971) 1 S.C.A. 394 : (1971) 1 S.C.J. 483 : (1970) 2 S.C.C. 340 : 1970 U.J. (S.C.) 604 : (1971) 1 S.C.R. 399 : A.I.R. 1971 S.C. 1162.

25. Kamala Kanto Das v. State, A.I.R. 1959 C. 342 : 1959 Cr. L.J. 694.

SYNOPSIS

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|---|---|
| 1. Principle. | adverse party. |
| 2. Scope. | 10. Commissioner for taking evidence, if can exercise discretion. |
| 3. Right of party to cross-examine and impeach his own witness. | 11. Extent of right to put questions by way of cross-examination. |
| 4. Cross-examination. | —Cross-examination by co-complainants. |
| 5. Impeachment. | 12. Transfer of earlier statement to record of Sessions case. |
| 6. Attesting witness. | 13. Statement recorded during illegal investigation. |
| 7. Witness tendered for cross-examination. | 14. Value of evidence of hostile witness. |
| 8. Permission of Court : Discretion. | |
| 9. Procedure when hostility is revealed during cross-examination by the | |

1. Principle. A party may, with the permission of the Court, put leading questions to the witness under the provisions of Sec. 143 or cross-examine him as to the matter mentioned in Secs. 145 and 146. The rule, which excludes leading questions, is chiefly founded on the assumption that a witness must be taken to have a bias in favour of the party by whom he is called; whenever circumstances show that this is not the case and he is either hostile to that party or unwilling to give evidence, the Judge may, in his discretion, allow the rule to be relaxed.¹ Further, by offering a witness, a party is held to recommend him as worthy of credence, and so it is not in general open to him to test his credit, or impeach his truthfulness. But there exist cases in which the rule should be relaxed at the discretion of the Court, as for instance, where there is a surprise, the witness unexpectedly turning hostile, in which and in other cases the right of examination *ex adverso* is given.² And when the defence has elicited new matter from a witness for the prosecution in cross-examination, the Court may, under this section, permit the prosecution to test the witness's veracity on this point by cross-examining him in turn.³ A witness, whether of the one or the other party, ought not to receive more credit than he really deserves; the power of cross-examination is therefore sometimes necessary for the purpose of placing the witness fairly and completely before the Court.⁴

2. Scope. This section allows a party, with the permission of the Court at its discretion, to cross-examine his own witness in the same way as he adverse party. Such cross-examination means that he can be asked (a) leading questions (Sec. 143), (b) questions relating to his previous statements in writing (Sec. 145) and (c) questions which tend to test his veracity, to discover who he is and what is his position in life or to shake his credit (Sec. 146). Ordinarily, a party calling his witness is not allowed to ask him these questions but this ordinary rule is relaxed in this section. The purpose of such relaxation is only to find out if the witness is one of truth and can be relied on, because cross-examination is the most powerful and effective instrument for bringing out and testing the truth.⁵ In *Bikram Ali v. Emperor*,⁶ Cuming, J., referring to certain questions put to a witness by the Public Prosecutor, observed: "He was not cross-examining his own witness it, with the permission of the Court, was asking him leading questions."

1. Best, Ev., s. 642; Wharton, Ev., s. 499.

2. *ib.*, p. 600.

3. *Amrita Lal Hazra v. R.* 1916 Cal. 188; I.L.R. 42 Cal. 957; 29 I.C. 519; 21 C.L.J. 381; 19 C.W.N. 670.

4. Ph. & Arn. Ev., 528, 540.

5. *Tulsi Ram Shaw v. R.C. Pal, Ltd.*, 1953 Cal. 180; 89 C.L.J. 127.

6. 1930 Cal. 139; I.L.R. 57 Cal. 801; 124 I.C. 66; 31 Cr. L.J. 610; 50 C.L.J. 467; 1930 Cal. 139.

That is not necessarily to cross-examine. This is clear from Sec. 154 itself, which does not say that a person who calls a witness may cross-examine him in certain circumstances but that he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examining him. If it were, the Code would have said so." Lord Williams, J. said: "Sections 143 and 154, Evidence Act, read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of Sec. 154 is that they may, with the permission of the Court, treat a witness as hostile and cross-examine him." With regard to these observations, in the Full Bench case of *Profulla Kumar Sarkar v. Emperor*,⁷ Rankin, C. J., observed: "Upon this I would make two observations. First, the reason why Sec. 154 does not say that with the permission of the Court a party may cross-examine his own witness is simply that this would in strictness be a contradiction in terms. Cross-examination means examination by the adverse party as distinct from the party who calls the witness (Sec. 137). This is I think the whole explanation of the use of the phrase 'put any questions to him which might be put in cross-examination by the adverse party.' The second observation is that while the mere putting of a question in a leading form is not necessarily tantamount to cross-examination, there is no doubt as to the power of the Judge to give leave to put a leading question to one's own witness. This is plain from Sec. 142, the second part of which goes further than English law and requires the Judge to give permission in certain cases." It is, therefore, submitted that the scope of the section is not limited to putting leading questions, but extends to the whole range of cross-examination. There is a distinction between Sec. 142 and Sec. 154. The former refers merely to leading questions; the latter refers to questions which might be put in cross-examination by the adverse party. A question put in a leading form is not necessarily tantamount to cross-examination, whereas most questions in cross-examination are leading questions. The distinction between the object of these two sections is that this Section provides for putting any questions which might be put in cross-examination of the witness by the adverse party for the purpose of contradicting answers given by the witness or to test the witness's veracity or to drag the truth from him. Section 142 clearly does not deal with such a case. It merely deals with leading questions defined by Sec. 141.⁸ It is, however, easier in the matter of this and the following sections to show objection against the existence of any rigid rule than to declare one which shall be of general application, should such a declaration be possible or advisable. The Legislature has, however, given two indications that any rule upon this point should be of a liberal character: (a) It has placed no fetter on the discretion of the Court to allow putting any questions which might be asked in cross-examination under the provisions of this Section, and (b) it has relaxed the rule of English law,⁹ that a party shall not, in any case, be allowed to impeach his witness's credit by general evidence of his bad character.¹⁰ For under the provisions of this Section the party calling a witness may, with the consent of the Court, impeach his credit by cross-examination by putting all the questions mentioned in Sec. 146 and may, under the provisions of Sec.

7. 1931 Cal. 401 : I.L.R. 58 Cal. 1404: 131 I.C. 575 : 32 Cr. L.J. 768 (F.B.).

8. *Ammathayarammal v. Official Assignee*, 1933 Mad. 137 : I.L.R. 56 Mad. 7 : 144 I.C. 629 : 64 M.L.J. 208 : 37 L.W. 233.

9. *Greenough v. Eccles*, (1859) 5 C.B.

N.S. 786.

10. The meaning of this rule is that a party, after producing a witness, cannot prove him to be of such a general bad character as would render him unworthy of credit, Ph. & Arn., Ev., 526, 527.

155, impeach his credit by the independent testimony of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit. The rules considered in this section are applicable to both criminal¹¹ and civil cases. In England, it seems to have been held that the opinion of the Judge as to whether a witness is adverse is final and not the subject of appeal¹² but this last rule may be held not to have application in this country. A prior contrary statement, it is clear, cannot be admitted as proof of the facts therein asserted: it can only be admitted for the purpose of neutralising or raising doubt and suspicion as to those parts of the witness's testimony with which the contrary statement is at variance.¹³

Before declaring a witness hostile, it is usual for a Judge to look into the statement made before the investigating officer to see whether the witness was actually resiling from the position taken during investigation. The party must lay a foundation for cross-examining his own witness.¹⁴

Ordinarily if it is made to appear to the court that a witness has resiled from the statement made by him during investigation, it should permit the putting of questions which might be put in cross-examination of such a witness under this Section; also under Sec. 162, Cr. P. C., as amended in 1955, it is open to the prosecution to confront a witness with his statement made during investigation with the permission of the court.¹⁵

The mere presentation of an application to the court that a witness has been won over by the other side is not conclusive of the question that the witness has been won over. In such a case the proper procedure would be to produce him for cross-examination by the accused. That would elicit the correct facts.¹⁶

It is only the maker of a statement who can be contradicted with his previous statement, but no one else.¹⁷

When a person is not examined as a witness in the case, his previous statement cannot be used either to contradict his evidence or corroborate it, even if it is held that the statement coming under Section 154, Criminal Procedure Code [now Section 154(1) of the Code of 1973].¹⁸

3. Right of party to cross-examine and impeach his own witness. This section under which the party calling a witness may, with leave of the Court, put questions which may be asked in cross-examination and putting leading and pressing questions to him is one of great practical importance; it does not unfrequently happen that a witness who has been called in the

11. *R. v. Murohy*, (1887) 8 C. & P. 297, 308; *R. v. Little*, (1883) 15 Cox. 319.

12. *Rice v. Howard*, (1886) 16 Q.B.D. 681.

13. *Ph. & Arn. Ev.*, 528; *Wright v. Beckett*, (1834) 1 Moo & R. 414.

14. *Jalu v. State*, A.I.R. 1960 Cal. 776; 1960 Cr. L.J. 1579; 64 C.W.N. 671.

15. *State v. Balchand*, A.I.R. 1960 Raj. 101; 1960 Cr. L.J. 520.

16. *State of U. P. v. Jaggo alias Jagadish*, 1971 C.A.R. (S.C.) 323; L.E.—451

1971 Cr. L.J. 1173; (1971) 2 S.C. Cr. R. 397; A.I.R. 1971 S.C. 1586 (1590).

17. *State of Bihar v. Mehta*, 1966 Cr. L.J. 343 (349) (Patna).

18. *Mohar Rai v. State of Bihar*, (1968) 3 S.C.R. 525; 1968 S.C.D. 564; 1968 A.L.J. 1094; 1969 B.L.I.R. 35; 1968 Cr. L.J. 1479; 1969 M.L.J. (Cr.) 31; 1968 M.L.W. (Cr.) 200; I.L.R. 47 Pat. 693; A.I.R. 1968 S.C. 1281 (1286); *Nisar Ali v. State of U. P.*, A.I.R. 1957 S.C. 366.

expectation that he will speak to the existence of a particular state of facts, pretends non-remembrance of those facts or deposes to an entirely different set of circumstances, in which case the question arises whether the witness has by his conduct entitled the party to cross-examine him. This question has in such cases generally been argued with reference to the English cases explaining the meaning of the term "adverse," used in the twenty-second section of the Common Law Procedure Act of 1854,¹⁹ as meaning either "hostile" or "unfavourable" respectively. A witness is considered adverse when, in the opinion of the Judge, he bears a hostile *animus* to the party calling him, and not merely, it is said,²⁰ when his testimony contradicts his proof, though it is to be observed that the fact may under the circumstances be evidence of hostility. A witness cannot be said to be hostile, whenever his testimony is such that it does not support the case of the party calling him,²¹ or is not in accord with the evidence of other witnesses.²² An attempt on the part of the witness to depart from what is tentatively believed to be true makes it necessary to test his veracity by cross-examination by the party to whose detriment this unexpected departure may operate.²³ The mere fact that the witness is a relative or a friend of the victim of an attack would not make him a hostile or interested witness, and, in the absence of facts showing enmity or grudge, he stands in the same footing as any other independent witness. This has been laid down by the Supreme Court in *Rameshwar v. State of Rajasthan*,²⁴ *Dalip Singh v. State of Punjab*,²⁵ *Karnail Singh v. State of Punjab*,¹ *Mangal Singh v. State of M. B.*,² and *Vadivelu Thevar v. State of Madras*.³ The mere fact that a witness does not adhere to, or subsequently makes a statement different from his previous statement, does not, of itself, justify the employment of the power given by this section.⁴ It is, of course, clear that the mere fact that a witness tells two different stories does not necessarily and in all cases show him to be hostile. So, it has been held that the mere fact, that at a Sessions trial a witness tells a different story from that told by him before the Magistrate, does not necessarily make him hostile. The proper inference which may be drawn, in such a case, from contradictions going to the whole texture of the story being that the witness is neither hostile to this side nor that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.⁵ It is also clear that where

19. Extended by S. 3 of Criminal Procedure Act, 1865, now repealed by the St. L. Rev. Act, 1892.

20. *Surendra Krishna Mandal v. Ramee Dasee*, 1921 Cal. 677 : 59 I.C. 814 : 33 C.L.J. 34 ; *Fouzdar Rai v. Emperor*, 1918 Pat. 193 : 44 I.C. 33 : 3 P.L.J. 419 : 4 P.L.W. 111 ; but see notes, post.

21. *Tulsiram Shaw v. R. C. Pal, Ltd.*, 1953 Cal. 160 : 89 C.L.J. 127 ; I.L.R. (1975) Him. Pra. 46.

22. *Province of Bihar v. Rameshwar Prasad Singh*, 1945 Pat. 136 : I.L.R. 23 Pat. 738 : 218 I.C. 409 : 46 Cr. L.J. 499 ; *P. Ratnasabhapathy Goundan v. Public Prosecutor*, 1936 Mad. 516 : I.L.R. 59 Mad. 904 : 164 I.G. 243 : 37 Cr. L.J. 909.

23. *Sachidananda Prasad v. Emperor*, A. I.R. 1933 Pat. 488 at p. 492 ; *Siohamurthy Swamy v. Agnoli Senganno*, 1969 Cr. L.J. 119 : A.I.R.

1969 Mys. 12.

24. A.I.R. 1952 S.C. 54 : 1952 S.C.R. 377 : 1952 S.C.J. 46 : 1952 S.C.A. 40.

25. A.I.R. 1953 S.C. 364 : 1954 S.C.R. 145 : 1953 S.C.J. 532 : 1953 S.C.A. 709.

1. A.I.R. 1954 S.C. 204 : 1954 S.C.R. 904 : 1954 S.C.J. 269 : 1954 S.C.A. 339.

2. A.I.R. 1957 S.C. 199 : 1957 Cr. L.J. 825.

3. A.I.R. 1957 S.C. 614 : 1957 S.C.A. 798 : 1957 S.C.J. 527.

4. *Nga Nyein v. Emperor*, 1933 Rang. 57 : I.L.R. 11 Rang. 4 : 142 I.C. 87 ; *Nayeb Shahana v. Emperor*, 1934 Cal. 636 : I.L.R. 61 Cal. 399 : 152 I.C. 44 : 38 C.W.N. 659 ; *Emperor v. Satyendra Kumar Dutt*, 1925 Cal. 463 : 71 I.C. 657 : 37 C.L.J. 175.

5. *Kuluchand v. R.*, (1883) 13 C. 53.

these conflicting statements involve great discrepancies and contradictions and are the outcome of fraud, dishonesty and treachery on the part of the witness, the party calling him should be permitted to cross-examine him as to the fact and cause of the discrepancies and contradictions, and if necessary to impeach his credit under Sec. 155 by substantiating the facts contained in the questions put to him by independent testimony. If a party, not acting himself a dishonest part, is deceived by his witness—or if a witness professing himself a friend, turns out an enemy, and after promising proof of one kind gives evidence directly contrary—is the party to be restrained from laying the true state of the case before the Court? The commonsense of mankind might be expected to answer this proposition in the negative and to decide that the true state of the case should be made known.⁶ No hard and fast rule can be laid down as to when a witness can be called an adverse or hostile witness. It can, however, broadly be stated that a court can allow a party to cross-examine his witness, firstly, when his temper, attitude, demeanour, etc., in the witness-box shows a deliberately hostile or antagonistic feeling towards the party calling him, or, secondly, when concealing his true sentiments he does not exhibit any hostile feeling but makes statements contrary to what he was called or expected to prove what he had deliberately told before. The permission to treat a witness as hostile can be sought during the stage of examination-in-chief, or at the stage of cross-examination or perhaps there may be cases even where he is under re-examination.⁷ If the manner of his answers shows that the witness is not prepared to give a truthful version he is a hostile witness. But the mere fact that in cross-examination he has given some answers on minor details which tend to be favourable to the accused is no ground for permission to cross-examine one's own witness.⁸ No written application to court for the purpose of cross-examining one's own witness is required by the section. A formal request by the client or his Advocate during the course of examination will suffice.⁹

It is not a healthy practice for the Public Prosecutor to tell the Court that he had information that a particular witness had turned hostile. The inference of the hostility of a witness could be drawn only from the answers given by him and to some extent from the demeanour.¹⁰ It has been also held¹¹ that even where a witness stands in a situation which naturally makes him adverse¹² to the party desiring his testimony, the party calling the witness is not as of right entitled to cross-examine him, the matter being solely in the discretion of the Court to permit the person calling the witness to put any questions to him which might be put in cross-examination by the adverse party. A witness who is unfavourable is not necessarily hostile. A hostile witness is one who from the manner in which he gives his evidence shows

6. Ph. and Arn. Ev., S. 55; see ib.

7. B.N. Chobe v. Sami Ahmad, (1969) 1 Andh. L.T. 32 (33, 34).

8. Yusuf v. State of U. P., 1973 All L.J. 111; 1973 All Cr. R. 148; 1973 All W.R. 251; 1973 Cr. L.J. 1220.

9. B. N. Chobe v. Sami Ahmad, (1969) 1 Andh L.T. 32 at 35.

10. In re Vengala Reddy, 1956 Andh. 26; I.L.R. 1955 Andh. 666; see also Public Prosecutor v. Subrahmanya Odayar, 1937 M W N. 557 (F.B.).

11. Luchiram v. Radha Charan, 1922 Cal. 267; I.L.R. 49 Cal. 93; 66 I.C. 15.

12. But should not the proposition be "which naturally might make him adverse" for if he is in fact adverse then cross-examination should be allowed. Probably what is meant is that though the witness's position is such that he might be adverse it must be shown that he is in fact so, or that there are grounds for so supposing. State of Mysore v. Raja Shetty, A.I.R. 1961 Mys. 74.

that he is not desirous of telling the truth.¹³ It is, however, to be marked in the first place, that the English statute dealt with the question of the admissibility of evidence to contradict the party's own witness, a matter which is dealt with by the next section of this Act and that the question whether a party can cross-examine his own witness as to (for example) whether he had not upon another occasion given a different account of the transaction from that which he then deposed to, is not the same as the question whether, if the witness denies having done so the party calling him is at liberty to call other witnesses to prove it.¹⁴ Further, the statute mentioned is not in force in this country, and the section of this Act makes no mention either of the terms "hostile," "adverse" or "unfavourable," or of any others, but leaves the matter entirely to the discretion of the Court, which discretion must obviously be exercised with reference to the particular circumstances of each case.¹⁵ It is much to be desired that the matter should, if possible, be set at rest by judicial decision more especially since, as will hereafter be observed, the English cases lack unanimity. Some of the cases here cited deal with the right to discredit the party's own witness by calling other testimony, but such as are authorities for this right are a *fortiori* also authorities for the right to put questions which may be put in cross-examination to one's own witness, though, as already observed, the converse may not be the case. The question of the right of a party to impeach and contradict his own witness is properly the subject-matter of the next section, but being closely allied to that of the present section it is here alone treated to avoid unnecessary repetition. This section which does not speak of a "hostile" witness, as sometimes a witness who is permitted to be cross-examined by the party who calls him is described, confers powers on the Court to permit the putting of such questions as are put in the cross-examination of a witness, by the party who calls him. The fact that such questions are permitted does not mean that the witness who is put such questions is, for all purposes, an untrustworthy

13. Luchiram v. Radha Charan, 1922 Cal. 267 : I.L.R. 49 Cal. 93 : 66 I.C. 15 ; referring Surendra Krishna Mandal v. Ranee Dasee, 1921 Cal. 677 : I.L.R. 47 Cal. 1043, 1057 : 59 I.C. 814 : 33 C.L.J. 34 ; Siohamurthy Swamy v. Agodi Songano, 1969 Cr. L.J. 118 : A.I.R. 1969 Mys. 12 ; Yusuf v. State of U. P., 1973 A.W.R. 251 (259) : 1973 A. Cr. R. 148 ; The section was applied in Moti Ram v. Emperor, (1923) 24 Cr. L.J. 904 ; see also Tulsiram Shaw v. R. C. Pal, Ltd., 1953 Cal. 160 : 89 C.L.J. 127 ; Panchamangogai v. Emperor, 1930 Cal. 276 : I.L.R. 57 Cal. 1266 : 127 I.C. 270 : 31 Cr. L.J. 1207 ; Parmeshwar Dayal v. King-Emperor, 1926 Pat. 316 : 94 I.C. 705 : 27 Cr. L.J. 657 : 7 P.L.T. 567 ; Fauzdar Rai v. Emperor, 1918 Pat. 193 : 44 I.C. 33 : 19 Cr. L.J. 241.
14. See Greenough v. Eccles, 5 C.B.N. S. 786, arguendo.
15. Baikuntha Nath Chatterji v. Prasannamoyi Debye, 1922 P.C. 409 : 72 I.C. 286 : 27 C.W.N. 797 : 44 M.L.J. 699 ; Mohan Banjari v.

Emperor, 1933 Nag. 384 : 30 N.L.R. 55 ; Profulla Kumar Sarkar v. Emperor, 1931 Cal. 401 at 405 : I.L.R. 58 Cal. 1404 : 131 I.C. 575 : 32 Cr. L.J. 768 : 53 C.L.J. 427 : 35 C.W.N. 731 (F.B.) ; Ammathayarannal v. Official Assignee, 1933 Mad. 137 : I.L.R. 56 Mad. 7 : 144 I.C. 629 : 64 M.L.J. 208 : 37 L.W. 233 ; see Bastin v. Carew, (1824) R. and M. 127 when Abbott, Ld. C.J., said upon allowing cross-examination of an adverse witness : "I mean to decide this and no further. That in each particular case there must be some discretion in the Presiding Judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice," cited in Price v. Manning, I.R. (1889) 42 Ch. D. 372 ; State of Mysore v. Subbhappa, (1961) 2 Cr. L.J. 653 (Discretion to be exercised judicially) ; Kuntibas Sahu v. Madhab Das, A.L.R. 1961 Orissa 48 ; Siohamurthy Swamy v. Agodi Songano, 1969 Cr. L.J. 118 : A.I.R. 1969 Mys. 12.

witness and that his evidence or no part of it can be regarded as representing the truth. A witness who is unwilling to speak the whole truth when he is called by the prosecution to support his case, but gives an inaccurate or incomplete version of what he is supposed to have seen or known may, in the course of his cross-examination, either feel persuaded or compelled to complete the story and to state facts about which he gave no evidence in examination-in-chief. It may also happen that a prosecution witness contradicts himself completely in the course of his cross-examination, and, having stated nothing about the incident about which he was expected to speak, says all about it in his cross-examination. The question before the Court in either event would be to decide which part of a testimony is false and which part of it is true. Provided there is the required degree of conviction in the mind of the Court that a particular part of the testimony of a witness whether it forms part of the examination-in-chief or cross-examination is true, there is nothing which can constitute an impediment to the Court acting upon such evidence in support of its conclusion. It is open to the Court to say even after the witness is permitted to be put questions under this section, that some part of his testimony is acceptable while the rest is not, provided it is convinced that some part of the evidence can be acted upon.¹⁶ The defence is entitled to rely on so much of the evidence of the hostile witness to support its case as much the prosecution depends.¹⁷

A party can cross-examine even a witness tendered by it.¹⁸ Nothing in the section warrants the inference that only when any previous statement of the witness is available and if he is alleged to have departed from that, that the court can declare the witness hostile there is no such limitation on the power of the court.¹⁹

The section applies only when the witness is under examination. An application for recalling a witness whose examination was over and to treat him as a hostile witness and cross-examine him will be rejected.²⁰

The discretion of Court under Section 154 is wide and unfettered; it does not depend upon hostility. The discretion should be exercised liberally whenever it appears to Court that due to the demeanour, attitude way of answering questions of the witness or the tenor of his answers or other reasons permission should be given in the interest of justice. The Court should not use the words that the witness is declared "hostile" or "unfavourable" in the order because these words create confusion.²¹ In order to permit a party to cross-examine his own witness the Court must be fully satisfied that the witness is either showing an element of hostility or that he is making statements inconsistent with his previous statements or that he is not speaking the truth.

16. *In re Saibanna*, A.I.R. 1966 Mys. 248 : 1966 Cr. L.J. 1155.

17. *In re Madhulkar Dasarath Mandekar*, 1972 M.L.J. (Cr.) 123 : 1972 Cr. L.J. 978 (1981) (State of Mysore).

18. *Manzurul Haque v. State of Bihar*, 1958 Pat. L.R. 18 : A.I.R. 1958 Pat. 422.

19. *Sahdeo Tanti v. Bipti Pasan*, 1969 Cr. L.J. 1527 : A.I.R. 1969 Pat. 415 (416).

20. *B. N. Chobe v. Sami Ahmad*, (1969) 1 Andh. L.T. 32 (35, 36); see also *Ammathayammal v. Official Assig-*

nee, A.I.R. 1933 Mad. 137; *P. K. Das v. State*, I.L.R. (1971) 2 Cal. 392 relying on A.I.R. 1964 S.C. 1563.

21. *Sat Pal v. Delhi Administration*, A.I.R. 1976 S.C. 294 : 78 P.L.R. 194 : (1976) S.C.C. (Cr.) 160 : (1976) 1 S.C.C. 727 : 1976 Cr. L.J. 295 : (1975) Cr. L.R. (S.C.) 697 : (1975) Cr. A.R. (S.C.) 387 : (1976) Cur. L.J. (Cr.) 1 : I.L.R. (1976) Kant. 720 : (1976) 2 S.C.R. 11 : 1976 Mah. L.J. 174 : 1976 M. P.L.J. 206.

The Judge must scrutinise the previous statements to find out if the witness is making any departure on very material points. Permission should be given in special cases and not as a matter of course and discretion should not be exercised in a casual manner without weighing the circumstances.²²

4. Cross-examination. Prior to the Common Law Procedure Act, 1854, it had been held, with regard to cross-examination, that the party who called a witness may cross-examine him if on the trial he showed any unfair bias,²³ or was unwilling,²⁴ or by his conduct in the box showed himself decidedly adverse,²⁵ or deposed in the interest of the opposite party¹ or if the witness was the party's opponent in the case.²

And it was also held that a party's own witness who, having given one account of the matter to his attorney, when called on the trial, gave a different account may be asked by the party calling him whether he had given a different account stating it, to attorney.³ It not unfrequently happens as, in the

22. *Rabindra Kumar Dey v. State of Orissa*, (1976) 48 S.C.C. 235 : 78 P.L.R. 928 : 1976 S.C.C. (Cr.) 566 : 43 C.L.T. 1 : (1977) 1 S.C.R. 439 : (1976) S.C.W.R. 450 : A.I.R. 1977 S.C. 170 : 1977 Cr. L.J. 173.

23. *R. v. Chapman*, (1838) 8 C. & P. 558, 559; see also *R. v. Murphy*, (1837) 8 C. & P. 197.

24. *R. v. Ball*, (1839) 8 C. & P. 745. (The situation in which a witness stands towards either party does not give the party calling the witness a right to cross-examine him, unless the witness's evidence be of such a nature as to make it appear that the witness is an unwilling one; *Parkin v. Moon*, (1836) C. & P. 408, 409.

25. *Clarke v. Saffery*, (1824) R. & M. 126; *Bastin v. Carew*, (1824) R. & M. 127.

1. *Ph. & Arn., Ev.*, s. 462.

2. *Clarke v. Saffery*, (1824) R. & M. 126 (that is when the witness stands in a situation which naturally makes him adverse to the party who desires his testimony, as for example, a defendant called as the plaintiff's witness); *Radha Jeebun v. Taramonjee Dossi*, (1859) 12 Moo I.A. 380, 393. (It is, however, now settled law in England that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Court); *Price v. Manning*, (1889) 42 Ch. D. 372 overruling *Clarke v. Saffery*, (1824) R. & M. 126. "Since which decision also it would seem that the other cases (see *Bowman v. Bowman*, 2 M. & R. 501; *Jackson v. Thomson*, 1 B. & S. 745; *Coles v. Coles*, L.R. 1 P. & D. 70) holding that a neces-

sary witness, i.e., one whom a party is compelled to call, and who may therefore be considered rather the witness of the Court than of the party as an attesting witness to a will, can be discredited (as of right) by his own side, are no longer law"; *Phipson, Ev.*, 11th Ed., 638. The same rule applies in India, see *Subbaji v. Shiddapa*, I.L.R. 26 Bom. 392, 395 : (1901) 4 Bom. L.R. 86. Where, however, the accused applied for an adjournment to enable them to cross-examine the prosecution witnesses, which was refused, and subsequently had the witnesses summoned for the defence, it was held that the mere fact that the accused had been compelled to treat the witness for the prosecution as their own witnesses did not change their character and that they were entitled to cross-examine them (*Sheopraakash Singh v. Rawlins*, (1901) 28 C. 594).

3. *Melhuish v. Collier*, (1850) 19 L.J. Q.B. 493 : 15 Q.B. 878 wherein *Erle, J.* observed: "There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then, for a bribe, or from some other motive, make statements in support of the opposite interest. In such cases the law undoubtedly ought to permit the party calling the witness to question him as to the former statements and ascertain, if possible, what induces him to change it." And for similar cases subsequent to the Act of 1854, see *Dear v. Knight*, (1859) 1 M. & F. 433, where the prior statement was made to the party; *Faulkner v. Brine*, (1858) 1 F. & F. 254, where it was made to the

cases last cited, that a witness had given one account to the party or his attorney or others and had thereby induced the party to call him, but when so called he gives a totally different version, and then, when asked by the counsel of the party calling him whether he had not previously made a statement different from his present evidence, objection is commonly taken by the other side on the ground that the witness has not yet appeared adverse. A similar objection was taken in the case undermentioned,⁴ upon which counsel, seeking to put questions as can be put in cross-examination, replied that it might not at present appear that the witness was adverse, but that he desired to prove that it was so, and it could only appear how it was, by the question which he proposed to ask, which in effect was whether the witness did not give a totally different account of the matter to the attorney, to prove which he called him. Lord Campbell, C. J. in the under-noted case said: "The defendant's Counsel stating that, I will allow the question to be put; but it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony. If that which is suggested shall be elicited, it will show that he is not trustworthy at all."⁵ Also a party compelled to call the attesting witnesses to a will or codicil may cross-examine them, as these are technically not the witnesses of either party but of the Court.⁶

5. Impeachment. Passing from the question of the cross-examination of the party's own witness⁷ to the question of his impeachment, it was settled law in England⁸ prior to the Common Law Procedure Act, 1854, that a party could not impeach his witness's credit by general evidence of his bad character,⁹ but he might contradict him by other evidence on points directly relevant to the issue. It was, however, an unsettled point whether the witness could be discredited by proof that he had made inconsistent statements. The Act mentioned settled the controversy on this last question by declaring that in case the witness should, in the opinion of the Judge, prove adverse,

party's attorney : Pound v. Wilson, (1865) 4 F. & F. 301 ; where the prior statement was made in the bankruptcy Court ; and R. v. Little, (1883) 15 Cox. 319, where the prior statement was made to mother of the prosecutrix. In two cases in the Calcutta High Court, Marlow v. Chuni Lal, Small Cause Court, Transfer Suit No. 15 of 1899, 3rd Jan., 1901 and McLeod v. Sirdarmull, Suit No. 833 of 1900, 13th August, 1901, the Court allowed cross-examination, it appearing that the witness had made a statement to the attorney of the party calling him.

4. Faulkner v. Brine, (1858) 1 F. & F. 254.

5. See also to the same effect Amstell v. Alexander, (1867) 16 L.T.N.S. 830 (A witness, called on behalf of the plaintiff, gave evidence quite different from the proof in brief of plaintiff's counsel and from the heads of evidence as taken down in writing by the plaintiff's attorney and alleged to have been read over

by him to the witness. The witness was considered sufficiently adverse to be examined as to his previous statements to the plaintiff's attorney, and the Judge allowed the witness to be asked whether he did not say the several things stated in the paper containing the heads of his evidence as taken down by plaintiff's attorney) see as to this case, post.

6. Jones v. Jones, (1908) 24 T.L.R. 839.

7. As to which, see further Taylor, Ev., S. 1404 ; Starkie Ev., 167, 168 ; Phipson, Ev., 11th Ed., 662 ; Ph. and Arn., Ev., 462 ; Wharton, Ev., S. 500 ; Stewart Rapalje's *op cit.* Ss. 242, 216 ; Best, Ev., S. 642.

8. See Grenough v. Eccles, (1859) 5 C. B.N.S. 786, 802, per Williams, J. ; and see generally Taylor, Ev., S. 1426 ; Ph. and Arn., Ev., 524, 540 ; Stewart Rapalje's *op cit.* Ss. 211, 216 ; Wharton, Ev., S. 549 *et seq* ; Burr. Jones, Ev., Ss. 857, 862 ; Best, Ev., S. 645.

9. This is not the law in India under S. 154. or S. 155, post.

the party might, by leave of the Judge, prove that he had made at other times a statement inconsistent with his present testimony.¹⁰

The question was then debated as to what was the meaning of the word 'adverse' in the statute. Was it meant that the witness himself shall prove hostile to the party calling him, or that the testimony he gives shall be adverse? Upon this question there appear to have been conflicting decisions. In some cases,¹¹ it has been held that a witness is adverse when, in the opinion of the Judge, he bears a hostile¹² feeling to the party calling him (as indicated by his attitude and demeanour and mode of answer) and not merely when his testimony contradicts his proof; but the contrary view has been taken in several other cases.¹³ It can therefore be hardly said in this state of the authorities (especially in India where the words of Secs. 154 and 155. are alone to be considered) that it is a settled rule that it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment.¹⁴ The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition,¹⁵ and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court. In the language of Lord Denman, "it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose to the truth when brought into Court and in the meantime is persuaded to swear, when he appears, to a completely inconsistent story."¹⁶

6. Attesting witness. The fact that when called he will prove hostile does not excuse a party producing a document from calling an attesting

10. See Taylor, Ev., S. 1426; the section of the statute is, however, very confused; see the judgment in Greenough v. Eccles, (1859) 5 C.B.N.S. 802, *supra*.

11. Greenough v. Eccles, (1859) 5 C.B.N.S. 786; per Williams and Willes, JJ, Cockburn, C.J., not wholly concurring in the judgment; Reed v. King, (1858) 30 L.T. 290; see Taylor, Ev., p. 938n (11).

12. In Coles v. Coles, (1866) L.R. 1 P. and D. 70, Wilde, J.O., adopting counsel's definition, said: "An adverse witness is one who does not give the evidence which the party calling him wishes him to give. A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court". The terms appear to be treated as synonymous in Surendra Krishna Mondol v. Rance Dasee, 1921 Cal. 677; 59 I.C. 814, *supra*.

13. R. v. Little, (1883) 15 Cox. 319; where the objection was expressly taken that there was nothing in the demeanour of the witness to show that she was hostile yet the evidence was admitted, per Day, J., in consul-

tation with Cave, J., Amstell v. Alexander, (1867) 16 L.T.N.S. 830; ["In Greenough v. Eccles, (1859) 5 C.B.N.S. 786, it is laid down that to enable a party thus to contradict his own witness, the witness must appear not only unfavourable but actually hostile. There must be some exhibition of *animus* which this witness does not seem to exhibit. He is, however, in my opinion, adverse" per Bramwell, B.]; Pound v. Wilson, (1865) 4 F. and F. 301; Erle, J. (In this case there were merely different statements and the witness was held adverse); Dear v. Knight, (1859) 1 F. and F. 493 (a similar case).

14. See Baikuntha Nath Chattoraj v. Prasannamoyi Debya, A.I.R. 1922 P.C. 409; 72 I.C. 286; Profulla Kumar Sarkar v. Emperor, 1931 Cal. 401; I.L.R. 58 C. 1404; 131 I.C. 575 (F.B.); Ammathayarammal v. Official Assignee, 1933 Mad. 137 at 140; I.L.R. 56 M. 7; 144 I.C. 629, *supra*.

15. Greenough v. Eccles, (1859) 5 C.B.N.S. 786, *arguendo*.

16. Wright v. Beckett, (1834) 1 M. and R. 414

witness.¹⁷ But so far as this section is concerned, there is no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice; but the Court may, in the exercise of its discretion, be more easily persuaded in the latter.¹⁸

7. Witness tendered for cross-examination. It is permissible with the consent of the Court to cross-examine one's own witness, but there is no warrant for the procedure by which a Judge permits a witness, whose evidence-in-chief he has not heard and whose evidence before the committing Court cannot be put in under the law until that witness has been examined, to be treated at once as a hostile witness and cross-examined by the side which called him.¹⁹ In *Ramjag Ahir v. Emperor*,²⁰ it was held that a prosecution witness not called by the prosecution but "tendered as gained over" cannot be cross-examined by the prosecution under this section. The practice of tendering a witness for cross-examination without calling and examining him has been condemned. It is not the duty of the prosecution or of the Court to examine any witness merely because he was examined as a prosecution witness before the Committing Magistrate if the prosecution is of opinion that the witness was not likely to speak the truth. All that the prosecution need do in such a case is to see that the witness was present in Court so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining him.²¹ In a case of the Calcutta High Court it was observed: "The phrase 'tendering for cross-examination' has also been used in this country in cases where the prosecution discards a witness examined before the Committing Magistrate on the ground that, in its opinion, he is not likely to prove himself to be a witness of truth. In such cases, the prosecution really declares the witness to be hostile, and what it actually does is that although it does not consider it expedient to call the witness itself, it, nevertheless, makes the witness available to the defence so that the defence may examine him, if it likes. In such a case, the witness is really examined-in-chief by the defence and not cross-examined. But in order that a witness may be dealt with in that way, it is clearly necessary that the leave of the Court contemplated by Sec. 154, Evidence Act, should be asked for and obtained."²² But it is submitted that in such a case merely 'tendering' the witness without examining him is not calling the witness within the meaning of this section²³ and that if the witness is really examined-in-chief by the defence and not cross-examined, the prosecution is entitled to cross-examine the witness as of right, not under this section but under Secs. 138 and 145.

8. Permission of Court: Discretion. It is not necessary to make any formal declaration that a witness is hostile before granting permission to

17. *Kali Charan v. Suraj Bali*, 1941 Oudh. 89 : 191 I.C. 215 : 1940 A.W.R. (C.C.) 446 ; *T. Peda Manikyam v. V. Periyagadu*, 1932 Mad. 148 : 135 I.C. 532 : 34 L.W. 663 ; see also the cases cited therein.

18. *Surendra Krishna Mondol v. Raneer Dasee*, 1921 Cal. 677 at 683 : 59 I.C. 814 : 47 Cal. 1043 : 33 C.L.J. 34 : 24 C.W.N. 860.

19. *Abdul Latif v. Emperor*, 1941 Cal. 533 : 196 I.C. 439 : 42 Cr. L.J. 871 : 45 C.W.N. 763.

20. 1928 Pat. 203 : I.L.R. 7 Pat. 55 ;

I. F. —459

109 I.C. 114 : 29 Cr. L.J. 466.

21. *Manzurul Haque v. State of Bihar*, A.I.R. 1958 Pat. 422 : 1958 Pat. L.R. 18 : I.L.R. 37 Pat. 274 : 1958 Cr. L.J. 931 ; see also *Sadeppa Gireppa Mutgi v. Emperor*, 1942 Bom. 37 : I.L.R. 1942 Bom. 115 : 198 I.C. 245 : 43 Cr. L.J. 328 : 43 Bom. L.R. 946.

22. *Dhirendra Nath v. State*, 1952 Cal. 621 at 627 : 53 Cr. L.J. 142.

23. *Karan Singh and another v. The State of Punjab*, 1974 Chand. L.R. (Cr.) 148.

a party to cross-examine its own witness.²⁴ The party calling a witness, even if he be his opponent, is not entitled to cross-examine him as a matter of right. He can do so only with the permission of the Court or under this section.²⁵ Even the Public Prosecutor has no right to declare a prosecution witness as hostile and cross-examine him. He must ask the leave of the Court to cross-examine an offending witness.¹ The granting of the permission is entirely in the discretion of the Court.² The discretion of the court, though stated in wide terms, is a judicial discretion.³ It should not be freely granted. Once we are rid of the mischief of considering the grant of permission to be equivalent to an adjudication or expression of opinion of the Court adverse to the veracity of the witness, it is harder to justify the refusal than the grant to any party of permission to cross-examine any witness who supports the case of his opponent.⁴ But the discretion has always to be exercised with caution.⁵ It should not be exercised without sufficient reason.⁶ The reason should be stated because, by offering a witness, a party is held to recommend him as worthy of credence and so, in general, it is not open to him to test the witness's credit or impeach his truthfulness.⁷ A witness cannot be treated as hostile merely because his evidence is favourable to the other side. The fact that the witness has become hostile has to be established by eliciting information such as could give an indication of hostility.⁸ It is impossible to formulate any comprehensive rule as to when permission under the section should be given. One observation, however, is permissible. The object of calling witnesses is to elicit the facts and if the facts to be elicited are such as ought to be elicited from a witness, and if they cannot be elicited without cross-examining him, it would be difficult to say that the discretion in favour of the party seeking to cross-examine was wrongly exercised.⁹ The Court ought not to exercise its discretion unless during the examination-in-chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross-examination. The scheme of the section is that something more than the mere position in which the witness stands to the party calling him is required before the Court can exercise its discretion. The use of the word "permit" in this section and the word "consent" in the next section makes it probable that it was not intended that

24. *Baikuntha Nath Chatteraj v. Prasannamoyi Debya*, A.I.R. 1922 P.C. 409; *Sivhamurthy Swamy v. Agodi Songanno*, 1969 Cr. L.J. 118; A.I.R. 1969 Mys. 12.

25. *Luchiram Motilal Boid- v. Radha Charan Poddar*, 1922 Cal. 267; I.L.R. 49 C. 93; 66 I.C. 15; *Khijiruddin v. Emperor*, 1926 Cal. 139; I.L.R. 53 Cal. 372; 92 I.C. 442; 42 Cr. L.J. 504; *Puran Singh Relu Singh v. Mathra Das*, 1934 Lah. 126; 148 I.C. 1010; 35 P.L.R. 28.

1. *Samarali v. Emperor*, 1936 Cal. 675; 166 I.C. 323.

2. *Emperor v. Radhev Shyam*, 1944 Oudh 296; 1944 A.W.R. (C.C.) 202; 1944 O.W.N. 291; *Mohan Banjari v. Emperor*, 1933 Nag. 384; 30 N.L.R. 55; *Sachchidanand v. Emperor*, 1933 Pat. 488; 144 I.C. 936; 14 P.L.T. 580; *Deodhari Koeri v. Emperor*, 1937 Pat. 34; 166 I.C. 726; *Revan Chandra Dur-*

gapal v. State, 1971 All Cr. C. 354

3. *Sivhamurthy Swamy v. Agodi Songanno*, 1969 Cr. L.J. 118; A.I.R. 1969 Mys. 12.

4. *Nebti Mandal v. Emperor*, 1940 Pat. 289; I.L.R. 19 Pat. 369; 190 I.C. 457; see also cases cited therein

5. *Khijiruddin v. Emperor*, 1926 Cal. 139, *supra*.

6. *Emperor v. Suar Gola*, 1934 Pat. 533; 152 I.C. 1021; 16 P.L.T. 9

7. *State v. Rajendra Singh*, (1971) 1 Cr. L.J. 724 (737); (1971) 1 Cr. W.R. 904; 1974 B.B.C.J. 21 (Patna) relying on A.I.R. 1934 Pat. 533.

8. *Saraswathamma v. Bhadramma*, A.I.R. 1970 Mys. 157 (159).

9. *Profulla Kumar v. Emperor*, 19 Cal. 401; I.L.R. 58 C. 1404; 1 I.C. 575 (F.B.) at 410, per Buckland, J.; I.L.R. (1974) 1 Del. 129 (permission may even be given suo motu by the Court).

these words were to have the same meaning. "Consent" seems to imply that it is to be given in consequence of a request made, whereas "permission" need not necessarily follow a request. But still, the permission of the Court should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him. Mere tacit permission is not enough.¹⁰

The power given by the section being a discretionary one, it will not be reviewed by the appellate Court, provided there was some material on which such discretion could be exercised.¹¹ Under this section, the trial Court has a discretion and if this discretion is exercised after considering all the circumstances of the case, the appellate Court cannot lightly interfere with it, without perusing the statement given by the witness.¹² In cases where the appellate Court holds that permission to cross-examine was wrongly refused by the trial Court, it should send back the case to the trial Court to take the evidence of the witness further, after granting permission to cross-examine the witness. Without doing so, the appellate Court should not reject the entire evidence of the witness as if he was a hostile witness and had been won over by the defence.¹³ Where the prosecution cross-examined a witness without leave of the Court, it was held that "the evidence of this witness, at least so much of it as was elicited from him by the cross-examination by the prosecution itself, was not properly and legally obtained and to that extent the defence has certainly been prejudiced."¹⁴

The order of trial court permitting party to cross-examine its own witness will not be interfered with in revision.¹⁵

9. Procedure when hostility is revealed during cross-examination by the adverse party. Very often in our Courts unscrupulous lawyers and parties arrange beforehand for P. Ws. to turn hostile during cross-examination. In such cases permission should be freely granted thereafter to the prosecution to cross-examine the witnesses after declaring them hostile to the prosecution.

Section 137 of the Act gives only the three stages in the examination of a witness, namely, examination-in-chief, cross-examination and re-examination. This is a routine sequence in the examination of a witness. This has no relevance to the question when a party calling a witness can be permitted to put him questions under this section. That question is governed by the provisions of this section, which confers a discretionary power on the Court to permit a person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. It does not, in terms, or by necessary implication, confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. The section is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief would be to make

10. *Ammathayarammal v. Official Assignee*, 1933 Mad. 137; I.L.R. 56 Mad. 7; 144 I.C. 629; I.L.R. (1974) 1 Delhi 129.
11. *Nga Nyein v. Emperor*, 1933 Rang. 57; I.L.R. 11 Rang. 4; 142 I.C. 87; *Ammathayarammal v. Official Assignee*, 1933 Mad. 137, *supra*.

12. *Munsar Ali v. Union Territory*, A. I.R. 1964 Tripura 45.

13. *Ibid.*

14. *Dharendra Nath v. State*, 1952 Cal. 621 at 627; 53 Cr. L.J. 1427.

15. *P. C. Durgpal v. State of U. P.*, 1971 All Cr. R. 354.

it ineffective in practice. The Court can permit party calling a witness to put questions in the nature of cross-examination even at the stage of re-examination. In that case the adverse party can have an opportunity to further cross-examine the witness on the answer elicited by putting such questions, which do not find place in the examination-in-chief.¹⁶

It is to be noted that a Court would not give leave to the party calling a witness to question him under this section until it is satisfied that there is some hostility or adverseness displayed by the witness to the very party on whose behalf he has come to give evidence. If his memory plays a trick in regard to a detail, and he does not in any other manner go back on his previous statement, or show any disinclination to tell the truth, then he is not hostile or adverse. In other words, he cannot be cross-examined but he can be examined with the leave of the Court under this section.¹⁷

A witness is not necessarily hostile if, in speaking the truth as he knows and sees it, his testimony happens to go against the party calling him. The Court always aspires to find if the witness desires to tell the truth. That aspiration is the yardstick which measures the appreciation of the evidence of a witness. It is with that object that the Court is given the discretion to permit the person who calls a witness to put any question to the witness which might be put to him in cross-examination. This section says nothing about declaring a witness hostile. It allows a party with the permission of the Court at its discretion to put any questions to his witness which might be put in cross-examination by the adverse party. This is far from saying that a witness is hostile whenever his testimony is such that it does not support the case of the party calling him.¹⁸ The person who calls a witness and who wants to put any question to him which might be put in cross-examination by the adverse party must lay a foundation for putting such questions.¹⁹ But it is not necessary that the witness must be declared hostile before the Court grants permission to put any question under this section.

In a bribery case, the prosecution ought to examine a witness to the acceptance of bribe. The filing of a petition for non-examination of such witness on the ground of his having turned hostile is not proper. The prosecutor must examine him as witness, and after getting him declared as hostile witness, ought to cross-examine him.²⁰

10. Commissioner for taking evidence, if can exercise discretion
In *Surendra Krishna Mondol v. Runee Dassee*,²¹ Mookerjee, J., referring to certain principles to be considered under this section observed: "These principles have all been disregarded in the examination-in-chief and cross-examination of the *panda* and the doctor. The Commissioner could not exercise the discretion vested in the Court under Sec. 154 of the Indian Evidence Act, and the mischief due to improper cross-examination could not be remedied

16. *Dahyabhai v. State of Gujarat*, (1964) 7 S.C.R. 361 : (1965) 7 S.C.D. 44 : (1965) 2 S.C.J. 531 : 1965 A.W.R. (H.C.) 740 : 1965 M.L.J. (Cr.) 773 : A.I.R. 1964 S.C. 1563 : (1964) 1 S.C.W.R. 831 : 1964 (2) Cr. L.J. 472.
17. *In re Kalu Singh*, A.I.R. 1964 M. P. 30, 39.
18. *Krutibas v. Madhab Das*, A.I.R. 1961 Orissa 48 ; see *Tulsiram v.*

- R. C. Pal, Ltd., A.I.R. 1953 C. 160 : 89 C.L.J. 127.
19. *Lalu v. The State*, A.I.R. 1960 C. 776 : 64 C.W.N. 671.
20. *Madhusudan Prasad Agarwal v. The State of Bihar*, 1973 Cr. L.J. 15 (1584) (Pat.).
21. 47 Cal. 1043 : 33 C.L.J. 34 : C.W.N. 860 : 1921 Cal. 677 683 : 59 I.C. 814.

in the trial Court." This has been interpreted as laying down the proposition of law that a Commissioner for taking evidence cannot exercise the discretion vested in the Court under Sec. 154.²² But it is submitted that the observation quoted above was only a statement of fact and was not intended to be a proposition of law and a Commissioner has the same powers as the Court in this regard.²³

11. Extent of right to put questions by way of cross-examination.

Where a witness turns hostile in cross-examination by the opposite party, the Court has discretion to permit the party producing the witness to cross-examine him with regard to the matters deposed to by him in cross-examination and not connected with the matters deposed to by him in the examination-in-chief.²⁴

Cross-examination by co-complainants. A witness is cross-examined by the adverse party; but under this section the Court can, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The cross-examination of a witness by the person producing him is permissible, but such a witness cannot be cross-examined by the other complainants who had not called him as their witness. The cross-examination of the witness of a complainant by the other complainants is not warranted by the provisions of this Act, and as it is likely to create confusion, it should not be allowed. But the Court has unlimited power under Sec. 165 of this Act to put any question to a witness or to order him to produce documents. If the Court finds that any witness examined by any of the parties does not make a completely true statement or has been won over, it can put questions to the witness, as may be necessary, either *suo motu* or on the suggestion of a party, so that complete material may come on the record and it may be possible to pronounce a proper judgment.²⁵

12. Transfer of earlier statement to record of sessions case. A witness treated hostile in the committing Court by prosecution though examined in Sessions Court but not cross-examined by the prosecution with respect to his previous inconsistent statement and whose testimony was not transferred to the record of Sessions Court under Section 288 of the old Code (omitted from new Cr. P. C., 1973) cannot be considered to be a witness hostile to the prosecution.¹ It is highly desirable that the court should, before the transfer of the earlier statement, made before the Committing Magistrate to the record of the Sessions case under Section 288, Criminal Procedure Code (repealed), indicate in a brief order why the earlier deposition was being transferred to the record of the trial. This will make it quite clear to the accused that the earlier statement is likely to be used as substantive evidence against him. If the matter had rested with the use of the earlier statement without this notice to the accused, the Supreme Court would have found it difficult to rely upon the earlier deposition²; this decision is of academic interest as the

22. See Corpus Juris of India, Evidence Act, S. 154, N. 1 pt. (3) and Head-note (e) to the report of the case in A.I.R. 1922 Cal. 677.

23. See Order XXVI, Rr. 16, 17, C.P. C. and S. 505, Criminal Procedure Code.

24. Amrita Lal Hazra v. Emperor, 1916 Cal. 188 : I.L.R. 42 Cal. 957 : 29 I.C. 513.

25. Giriraj Singh v. State, A.I.R. 1965

A. 131 : 1964 A.L.J. 335.

1. Biri Singh Majhi v. State of Assam, 1977 Cr. L.J. 1349.

2. Periyasami v. State of Madras, (1967) 2 S.C.R. 122 : 1967 S.C.D. 761 : (1967) 2 S.C.J. 227 : (1967) 1 S.C.W.R. 443 : (1967) 2 Andh W.R. (S.C.) 41 : 1967 Cr. L.J. 975 : (1967) 2 M.L.J. (S.C.) 41 : 1967 M.L.J. (Cr.) 621 : A.I.R. 1967 S.C. 1027 (1028, 1029).

new Code of Criminal Procedure, 1973 (Act 2 of 1974) has dispensed with preliminary inquiries by Magistrates in cases exclusively triable by the Court of Session, making the committal to the Court of Session a formal affair.

13. **Statement recorded during illegal investigation.** The statements recorded by a police officer, through the investigation by him was illegal, are still statements recorded by a police officer in the course of investigation under Chapter XIV of the Code of Criminal Procedure, 1898 (now Chapter XII of the Code of Criminal Procedure, 1973) and consequently they fall within Sections 161 and 162 of the said Code. Such investigation is not *non est* and a witness can be cross-examined with reference to the statement alleged to have been made during the illegal investigation.³

14. **Value of evidence of hostile witness.** A party calling his opponent as a witness is not bound by all the statements made by him as such witness is clearly hostile to the person calling him.⁴ A party is not bound by the evidence of a witness whom he produces, and no part of the statement of such a witness amounts to an admission on behalf of the party producing him, nor is there any rule of law that a party is not able to say that a witness produced by him is not speaking the truth upon some particular point unless he makes a written application to say that the witness is hostile.⁵ The refusal by the Magistrate to allow a witness to be cross-examined as hostile does not necessarily imply that he considers him to be a truthful witness.⁶ Nor does the granting of the permission amount to a declaration that his evidence is worthless and unreliable.⁷ His evidence should be evaluated like that of any other witness, with caution.⁸ It merely amounts to a declaration that the witness is adverse or unfriendly to the party and not that the witness is untruthful.⁹ It is for the court to go through the entire evidence of the witness and determine what part of his evidence is acceptable.¹⁰

It will depend upon the nature of his statement whether it can be believed in part or is to be rejected *in toto*. But the whole testimony has to be rejected if the witness is thoroughly discredited.¹¹

A prosecution eye-witness became hostile and instead of saying that he saw the accused beating deceased, he said that on his reaching the place he

3. Bhanuprasad Hariprasad Dave v. The State of Gujarat, 1968 S.C.D. 1026 : (1969) 1 S.C.J. 300 : 71 Bom. L.R. 48 : 1969 M.P.L.J. 260 : 1969 M.L.J. (Cr.) 179 : 1969 Mah. L.J. 299 : 1968 Cr. L.J. 1505 : A.I.R. 1968 S.C. 1323 (1826).
4. In re Rangaswami Iyengar, 21 I.C. 781 : 1913 M.W.N. 998.
5. Babu Ram v. Emperor, 1937 All 754 : 172 I.C. 617 : 1937 A.L.J. 1214 ; Jalal Din v. Nawab, 1941 Lah. 55 : 193 I.C. 186 : 42 P.L.R. 765 ; Nand Kishore v. Brij Behari, 1955 Raj. 65 : I.L.R. 1954 Raj. 822.
6. State v. Genda Lal, 1950 M.B. 89.
7. Emperor v. Haradhan, 1933 Pat. 517 : 146 I.C. 993 : 14 P.L.T. 494 ; Baijnath v. Emperor, 1946 Pat. 109 : 222 I.C. 373 : 27 P.L.T. 77 ; Sachhidanand Prasad v. Emperor, 1933 Pat. 488 : 144 I.C. 936 : 14 P.L.T. 580.

8. Janardan v. State of Kerala, 1978 K.L.T. 546.
9. Sarjug Prasad v. The State, A.I.R. 1959 Pat. 66 citing Emperor v. Haradhan, A.I.R. 1933 Pat. 517 *supra* ; Sabdeo Tanti v. Bipti Pasin, 1969 Cr. L.J. 1527 : A.I.R. 1969 Pat. 415.
10. Agasti Mahananda v. Ramaprasad Padhi, (1969) 35 Cut. L.T. 794 (795) ; Gobinda Chandra v. Hari Chandra, 1968 Cr. L.J. 1352 (Cal.).
11. Sat Paul v. Delhi Administration, A.I.R. 1976 S.C. 294 : (1976) 1 S.C.C. 727 : 78 P.L.R. 194 : (1976) S.C.C. (Cr.) 160 : 1976 Cr. L.J. 295 : 1976 Mah. L.J. 174 : 1976 M.P.L.J. 206 : (1975) Cr. L.R. (S.C.) 597 : (1976) Cr. A.R. (S.C.) 387 : 1976 Cur. L.J. (Cr.) 1 : I.L.R. 1976 Kant. 720 : (1976) 2 S.C.R. 11 : (1976) 3 Cr. L.T. 121.

saw that the deceased was in an injured condition and that another prosecution told him that the accused had assaulted the deceased. The Court believed the evidence of that witness to the limited extent of about place of occurrence and the presence of the other prosecution witness there.¹² The position of law on the effect to be given to the evidence of a hostile witness in a criminal case is that the court can rely on that portion of his evidence which supports the prosecution case and which the court believes to be true and reject the rest which it considers false.¹³ As Rankin, C. J., observed in the Full Bench case of *Profulla Kumar Sarkar v. Emperor*¹⁴:

"In my opinion the fact that a witness is dealt with under Sec. 154, Evidence Act, even when under that section he is cross-examined to credit, in no way warrants a discretion to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point that they may not give credit to him on another. The rule of law is that it is for the jury to say, "There can be no question as a matter of law rejecting the evidence of such a witness either so far as it is in favour of the party calling the witness or so far as it is in favour of the adverse party."¹⁵ The evidence of a hostile witness is not to be rejected either in whole or in part. It is also not to be rejected so far as it is in favour of the party which called him as his witness, nor is it to be rejected so far as it is in favour of the opposite party.¹⁶ There is nothing to prevent such portions of his evidence as support the case of the side putting him in the witness-box from being considered on their merits and being used as evidence against the party whom he has resolved dishonestly to favour. His evidence has, however, to be read with circumspection and if rules of caution warrant acceptance of his evidence in part as credible, there should be no hesitation in admitting that portion as good evidence. It is a mistaken notion of the law to maintain that the evidence of a hostile witness must be brushed aside completely. The appropriate course for a Court would be to bring its judicial discretion to bear on the whole statement and to decide which part of the statement impresses it as true and which not.¹⁷ The same view has been taken in the undernoted cases with this additional observation that the Court should normally look for corroboration to the evidence of such a witness.¹⁸ The Court has got to assess the evidence of such a witness like the evidence of any other witness and may accept it in whole or in part. The grant of permission to cross-

12. *Raja Ram v. State of U. P.*, 1978 All. Cr. R. 11 : 1978 Cr. L.J. 196 (All).

13. *State of Mysore v. Ramaji Ramappa Malagi*, 1972 (2) Mys. L. J. 6 (10) I. L. R. (1974) Him. Pra. 948 ; 1973 J. & K. L. R. 524 ; In re M. D. Mendekar, 1972 Mad. L.J. (Cr.) 123 : 1972 Cr. L.J. 978 (Mys.) ; *Lachmi Kirsani v. The State*, 1974 Cut. L.R. (Cr) 348 ; *Ashique Khan v. State of Bihar*, 1974 Cr. L.J. 724.

14. 1981 Cal. 401, (F.B.) at 407 ; the decisions to the contrary are no longer good law.

15. *Profulla Kumar Sarkar v. Emperor*, 1981 Cal. 401 at 410 (F.B.), per

Buckland, J ; see *Wahid Ali v. Emperor*, 1932 Cal. 523 : 138 I.C. 573 : 36 C.W.N. 356.

16. *Profulla Kumar Sarkar v. Emperor*, *supra* ; *Sohrai Sao v. Emperor*, A. I.R. 1930 Pat. 247 ; *Rema Naik v. State*, A.I.R. 1965 Orissa 31 : 30 Cut. L.T. 517.

17. *State v. Nagindra Singh*, 1953 Pepsu 97 : I.L.R. 1952 Pepsu 494 ; *Shridhar Mahadeo v. Emperor*, 1935 Bom. 36 : 154 I.C. 600 : 36 Bom. L.R. 1133.

18. *Karuppanna Thevar v. State of Tamil Nadu*, 1975 Cr. L.R. (S.C.) 506- : 1975 Cr. App. R. (S.C.) 294 : 1975 S.C.C. (Cr.) 753 : (1976) 1 S.C.C. 31 : 1976 Cr. L.J. 708 :

examine and cross-examination of one's own witness does not mean that witness is a liar.¹⁹ The evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same.²⁰ The correct rule is that either side may rely upon his evidence and that the whole of the evidence, so far as it affects both parties, favourably or unfavourably, must be considered for what it is worth.²¹ Broadly speaking, even if a witness is declared hostile and is cross-examined under the section, the value of his evidence would depend on all the circumstances and would not, merely because of the cross-examination, become suspect. It is, however, to be noted that any such use of the previous statement for the purpose of contradiction is cross-examination properly so called though Sec. 162, Criminal Procedure Code (same section in 1973 Code) does not use the word 'cross-examination'.²² When a witness becomes hostile it would in certain cases be unsafe to accept any portion of the testimony which he has given in examination-in-chief. To pick and choose between the statements which a witness makes in examination-in-chief under the influence of an *animus* adverse to the party who has called him would sometimes be an unsound proceeding. But to say that the court has no discretion to decide whether or not what is elicited from such a witness in cross-examination is the truth is an entirely different proposition. It would be quite wrong to hold that a Court is entirely debarred from bringing its judicial discretion to bear on materials which cross-examination elicits and of deciding whether the truth lies there.²³ The maxim *falsus in uno falsus in omnibus* cannot be applied to such a case. It must be a matter for the Court on the particular facts in each case to credit or to discredit the different portions of the evidence of each witness as in other cases.²⁴ It is not illegal to convict an accused on the basis of evidence of hostile witness.²⁵ The theory that a party cannot be allowed to say that his witness is a truthful witness so far as a part of his evidence is concerned but an untruthful witness so far as some other portion is concerned¹ is fallacious.

A.I.R. 1976 S.C. 980 ; (1975) 2 Cr. L.T. 359 (H.P.) ; Bhagwan Singh v. The State of Haryana, (1976) 1 A.P. L.J. (S.C.) 10 ; (1976) S.C.C. (Cr.) 7 ; 1976 Cr. L.J. 203 ; (1976) 1 S.C.C. 989 ; 1976 Cr. A.R. 71 ; A.I.R. 1976 S.C. 202 ; (1976) Cr. L.R. (S.C.) 48 ; (1976) 1 S.C.W.R. 382 ; 1976 (2) S.C.R. 921 ; Harpal Singh v. State of Himanchal Pradesh, 1976 Cr. L.J. 162 ; Bhola Nath v. State, 1976 Cr. L.J. 1409 ; Sat Paul v. Delhi Administration, A.I.R. 1976 S.C. 294 ; (1976) 1 S.C.C. 727 ; 1976 Cr. L.J. 295 ; Janardan Prasad v. State of Rajasthan, (1976) Raj. L.W. 410 ; 1977 Cr. L.J. 68 ; Babulal v. State of Rajasthan, 1977 Cr. L.J. 59 (F.B.) ; (1976) Raj. L.W. 345 ; Biri Singh Majhi v. State of Assam, 1977 Cr. L.J. 1349 ; Rabindra Kumar Dey v. State of Orissa, A.I.R. 1977 S.C. 170. (The evidence remains admissible at the trial and there is no legal bar to convict upon his testimony if it is corroborated by other evidence) ; The State of Bihar v. Lillanand Pathak, 1977 Cr. L.J. 513 (Pat.) .

19. Janardhanan v. State of Kerala, 1978 K.L.T. 546.
20. Badri Nath v. State, 1953 J. & K. 41 ; 54 Cr. L.J. 1719.
21. Shyam Kumar Singh v. Emperor, 1941 Oudh 130 ; 191 I.C. 466 ; Purustam Naik v. Chakradhar Das, 1959 Orissa 19 ; Sarjug Prasad v. The State, 1959 Pat. 66 ; Madhukar Dasarath Nendekar v. State of Mysore, 1972 M.L.J. (Cr.) 123 (128).
22. Kalu Singh v. Moti Singh, 1967 M. P.L.J. 849 (862).
23. Romesh Chandra v. National Tobacco Co. of India, Ltd., 1940 Cal. 536 ; 191 I.C. 535 ; 44 C.W.N. 999 ; Purustam Naik v. Chakradhar Das, A.I.R. 1959 Orissa 19.
24. Emperor v. Jehangir Ardeshir Cama, 1927 Bom. 501 ; 106 I.C. 100 ; 29 Bom. L.R. 996 ; Sarjug Prasad v. State, 1959 Pat. 66.
25. B. P. Mahton v. State of Bihar, 1973 B.L.J.R. 347.
- I. See Khijiruddin v. Emperor, 1926 Cal. 139 ; I.L.R. 53 Cal. 372 ; 92 I.C. 442 ; Mokbul Khan v. Emperor, 1928 Cal. 690 ; 32 C.W.N. 872.

A party is allowed to cross-examine his own witness because that witness displays hostility and not necessarily because he displays untruthfulness. The theory has gained currency owing perhaps to the common belief that the sole object of cross-examination is to discredit the witness whereas its main purpose is to obtain admissions, and it would be ridiculous to assert that a party cross-examining a witness is thereby prevented from relying on admissions and to hold that the fact that the witness is being cross-examined implies an admission by the cross-examiner that all the witness's statements are falsehood.² The evidence of a hostile witness is evidence in the case in the same manner and to the same extent as that of any other witnesses whether called by the prosecution or by the defence.³

In some cases it has been held that the evidence of a hostile witness is to be rejected *in toto* and it is unsafe to rely on any portion of his testimony.⁴ It is submitted that these cases do not seem to lay down good law in view of the undernoted subsequent decisions of the Supreme Court.⁵ Otherwise also there is nothing in the Evidence Act as a "hostile witness". Merely because the court allowed a witness to be cross-examined by the party who called him, it cannot be said that he is not a truthful witness. There may be cases where it may ultimately turn out that the so-called hostile witness was the only truthful witness. Thus no general rule can be laid down that a hostile witness cannot be relied upon.

155. *Impeaching credit of witness.* The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him

- (1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
- (2) by proof that the witness has been bribed, or ⁶[has] accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

2. *Sohrai Sao v. Emperor*, A.I.R. 1930, Pat. 247 : I.L.R. 9 Pat. 474 : 124 I.C. 836.

3. *Deodhari Koeri v. Emperor*, 1937 Pat. 34 : 166 I.C. 726 : *Shridhar Mahadeo v. Emperor*, A.I.R. 1935 Bom. 36 : *Babu Ram v. Emperor*, 172 I.C. 617 : A.I.R. 1937 All 754; *Nehti Mandal v. Emperor*, I.L.R. 19 Pat. 369 : 190 I.C. 457 : A.I.R. 1940 Pat. 289 : *State v. Naginder Singh*, A.I.R. 1953 Pepsu 97 : I.L.R. 1952 Pepsu 494.

4. *Jai Singh v. The State*, (Delhi Administration), 1975 Cr. App. R. 12 (S.C.) : 1975 Cr. L.R. (S.C.) 109 : 1975 S.C.C. (Cr.) 129 : 1975 S.C. Cr. R. 110 : (1975) 3 S.C.C. 562 : 1975 Punj. L.J. (Cr.) 65 : 1975 Cr. L.J. 1009 : A.I.R. 1975 S.C. 1400 : *Babu Nathu Gond v. State of Maharashtra*, 1975 Mah. L. J. 799 : *Chandrika Parmad v.*

State, 1975 Rajdhani L. R. 551 (neither the prosecution nor defence can rely upon any part of his testimony) : *Balkari v. State of Rajasthan*, 1975 W.L.N. 812 : 1975 Raj. L.W. 435 : *Sant Lal v. State of Rajasthan*, 1975 Raj. L.W. 350 : *Mobasingh v. State of Rajasthan*, 1975 W.L.N. 373.

5. *Bhagwan Singh v. State of Haryana*, 1976 Cr. L.J. 203 : A.I.R. 1976 S.C. 202 : *Karuppanna Thewar v. State of Tamil Nadu*, 1976 Cr. L.J. 708 : A.I.R. 1976 S.C. 980 : *Sat Paul v. Delhi Administration*, A.I.R. 1976 S.C. 294 : (1976) 1 S.C.C. 727 : 1976 Cr. L.J. 295 : *Rabindra Kumar Dey v. State of Orissa*, 1977 Cr. L.J. 173 : A.I.R. 1977 S.C. 170.

6. Subs by the Indian Evidence (Amendment) Act, 1872 (18 of 1872); S. 11 for "bad".

- (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;
- (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation. A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false he may afterwards be charged with giving false evidence.

Illustrations

(a) A sues B for the price of goods sold and delivered to B. C said that A delivered the goods to B.

Evidence is offered to show that on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

Sec. 3 ("Court.")
Sec. 3 ("Evidence.")

Sec. 127 (Examination-in-chief and cross-examination.)

Steph., Dig., Arts 131, 133, 134, Taylor, Ev., Secs. 1445, 363, 1470-1473; 1476; Ph. and Arn., 503-540; Wharton, Ev., Secs. 549-571; Burr. Jones Ev., Secs. 864, 865, 866, 849, 854, 870, 871-878; Stewart Rapalje's Law of Witnesses, Secs. 196-216; Markby, Ev., 109; Norton, Ev., 334.

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Principle. 2. Impeaching credit of witness, ways of. 3. English and Indian law, difference between. | <ol style="list-style-type: none"> 4. Scope :
—Clause (1).
—Clause (2).
—Clause (3).
—Clause (4). 5. Re-establishing credit—Recrimination. |
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1. Principle. The witness being a medium through which the Court is to arrive at the truth or falsity of the claim or charge in litigation, it is always necessary to ascertain the trustworthiness of this medium. This is the common function of cross-examination, which is, however, not in all cases adequate. It is necessary, therefore, that the parties should be empowered to give independent testimony as to the character of the witness with a view

to showing that he is unworthy of belief by the Court, which may be done in the four ways specified in this section. To avoid entering upon irrelevant matter, the section should be strictly construed.⁷

2. Impeaching credit of witness, ways of. The credit of a witness may be impeached in the following ways: (a) by cross-examination,⁸ that is, by eliciting from the witness himself facts disparaging to him; (b) by calling witness to disprove his testimony on material points.⁹ The credit of a witness is, of course, indirectly impeached by evidence disproving the facts which he has asserted; (c) by eliciting in cross-examination, or if denied, independently proving, the partiality or previous conviction of the witness,¹⁰ or that he has been bribed, or made previous inconsistent statements, or the immoral character of the witness, if she be the prosecutrix in a trial for rape;¹¹ (d) by independent proof that the witness bears such a reputation as to be unworthy of credit.¹²

This classification, though corresponding with that generally given in the English text-books, is not that adopted by the Act, which deals with the abovementioned matters under the classes of (a) cross-examination,¹³ (b) contradiction,¹⁴ (c) impeachment of credit.¹⁵

(a) Cross-examination may or may not have the effect of impeaching the credit of the witness; a result which depends upon the nature of the questions put to the witness and the answers which he gives to them.

(b) A distinction may be drawn between contradicting a witness and impeaching his credit. Where the facts stated by the witness are relevant to the issue, evidence may always be given to contradict them under the provisions of the fifth section, ante.¹⁶ If the fact be one which is not relevant to the suit or proceeding, except in so far as it affects the credit of the witness, no evidence is admissible in contradiction except in two specified cases.¹⁷

7. *Bhogilal v. Royal Insurance*, 1928 P. C. 54 : I.L.R. 6 Rang 142 : 108 I.C. 1 : *Kamal v. State*, A.I.R. 1959 Cal. 342.

8. See Ss. 138, 140, 145, 146, 147—154.

9. Under S. 5, ante ; see *Taylor, Ev.*, S. 1470.

10. S. 153.

11. S. 155, clauses (2), (3), (4).

12. S. 155, clause (1).

13. Ss. 138, 140, 145, 152—154.

14. Ss. 5, 153.

15. S. 155.

16. See *Cunningham, Ev.*, 372. "The Bombay High Court in *R. v. Sakharan Mukundji* (1974) 11 Bom. H. C.R. 169, appear to consider that the provisions of the Indian Evidence Act for the contradiction of witnesses is less extensive than that of the English law. If, however, S. 5 be read with these sections, it will, I think, be seen that they are identical." The express provisions of S. 5, however, render unnecessary

this recourse to an implied rule. It is also to be observed that the question whether contradicting evidence upon relevant points may be given is in part a question of procedure.

17. S. 153, v. *ib.*, Exceptions (1) and (2). This section does not appear to be accurately expressed for there is at least one other common case where the witness may be contradicted. If the witness be asked in cross-examination whether he made a previous inconsistent statement, and denies having done so, independent evidence may be given to contradict that statement under S. 154. In the two exceptional cases mentioned in s. 153, the evidence is allowed to contradict answers to questions actually put. The evidence allowed by S. 155 to impeach the witness's credit may apparently be given, although the witness has not been questioned upon the point, unless some other portion of the Act prohibits it—see e. g., S. 145.

(c) Lastly, the impeachment of the credit of a witness is considered and set apart from both cross-examination and contradiction, apparently because, under the Act, a witness's credit may be impeached upon a point upon which there has been no cross-examination and therefore no room for contradiction.

The testimony of a witness may not be rejected merely on the ground that certain criminal proceedings are pending against him and that he has shady or doubtful characteristics. His testimony must be scrutinised on its own merit, keeping in view and paying due consideration to the fact of his being involved in certain criminal proceedings. In cases of bribe, direct testimony of wholly disinterested strangers as eye-witnesses can seldom be forthcoming. It is, accordingly, either circumstantial evidence or the evidence of trap witnesses which is usually available in such cases. The testimony of police officers and of persons associated with traps may not be unceremoniously ruled out as tainted without scrutiny. It should be considered in the light of all the attending circumstances, and, if it impresses the Court as credible, it may be accepted.¹⁸ Such testimony deserves consideration by courts in the light of all the attending circumstances, and if it impresses the court as credible, it can safely be accepted for basing a conviction thereon.¹⁹

No presumption adverse to a witness can be drawn against him without giving him an opportunity to explain features complained of.²⁰

Impeaching credit of a witness, either under Sec. 145, ante (written statements) or under the present section (oral statements) can be done by drawing his attention to those statements, whether written or oral.²¹

Tape-recordings are not inadmissible in evidence merely for the reason that they are capable of being tampered with.²²

3. English and Indian law, difference between. This question of classification is, however, of no great practical importance, as the provisions of this section are in substantial accordance with those of English law on the point, though it is useful to bear it in mind, in order to avoid the confusion which is not unlikely to result from the novel view of the matter presented by this Act. The two main points upon which this section differs from English law are that, under the first clause, a party may discredit his own witness by proof of such a reputation as renders him unworthy of belief, which may not be done in England and that apparently it is not necessary under the third clause to lay a foundation by interrogation of the witness for subsequent evidence in proof of the previous inconsistent statements.²³ In England, further, a party may give proof of such statement by his own witness only where the witness is, in the opinion of the Judge, "adverse". And though doubtless the English practice will be in a large number of cases followed in this respect, yet it should be remembered that the Act has left the discretion of the Court wholly unfettered, either to allow or disallow such impeachment as justice and the particular circumstances of each case may require. "The importance of the section lies in this that it, by implication, restricts the evidence which

18. *Ram Sarup Charan Singh v. The State*, 1967 Cr. L.J. 744 : A.I.R. 1967 Delhi 26, 27.

19. *Ibid.*

20. *Sachindranath Chatterjee v. Nilima*, 74 C.W.N. 168 : A.I.R. 1970 Cal. 38.

21. *Doman Mehton v. Surajdeo Prasad*,

1970 B.L.J.R. 926 : 1970 Cr. L.J. 350 : A.I.R. 1970 Pat. 95 (96).

22. *Partap Singh v. State of Punjab*, (1964) 4 S.C.R. 733 : (1965) 1 S.C.A. 259 : (1966) 1 Lab. L.J. 458 : A.I.R. 1964 S.C. 72 (86).

23. *v. ante* S. 145.

may be given (otherwise than in the exceptional cases mentioned in Sec. 153) to impeach a witness's credit—to that specified in the section.²⁴

4. Scope. This section cannot be construed as an exception to Sec. 52, ante. The two sections deal with different matters. Section 52 prohibits character evidence in regard to the subject-matter of the suit, whereas this section prescribes the manner of impeaching the credit of a witness.²⁵ Sections 155 and 146 are not in conflict with each other, Secs. 138, 140, 145 and 154 provide for impeaching the credit of a witness by cross-examination. In particular Sec. 146 permits questions injuring the character of a witness to be put to him in cross-examination. This section lays down a different method of discrediting a witness by allowing independent evidence to be adduced.¹ The rules with regard to the impeachment of witnesses apply to both criminal and civil cases, and by the terms of the section, the same impeaching evidence may be given in the case both of the adversary's and the party's own witness. This section lays down four different ways in which the credit of a witness may be impeached, which may not be done by the party, who calls him, except with the leave of the Court.² As to the cases in which a party may discredit his own witness, see the Notes to the preceding section. It is to be here observed that though this section renders former statements relevant only to contradict or negative the statements made previously, yet Sec. 287 of the Criminal Procedure Code (omitted from the new Code) goes further in making previous statements before the committing Magistrate "evidence in the case", that is, substantive evidence of the facts therein deposed to.³

Clause (1). Independent evidence may be given that an adversary's (or with the leave of the Court a party's own) witness bears such a general reputation for untruthfulness,⁴ or perhaps for moral turpitude generally,⁵ that he is unworthy of credit. In India, it has been held that this section does not allow evidence of a witness's general bad character to be brought in.⁶ According to the theory of English law, such evidence should relate to general reputation only and not express the mere opinion of the impeaching witness. It is not sufficient that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is generally said of the person by those among whom he

24. Markby Ev., 109.

25. G. Hussenaiah v. B. Yerraiah, 1954 Andh. 39 : (1954) 2 M.L.J. (Andh.) 39.

1. *ib. s.* 145 does not control S. 155 ; Ram Ratan v. The State, A.I.R. 1956 Raj. 196 : 1956 Raj. L.W. 319 : Contra ; S. 155 is controlled by S. 145 ; In re Sambasiva Rao, 1958 M.L.J. (Cr.) 942.

2. Profulla Kumar Sarkar v. Emperor, 58 Cal. 1404 : 53 C.L.J. 427 : 35 C.W.N. 731 : 32 Cr. L.J. 768 : 1931 Cal. 401 (F.B.) at 409, per Buckland, J.

3. Maruti Shinde v. Emperor, 1922 Bom. 108 : I.L.R. 46 Bom. 97 : 23 Bom. L.R. 820 : 63 I.C. 332 following Queen-Empress v. Dorasami Ayyar, (1901) 24 M. 414 ; Emperor v. Dwarka Kurni, (1906) 28 A. 683 : 3 A.L.J. 852 : 1906 A.W.N.

187, referring to Queen-Empress v. Jadab Das, (1899) 27 C. 295 : 4 C.W.N. 129.

4. Taylor, Ev., ss. 1470, 1473.

5. Taylor, Ev., s. 1471, where the view is expressed that the enquiry need not be resisted to reputation for veracity, but may involve the witness's entire moral character ; the opposite party being at liberty to enquire whether in spite of bad character in other respects the impeached witness has not preserved his reputation for truth. The weight of American authority confines the inquiry to the reputation of the witness for truth and veracity Burr. Jones, Ev., s. 864.

6. Maung San Myin v. Emperor, 1930 Rang 49 I.L.R. 7 Rang. 771 : 121 I.C. 715.

dwells, or by those with whom he is chiefly conversant; for it is this only which constitutes his general reputation. Though, as observed, the English theory requires that the witness should not express his own opinion, yet, in practice, the regular mode of examining is to ask the witness whether he knows the general reputation among the person's neighbours and what that reputation is, and, then whether from such knowledge he would believe the person whose veracity is impeached, upon his oath.⁷ The Explanation to this section is in accordance with the English law upon the point. The impeaching witness cannot, in direct examination, give particular instances of the other's falsehood, or dishonesty, but upon cross-examination he may be asked as to his means of knowledge of the other witness, his feelings, if any, towards him and the like: and the answers to these questions cannot be contradicted.⁸ Where a witness's veracity has been attacked, his credit may be re-established either by the cross-examination of the impeaching witness (v. ante), or by independent general evidence that the impeached witness is worthy of credit,⁹ and the party whose witness has been attacked may recriminate, that is, the impeaching witness may in his turn be attacked either in cross-examination or by independent general evidence with a view to show that he is unworthy of credit, but no further recrimination than this is probably allowable.¹⁰ Where the general reputation of the witness for truth and veracity is proved to be bad, the Court may properly disregard his evidence, except in so far as he is corroborated by other credible testimony.¹¹ The question, whether a witness is entitled to credit or not, must be decided by a Court on the evidence before it, and not on what another Court thought of the witness in another case.¹²

An inference against the credibility of a witness cannot be legitimately drawn without anybody going into the witness-box in the manner contemplated by Clause (1).¹³

Clause (2). This clause runs "has accepted the offer of a bribe," but was originally framed "has had the offer of a bribe." The substitution was probably grounded upon the ruling in the case of the *Attorney-General v. Hitchcock*,¹⁴ where it was held that the fact that the witness has accepted a bribe to testify may, if denied, be proved, though a mere admission by the witness that he has been offered a bribe cannot; Pollock, C. B., remarking that it was no disparagement to a man that a bribe is offered to him, though it may be a disparagement to the person who makes the offer.¹⁵

7. Taylor, Ev., s. 1470. In practice the question is generally shortened thus, "from your knowledge of the witness would you believe him on his oath." R. v. Brown, 1 C.C.R. 70; see the questions of the propriety of this question discussed in Burr. Jones, Ev., s. 865.
8. Steph Dig. Art 133; Taylor, Ev., s. 1473; Norton, Ev., s. 384. There are peculiar reasons for allowing a searching cross-examination of the impeaching witness; see Burr. Jones, Ev., s. 864.
9. Taylor, Ev., s. 1473; 2 Ph. & Arn. Ev., 504; Wigmore, Ev., s. 1104.
10. ib and see Wharton, Ev., ss. 568, 569.
11. Burr. Jones, Ev., s. 866, and

there cited.

12. Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh, 1927 Pat. 61 at 70; I.L.R. 5 Pat. 777; 101 I.C. 289; Pasumarty Jagappa, In the matter of. (1899) 4 C.W.N. 684; Mir Jawali v. Emperor, 1936 Pesh 106; 162 I.C. 300.
13. Dinkar Bandhu Deshmukh v. State, 72 Bom. L.R. 405 (409); 1970 Mah. L.J. 654; A.I.R. 1970 Bom. 438 (445).
14. Ex. R. 91.
15. See, however, criticism in Cunningham, Ev., 372, 373, where it is said: "The alteration, like several of the amendments introduced by Act XVIII of 1872, appears to have been made without adequate regard

Clause (3). The witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. See Illustrations (a) and (b).¹⁶ In the undermentioned case.¹⁷ Wilson, J., said: "I am inclined to think that in the third clause of Sec. 155 of the Evidence Act, the words 'which is liable to be contradicted' mean 'which is relevant to the issue'." The last cited proposition, according to the Supreme Court, is stated too broadly.¹⁸ Any statements, verbal as well as written, may be used for this purpose; but, where the statement is in writing, the provisions of Sec. 145, ante, should be followed.¹⁹ In fact, though it is not so expressly laid down and required by the Act in the case of verbal statements²⁰ the witness should always, if possible, be specifically asked whether he made such and such a statement before he is contradicted through another witness. A document, though not *inter partes*, is admissible to prove the possession and title to the property, if it is used as corroboration for the oral evidence of the executant of the document.²¹ A recital in the deed which becomes admissible under Sec. 157 to corroborate the testimony can also be used under this section to contradict such testimony.²² The handwriting of a witness is not his 'former statement' within the meaning of Clause (3) of the section and evidence of such writing cannot be let in under the section as other independent evidence for the purpose of impeaching his credit.²³

It is always relevant to put to a witness any question which, if answered in the affirmative, would qualify or contradict some previous part of his testimony given in the trial of the issue; and, if such question be put and be answered in the negative, the opposite party may then contradict the witness, and for this simple reason that the contradiction would qualify or contradict the previous part of the witness's testimony and so neutralise its effect.²⁴ On the principle just pointed out, if a case be such as to render evidence of opinion admissible and material, the witness may, on cross-examination, be asked whether he has not on some particular occasion expressed a different opinion upon the same subject, and if he denies the fact, it may be proved by other evidence. But the previous opinion as to the merits of the cause of a witness who has simply testified to a fact cannot be regarded as relevant to the issue and cannot therefore be given in evidence.²⁵ Evidence of previous statements made by a witness, whose good faith has not been questioned by

to the considerations which led the original framers of the Act to word it is as they did." See also *Bhogi Lal v. The Royal Insurance Co., Ltd.*, 1920 P.C. 54.

16. See also *Aruup v. Kedarnath*, 1925 Cal. 1017 : 91 I.C. 801.

17. *Khadijah v. Abdool*, (1899) 17 C. 344, 346 reported to the author to have been followed by Sale, J., in *Ramjeebun v. Rees*, Suit No. 686 of 1893, Calcutta High Court, May 7, 1895; however, whether these words do not refer to any part of the witness's evidence "which relates to a fact in issue or relevant, or which falls within the exceptions to S. 153." *Cunningham, Ev.*, s. 373.

18. *N. Sri Rama Reddy v. V. V. Giri*, (1971) 1 S.C.R. 299 : (1971) 1 S.C.A. 894 : 1970 S.C.D. 646 : (1971)

1 S.C.J. 493 : 1970 U.J. (S.C.) 804 : 1970 K.L.T. 390 : 1971 M.L.W. (Cr.) 75 : A.I.R. 1971 S.C. 1162 (1170).

19. See Notes to S. 145 under the headings "Oral statements" and "In writing or reduced into writing."

20. In England the circumstances of the supposed statement must be put to the witness; *Taylor, Ev.*, s. 1445 : *Wharton, Ev.*, s. 555, v. post.

21. *Mohimchandra v. Kanailal*, 1980 Cal. 311 : 124 I.C. 321 : 33 C.W. N. 1085.

22. *Rangayyan v. Innasimuthu*, 1956 Mad. 226 : (1955) 2 M.L.J. 687 : 69 L.W. 513.

23. *Kiranchandra Pal v. Bhondur*, 1970 M.P.W.R. 899 (902).

24. *Taylor, Ev.*, s. 1445.

25. *ib.*, and see *Wharton, Ev.*, s. 551.

the Crown, cannot be given without previous cross-examination of the witness as to such statements. Such procedure is both undesirable and not permitted by Secs. 154 and 155.¹

When it is intended to throw discredit upon the evidence of any witness, nothing is more common in practice (especially in criminal cases) than for the Counsel for the defence to prove, if it can be proved, that that witness has previously made statements inconsistent with the evidence at the trial. When this fact is satisfactorily established, the Court cannot but regard the evidence of such witness with suspicion, and the fact is established by the evidence of any one to whom such statements were made, or in whose presence or hearing they were made.² As to statements reduced to writing by a police officer under Sec. 162 of the Criminal Procedure Code,³ and as to first informations, see the undernoted case.⁴ If there is a report which is found to have been made quite independently of and in no relation to any pending investigation, was not designed to promote a pending investigation, and had no reference at all to the investigation which had in fact already begun, it is a document admissible for the purpose of corroborating the evidence of its maker.⁵

Where the impeaching declarations were oral, it is of course necessary to call the persons who heard them.⁶ Where a statement by J to H was reported at the *thana* by the latter and there recorded, it was held that though the evidence of J could be contradicted by the evidence of H proving the statement made to him by J, it could not under this clause be contradicted by what the police recorded as the first information.⁷ Generally, whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that the witness in his evidence omitted facts sworn to by him at the trial and that he now states facts which he then did not state.⁸ To make the impeaching statement admissible, it must be, on some point, a contradictory statement, opposite of the statement made by the witness at the trial, if the two statements are reconcilable, one cannot be received to contradict the other.⁹ It is not necessary, in order to make the previous statements admissible for the purpose of impugning the credit of a witness, that the accused should have an opportunity to cross-examine.¹⁰ Impeaching evidence is admissible, even though the witness when cross-examined as to the contradicting expressions should say he is uncertain whether he made them or not.¹¹ According to the English statute,¹² it is required that, before proof of such statement can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, should be mentioned to the

1. *Stephen Seneviratne v. The King*, 1936 P.C. 289 : 164 I.C. 545 : 39 Bom. L.R. 1.

2. *R. v. Uttamchand*, (1874) 11 Bom. H.C.R. 120, 121, 122, per Nanabhai Haridas, J.

3. See Notes under S. 145, ante.

4. *Azimuddy v. R.*, 1927 Cal. 17 : I.L.R. 54 Cal. 237 : 99 I.C. 227.

5. *Tika Ram v. State*, 1957 All 755 : 1957 Cr. L.J. 1200 ; *Suba Chaudhary v. The King*, 1950 Pat. 44 : I.L.R. 28 Pat. 762 ; *Emperor v. Lalji Rai*, 1936 Pat. 11 : 160 I.C. 181 ; *Emperor v. Aftab Mohammad Khan*, 1940 All 291 : 180 I.C. 649 ;

1940 A.L.J. 206 ; but see *Mani Mohan Ghose v. Emperor*, 1931 Cal 745 : I.L.R. 58 C. 1312 : 135 I.C. 289.

6. *Wharton, Ev.*, s. 553.

7. *R. v. Dina Bandhu*, (1909) 8 C.W.N. 218 at p. 221.

8. *Wharton, Ev.*, s. 554.

9. *Wharton, Ev.*, s. 558.

10. *Emperor v. Raghoo Ganpat*, 192 Bom. 404 : 97 I.C. 37 : 28 Bom L.R. 775.

11. *Crowley v. Page*, (1837) 7 C. & P 791.

12. 28 & 29 Viet. c. 18, s. 1 ; *Taylor Ev.*, s. 1445.

witness, and he must be asked whether or not he had made such statement. In other words, it is necessary, before giving evidence for the purpose of contradicting a witness, to lay a foundation for the evidence to be given by the interrogation of the witness himself and by obtaining his denial or non-admission. This is not made necessary by the terms of the present section.¹³ But, it is both usual and advisable and just to the witness to first interrogate him, whenever that be possible, in order that he may be able to deny, admit or explain his statement.¹⁴ The Act has made this necessary in the case of written statements¹⁵ (v. ante). Except where the witness is a party (in which case his previous statement may be relevant as an admission)¹⁶ the previous contradictory statement is not admissible as proof of the fact therein asserted; it can only be admitted to impeach the credit of the witness and for the purpose of neutralising or raising doubt or suspicion as to those parts of the witness's testimony with which the contrary statement is at variance.¹⁷ In the under-noted case, two persons made statements to the effect that C and another had robbed them and caused hurt while doing so. One statement was made to their employer and the other to the head constable. C was subsequently charged, and these two persons were called as witnesses for the prosecution, but they then denied that C was one of the men who had assaulted them. It was held, that the former statements referred to, and which implicated the accused, could be used only under this clause for discrediting their evidence and not as substantive evidence against the accused.¹⁸ It is not necessary, in order to introduce such contradictory evidence, that it should contradict statements made by the witness in his examination-in-chief. Ordinarily, the process is to ask the witness on cross-examination, whether, on a former occasion, he did not make a statement conflicting with that made by him on his examination-in-chief. But the conflict may take place as to matters originating in the cross-examination; and then, if such matters are material, contradiction by this process is equally permissible.¹⁹ A statement to contradict the evidence of a witness may be contained in a series of documents, not one of which taken by itself would amount to a contradiction of his evidence.²⁰ There is no rule of evidence which prevents a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements, from deposing that while he was engaged in conversation with the witness a tape-recorder was in operation, or from producing the said tape-recorder in support of the assertion that a certain statement was made in his presence.²¹ A tape recorded statement is also admissible under Section 155 (3) to contradict the evidence given by the witness in Court, to test the veracity of the witness and to show that he is not an impartial witness.²² As to the use

13. Cunningham, Ev., s. 372.

14. Wharton, Ev., s. 555; Burr. Jones, Ev., s. 849. 'This was laid down to be the proper course in R. v. Madho, (1892) 15 A. 25, and v. ante, last note to S. 145. When witnesses under examination make statements which are contrary to statements previously made by them, the Court ought to draw their attention to the contradiction, Sham Lal v. Anuntee Lal, (1874) 24 W. R. 312.

15. S. 145.

16. See Burr. Jones, Ev., s. 854.

17. v. ante, and R. v. Jagardeo Pande, L.E.—454

29 All. 469 : 1906 A.W.N. 64 (examination of police to prove former statement).

18. R. v. Cherath Choyi, (1902) 26 M. 191.

19. Wharton, Ev., s. 552.

20. Jackson v. Thomason, 1 B. & S. 745.

21. Rup Chand v. Mahabir Prasad, 1956 Punj. 173 : I.L.R. 1956 Punj. 1351 : 58 P.L.R. 441.

22. N. Sri Rama Reddy v. Shri V.V. Giri, 1970 Ker. L.T. 390 : 1970 S.C.D. 646 : (1970) 1 S.C.W.R. 872 : 1971 Mad. L.W. (Cr.) 75 : (1971) 1 S.C.A. 394 : (1971) 1

of previous statement under Sec. 228 of the Criminal Procedure Code (omitted from the new Code).²³ Where a witness made a statement before the coroner, it was held admissible at trial of accused. It was not necessary that, in order to make the previous statement of a witness before the coroner admissible for the purpose of impugning his credit, the accused should have had an opportunity to cross-examine him.²⁴ Previous statements put in to contradict a witness can be used only for the purpose of contradicting him and not as substantive evidence of the identification of a person.²⁵ If an attesting witness is dead, his depositions in a prior judicial proceeding would be relevant and admissible, if the prior judicial proceeding was between the same parties and adverse party in that proceeding had the right and opportunity to cross-examine him and the question in issue is substantially the same. But, if the witness, being alive, is examined in the present proceeding, his prior depositions are not available as substantive evidence but can only be used to contradict or corroborate his present statements.¹

Clause (4). The act, as originally drafted, contained the following additional section relating to the subject of character: "In trials for rape or attempts to commit rape, the fact that the woman on whom the alleged offence was committed is a common prostitute, or that her conduct was generally unchaste is relevant." It was, however, thought unnecessary to retain this as a separate section, and it was accordingly incorporated with the present one. In the case now mentioned, evidence is receivable not so much to shake the credit of the witness as to show directly that the act in question has not been committed. "Thus on indictment for rape, or attempts to commit that crime, not only is evidence of general bad character admissible under the first clause to show that the prosecutrix ought not to be believed upon her oath, but so also is proof that she is a reputed prostitute, for it goes far towards raising an inference that she yielded willingly. In such cases, general evidence of this kind will, on this ground, be received though the woman be not called as a witness, and though, if called, she be not asked, in cross-examination, any questions tending to impeach her character for chastity. Counsel for the defence cannot, however, prove specific immoral acts with the prisoner, unless he has first given the prosecutrix an opportunity of denying or explaining them. Moreover, the prosecutrix, if cross-examined as to particular acts of immorality with other men, may decline to answer such questions, while if she answers them in the negative, witnesses cannot be called to contradict her."² Interpreting this clause in *Wahid Ali v. Emperor*,³ it has been observed: "Such evidence, in our opinion, means something more than that it can be proved that she has on specific occasions done acts which may be called immoral. Some meaning must be given to the word 'generally', and we think that the sub-section⁴ refers to such evidence as that her general reputation

S.C.J. 483 : (1970) 2 S.C.C. 340 : 1970 U.J. (S.C.) 604 : (1971) 1 S.C.R. 399 : A.I.R. 1971 S.C. 1162.

23. See Note 15 under S. 145; heading "Depositions before Committing Magistrate".

24. *Emperor v. Raghu Ganpat*, 1926 Bom. 404 : 97 I.C. 37 : 27 Cr. L.J. 1061 : 28 Bom. L.R. 775.

25. *Samser Ali v. Emperor*, 1947 Cal. 342 : 222 I.C. 421 : 50 C.W.N. 206.

1. *Ponnuswami Goundan v. Kalyanasundara Ayyar*, 1930 Mad. 770 :

125 I.C. 231.

2. *Taylor, Ev.*, s. 363 ; *Keramat v. R.*, 1926 Cal. 147 : 92 I.C. 433. But to show consent she may be cross-examined as to other immoral acts with the prisoner, and if she denies them they may be independently proved, *R. v. Riley*, (1887) 18 Q.B.D. 481 ; *Taylor, Ev.*, s. 1441.

3. 138 I.C. 373 : 36 C.W.N. 356 : 1932 Cal. 523 at 524.

4. *Viz* clause (4) of section 155, Evidence Act.

was that of a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men."

5. Re-establishing credit—Recrimination. The Act does not in terms provide for either of these, but, as already observed,⁵ according to English practice, when a witness's character for truth and veracity has been directly impeached, the party calling him may sustain his character by countervailing proof, and the character of the impeaching witness for truth and veracity may itself be attacked. "A direct impeachment of moral character by testimony (reputation or personal opinion) to a general trait of character plainly satisfies the rule and opens the way for the opposite party to rehabilitate his witness by testimony to his good character. No one has ever doubted this."⁶ Whether a collateral attack admits sustaining testimony, that is, whether such a course is open where the witness is attacked upon the other grounds mentioned in this section, or in Secs. 153 and 146, is a matter upon which there has been conflict in the reported cases here referred to.⁷ It has been held in America that a witness's character so far impeached by putting in evidence his conviction of felony, is not admissible of his good reputation for truth.⁸ It is a matter of doubt, whether such testimony can be received merely upon proof of prior conflicting statements of the witness or upon the eliciting of answers disparaging to the witness in cross-examination.⁹ On the other hand, it has been said that where the opposing case is that the witness testified under corrupt motives, this being involved in the attack on his credibility, it is but proper that such evidence should be rebutted.¹⁰ But, in India, it has been held with specific reference to this section as well as Secs. 146 and 148, that the credit of a witness can be said to have been shaken only, if it can be shown that he is not a man of veracity and not that he is otherwise an undesirable person, such as a blackmarketeer.¹¹ The arguments for the admission of rebutting testimony to good character in all cases is, that since the object of the attack is to impeach the witness, the mode of such attack is immaterial, and that the same reasons exist for sustaining the witness, as where witnesses are called to testify directly to his bad reputation; on the other hand, it is said that the admissibility of the evidence in all cases may lead to confusion and the multiplicity of collateral issues.¹² It is, of course, clear that in any case, and as a general rule, a party cannot fortify the credit of his witness by proving good character for truth until the credibility of the witness has been assailed.¹³

5. ante, Notes under Cl (1) of the section and Wharton, Ev., ss. 568, 569; and as to the order of introduction of evidence which is at discretion of the Court, v. ib., s. 571.

6. Wigmore, Ev., s. 1105.

7. See the subject discussed in Burr. Jones, Ev., s. 870.

8. State v. Roe, 12 Vt. 111 (Amer.); Paine v. Tilden, 20 Vt. 554; Wharton, Ev., s. 569; Burr. Jones, Ev., s. 870.

9. Wharton, Ev., s. 557, note (1) and cases there cited; Burr. Jones, Ev., s. 870. It is said to be the better view that the evidence is not admissible though there are cases to the contrary; Burr. Jones, Ev., ss. 871, 870; In Taylor, Ev., s. 1476, how-

ever, the rule is stated to be that "where evidence of contradictory statements or of other improper conduct on his part has been either elicited from a witness on cross-examination or obtained from other witnesses with the view of impeaching his veracity—his general character for truth being thus in some sort put in issue, general evidence that he is a man of strict integrity and scrupulous regard for truth will be admitted.

10. Wharton, Ev., s. 570.

11. R. R. Chari v. State, A.I.R. 1959 All 149.

12. Burr. Jones, Ev., ss. 871, 870.

13. ib., ss. 868, 870; Wigmore, Ev., s. 1104.

156. *Questions tending to corroborate evidence of relevant fact admissible.* When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

s. 3 ("Fact.")
s. 3 ("Court.")

s. 3 ("Relevant.")

Markby, Ev., 109, 110; Cunningham, Ev., s. 156.

SYNOPSIS

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| Principle. | 4. Admissibility of First Information Report. |
| 2. Corroboration of witness. | |
| 3. Nature of corroboration. | |

1. Principle. See Note, post.

2. Corroboration of witness. Corroboration for any evidence given by a witness may be found necessary when a court is not inclined to reject the evidence of the witness as false. A court may be willing to act on the evidence of a witness but it may be of the view that the witness is an interested witness and it may not be safe to act on that evidence alone. In such circumstances, in order to enable the court to act on that evidence, it may seek corroboration from other independent evidence or circumstances.¹⁴ This section provides for the admission of evidence given for the purpose not of proving a directly relevant fact but of testing the witness's truthfulness. There is often no better way of doing this than by ascertaining the accuracy of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be in themselves relevant. While, on the one hand, important corroboration may be given in the case of a truthful witness, a valuable field for cross-examination and exposure is afforded in the case of a false witness. In order to prepare the ground for their corroboration, it is necessary to elicit these surrounding circumstances in the first instance from the witness himself, and for this the section makes provision.¹⁵ This section, in effect, declares evidence of certain facts to be admissible; and if it had been not inserted, the Judge would have had to determine the relevancy of these facts by reference to the 7th and 11th sections; and he might perhaps have been influenced by the practice in England which has been against the admission of such evidence.¹⁶ It is not incumbent on a party to

14. *Yudhishtir v. The State of M.P.*, 1971 S.C.D. 374 (383, 384) : 1971 S.C. C. (Cr.) 684 : 1971 S.C. Cr. R.

592.

15. *Cunningham, Ev.*, s. 156.
16. *Markby, Ev.*, 109, 110.

give corroborative evidence of statements not challenged by the other party.¹⁷ It is impossible to treat statements by a witness as corroborating his own evidence, these being merely parts of that very evidence itself.¹⁸ In the case noted it was held that where witnesses for the prosecution were proved to be untruthful in the greater part of their evidence, it would be dangerous to convict on the residue unless it was corroborated.¹⁹ It has, however, been held that the widow of a landlord could produce the rent-receipts got by her husband, although they had not been formally proved, in corroboration of her statement that these receipts had been regularly brought to the house by her husband.²⁰ In a departmental inquiry, the admission of guilt by the Government servant (a police constable) can be treated as supporting evidence against him.²¹

3. Nature of corroboration. Corroboration, in order to be of value, must be on material particulars; and the facts relied on for corroboration must be established by reliable and independent evidence. These facts must be such as to lend assurance to the crucial issue which is in question.²²

4. Admissibility of First Information Report. The first information report is the statement of the maker of the report at a Police Station, before a police officer, recorded in the manner provided by the Code of Criminal Procedure. That statement must be admissible in evidence under the provisions of this Act to be of use at the trial. It becomes admissible, if the maker of the first information report comes in the witness-box and narrates the events of which he has personal knowledge and then further states that he had made the same narration earlier at the Police Station which was recorded by way of first information report. The last portion of the statement of the witness is admissible under this section as corroborating the testimony.²³

157. *Former statements of witness may be proved to corroborate later testimony as to same fact.* In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

s. 3 ("Fact.")

s. 3 ("Proved.")

Gilbert, Ev., 135, 136; Wharton, Ev., s. 570; Taylor, Ev., s. 1476; Starkie, Ev., 253; Best, Ev., p. 600; ib., 11th Ed., pp. 580, etc; Phipson, Ev., 11th Ed., p. 684; Markby, Ev., 100, 110.

17. Moulvie Mahomed Ikramull Huq v. Wilkie, (1907) 11 C.W.N. 946.

18. Lim Yam Hong & Co. v. Lam Choon & Co., 1928 P.C. 127 : 107 I.C. 457 : 30 Bom. L.R. 757.

19. Hari Krishna v. R., 1916 Cal. 98 : I.L.R. 42 Cal. 784 : 28 I.C. 795 : 19 C.W.N. 330 ; see R. v. Babar Ali Gazi, 1915 Cal. 731 : I.L.R. 42 Cal. 789 : 28 I.C. 657 (corroboration of confession of co-accused).

20. Ambika Singh v. State, A.I.R. 1961 All 38 : 1960 A.L.J. 782.

21. Ram Subhak Ojha v. The Commissioner of Police, 12 Fac. L.R. 50 : (1966) 2 Lab. L.J. 722 : A.I.R. 1967 Cal. 381 (382).

22. Sarla Devi v. Birendra Singh, A.I.R. 1961 M.P. 127.

23. State of Rajasthan v. Shiv Singh, I. L.R. 1961 Raj. 299 : A.I.R. 1962 Raj. 3 : 1961 Raj. L.W. 441.

SYNOPSIS

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| 1. Principle. | —First Information Reports. |
| 2. Former statements provable in corroboration. | —Search memos. |
| 3. Former statements. | 8. Identification proceedings—Statements made in : |
| 4. Statement. | —Police diaries. |
| 5. "Fact". | 9. Panchnama. |
| 6. "At or about the time". | 10. Inquest Report. |
| 7. "Or before any authority legally competent to investigate the fact". | 11. Previous depositions, etc. |
| —Statements made to police during investigation. | 12. Accomplice—Previous statement of. |
| —Statements made before committing Magistrate. | 13. Register of Births and Deaths. |
| | 14. School Registers. |
| | 15. "To corroborate". |
| | 16. Proof of former statements. |

1. **Principle.** The force of any corroboration (which assumes that there is something to corroborate),²⁴ by means of previous consistent statements, depends upon the truth of the proposition that he who is consistent deserves to be believed. The corroborative value, however, of such previous statements is of a very varying character, dependent upon the circumstances of each case, and a person may equally persistently adhere to falsehood once uttered, if there be a motive for it.²⁵ In this connection it may be pointed out that in *Bogilal Pandya v. State of Bombay*¹ it has been held that communication to another person is not an essential condition of the use of a former statement for corroboration under this section. The term "statement" has to be construed as meaning only something which is stated and the element of communication to another person is not essential. All that is needed is that it must be recorded at or about the time when the incident deposed to took place.

2. **Former statements provable in corroboration.** It is often said that a witness cannot corroborate himself.² The section is an exception to that rule. Though admissible, a former statement can only be used for corroborative and not as substantive evidence of the fact in issue. Even as corroboration the value of such a statement must depend always on the peculiar circumstances of each case.³ To take the simplest illustration, if a person, A, is giving evidence as to the commission of a crime and declares that he made similar statements about the time, of its commission, he does not thereby corroborate himself, nor strengthen his own testimony. But if, in support of A's evidence, it is proved from another source that A did make statement of a kind similar to his evidence, about that time then the fact thus proved may be taken as corroborative of A's statement in evidence that he did so, and as showing the consistency of his testimony and conduct.⁴ The section cannot be invoked to let in statements made by somebody else as evidence for the purpose of corroboration of a witness examined in the case.⁵ This

24. *Nagina v. Emperor*, 1921 All 215 : 95 I.C. 477 : 19 A.L.J. 947 ; *R. v. Nga Hlaing*, (1928) 6 Rang. 480 (first information in other reports).
 25. *R. v. Malappabin*, (1874) 11 Bom. H.C.R. 196, 198.
 1. (1959) Supp. (1) S.C.R. 310 : (1959) Andh. W.R. (S.C.) 101 : 61 Bom. L.R. 46 : 1959 Cr. L.J. 389 : 1959 A.W.R. (H.C.) 156 : 1959 M.L.J. (Cr.) 105 : (1959) 1 M.L.J. (S.C.) 101 : A.I.R. 1959

S.C. 356 : 1959 S.C.J. 240.
 2. *R. v. Christie*, (1914) A.C. 545, 557 ; *Owen v. Moberley*, (1900) 64 J.P. 88 ; *Hodds v. Palfrey*, (1898) 56 Q.B. 172.
 3. *Gauranga Charan Mohanty v. The State of Orissa*, 1968 C.L.T. 24 (S.C.) at pp. 252, 253.
 4. *The King v. Nga Myo*, 1938 Rar 177 : 175 I.C. 465 (F.B.).
 5. *Ambica Charan v. Kumud Moha* 1928 Cal. 693 : 110 I.C. 521.

section is not in accordance with English practice, according to which evidence of prior statements is not generally admissible to corroborate a witness.⁶ It is argued that, by offering a witness a party is held to recommend him as worthy of credence and warranting his veracity corroboration is not permitted,⁷ that former statements are no proof that entirely different statements may not have been made at other times and are therefore no evidence of consistency, that, if the sworn statements are of doubtful credibility, those made without the sanction of an oath or its equivalent, cannot corroborate them,⁸ that a witness having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not, in general, carry his credibility further than nor so far as his oath.⁹ The section, however, proceeds upon the principle that consistency is a ground for belief in the witness's veracity.¹⁰ Accordingly, the evidence of a witness could not be corroborated by the statement made by him in his complaint, when he had admitted that he had no personal knowledge of the facts.

So, Chief Baron, Gilbert was of opinion that the party, who called a witness against whom contradictory statements had been proved,¹¹ might show that he had affirmed the same thing before on other occasions and that he was therefore "consistent with himself,"¹² the only condition being that his previous statement shall have been made (a) either about the time of the occurrence, or (b) before a competent authority. A former statement made, neither at or about the time when the fact took place nor before any authority legally competent to investigate facts, cannot be used to corroborate evidence of the witness.¹³ This condition is, to some extent, a safeguard against fictitious statements designedly made to support subsequent evidence; but it is obvious that the corroborative value of such previous statements depends entirely on the circumstances of each case, and that they may easily be altogether valueless. The mere fact of a man having, on a previous occasion, made the same assertion generally, though not always, adds but little to the chances of its truthfulness, and such evidence should be distinguished from that which is really corroborative.¹⁴ One may persistently adhere to falsehood once uttered, if there is a motive for it; and should the value of such a

6. Wharton, Ev., s. 570; Taylor, Ev., s. 1476; Starkie, Ev., 253; Best, Ev., p. 600; Richard Gillie v. Posho, Ltd., 1939 P.C. 146; 182 I.C. 27; 50 M.L.W. 81; 41 P.L.R. 622. In certain cases—(1) where the witness is charged with having recently fabricated the story; (2) on charges of rape and similar offences—previous similar statements are admissible, see Phipson, Ev., 11th Ed., pp. 684, 685, 690.

7. Best, Ev., 11th Ed., pp. 580, etc.

8. Wharton, Ev., s. 570.

9. Starkie, Ev., s. 253.

10. R. v. Malappabin, (1874) 11 Bom. H.C.R. 196, 198; R. v. Bepin Biswas, (1884) 10 C. 970, 973. It had long been the practice in India to admit this evidence; see Act II of 1855, S. 31, the provisions of which have been simplified and reproduced

in the above section. See R. v. Bishonath Pal, (1869) 12 W.R. Cr. 3; R. v. Bissen Nath, (1867) 7 W.R. Cr. 31; Muthukumaraswami Pillai v. R., (1912) 35 M. 397; 14 I.C. 896; 1912 M.W.N. 549; 12 M.L.T. 1; Musammatt Naina Koer v. Gohardhan Singh, 1918 Pat. 40; 37 I.C. 424 (admissibility of entries); Pratap Singh v. State of M. P., 1971 Cr. L.J. 172 (But previous statement of witness turned hostile is not admissible).

11. This is not necessary under the section.

12. Gilbert, Ev., 135, 136, these statements are treated as exceptions to the hearsay rule.

13. C. W. Case, In re, 1948 Mad. 489; I.L.R. 1949 Mad. 206; (1948) 1 M.L.J. 404; 61 M.L.W. 402.

14. Cunningham, Ev., s. 157.

corroboration ever come to be rated higher than it is now, nothing would be easier than, to take an example, for designing and unscrupulous persons to procure the conviction of any innocent men who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times and places, implicating those innocent men.¹⁵ Two conditions are essential to attract the provisions of this section: (1) the witness should have given testimony with regard to same fact, and (2) he should have made a statement earlier with respect to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact. If these two conditions be present, the former statement can be proved to corroborate the testimony of the witness in Court. The former statement may be in writing, or may be made orally to some person at or about the time when the fact took place. If that statement is made orally to some person at or about the time when the fact took place, that person would be competent to depose to the former statement and corroborate the testimony of the witness in Court. The section does not in terms require that, before the corroborating witness deposes to the former statement, the witness to be corroborated must also say in his statement that he had made that former statement to the witness who is corroborating him. It is true that it does happen often that the witness to be corroborated says that he had made a former statement about the fact to some person and then that person steps into the witness-box and says that the witness to be corroborated had made a statement at or about the time when the fact took place. But, in the opinion of the Supreme Court in *Rama Ratan v. State of Rajasthan*,¹⁶ it is not necessary, because the terms laid down in this section do not say so expressly. What it requires is that the witness to be corroborated must give evidence in Court of some fact; if that is done, his testimony in court, relative to that fact, can be corroborated under this section by any former statement made by him relating to the same fact; and it is not necessary that the witness to be corroborated should also state that he had made it to that person.¹⁷ But if a witness is not believed, his previous statement cannot be used as independent evidence in support of other evidence. In *Moti Singh v. State of U. P.*,¹⁸ the statements of two witnesses were recorded by a Magistrate at the hospital. They were examined as Court-witnesses. They were disbelieved by the Sessions Judge, and the High Court did not take any more favourable view of their depositions but it relied on the statements recorded by the Magistrate. The Supreme Court observed that the High Court was in error. Those statements could have been used only in either corroborating or contradicting the statements of these witnesses in Court. When those witnesses were not believed, their previous statements recorded by the Magistrate could not be used as independent evidence in support of the other prosecution evidence. And in *Dwarka Nath v.*

15. *R. v. Malappabin*, (1874) 11 Bom. H.C.R. 196, 198.

16. 1962 S.C. 424 : (1962) 1 S.C.J. 371 : (1962) 3 S.C.R. 590 : 1962 A.W.R. (H.C.) 268 : (1962) 1 Cr. L.J. 473 : 1962 M.L.J. (Cr.) 263 ; *Radha Kishan v. State*, 1973 Cr. L.J. 481 (Raj) : (1962 S.C. 424 relied upon) ; *Banwari v. State of Rajasthan*, I.L.R. (1969) 19 Raj. 613 : 1970 Raj. L.W. 20.

17. *Nazar Singh v. The State*, A.I.R. 1951 Pepsu 66 : 2 Pepsu L.R. 660

and *Mst. Misri v. Emperor*, 151 I. C. 437 : A.I.R. 1934 Sind 100 overruled ; see also *Awadh Behari v. State of M. P.*, A.I.R. 1956 S.C. 738 : 1957 M.P.L.J. 49 : 1956 Cr. L.J. 1372 : 1957 N.L.J. 1 where a contrary view is indicated.

18. (1964) 1 S.C.R. 688 : (1963) 2 S.C.J. 714 : I.L.R. (1963) 2 A. 708 : A.I.R. 1964 S.C. 900 : 1963 S.C. D. 1007 : 1963 A.L.J. 647 : 1963 Cr. L.J. 87 : 1963 A.W.R. (H.C.) 469 : 1963 M.L.J. Cr. 625.

Lalchand,¹⁹ the Supreme Court pointed out that two circumstances, which are alternative, are conditions precedent to the proof of earlier statements under this section, namely,—

(1) the statements must have been made at or about the time when the facts took place, and

(2) the statements must have been made before the authority legally competent to enquire into the facts.

3. Former statements. The words “former statement” in this section mean a previous statement of the witness who is to be corroborated made on another occasion, i.e., an occasion other than that at which the subsequent statement requiring corroboration is made.²⁰ As to former statements which may be proved under this section *see* also Commentary on Sec. 145, ante under the heading ‘Previous statements’.

The statement, which may be proved under the section in order to corroborate, may be a statement made either on oath or otherwise, and either in ordinary conversation or before some person who had authority to question the person who made it. It may also be verbal or in writing.²¹ Thus in a case under Sec. 107, Criminal Procedure Code (now corresponding section of the Code of Criminal Procedure, 1973), reports made by prosecution witness on various dates in the absence of the accused were held to be admissible to corroborate what the witness testified to in Court about the past conduct of the accused and their disposition to use violence.²² If not made before any person legally competent to investigate the fact, it would seem that it must have been made at or about the time when the fact took place.²³

A complaint made by a person, or information given by him, does not itself become evidence automatically. It can go in as evidence only to corroborate the evidence of the complainant or the person who has given information.²⁴ A statement made by the complainant immediately after the occurrence is admissible as corroboration of his evidence under this section. What weight is to be attached to such statement is a different matter. That depends upon the facts of each case.²⁵ In *Kambi Vaghji v. State*,¹ it was said that if the *sarpanch* had referred to a talk he had with some other person such as the accused, saying that he had scuffle or fight with the deceased, the person who heard it so said, viz., the *sarpanch*, can speak about it and that would be

19. A.I.R. 1965 S.C. 1549 : (1965) 1 S.C.W.R. 947.

20. Harendra Kumar v. Emperor, 1938 Cal. 125 : 174 I.C. 36.

21. Sheikh Ketabuddin v. Nafar Chandra, 1927 Cal. 230 : 99 I.C. 907 : 44 C.L.J. 582 ; Rangayyan v. Innasi Muthu, 1956 Mad. 226 : (1955) 2 M.L.J. 687 : 69 L.W. 513 ; Mst. Misri v. Emperor, 1934 Sind 100 : 151 I.C. 437 ; Awadh Behari v. State of M.P., 1956 S.C. 738 : 1957 M.P.L.J. 49 ; Pramatha v. Rajah Bejoy, 1927 Cal. 234 : 99 I.C. 910 (recital of boundaries).

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22. Mahabir Gope v. Samarathi Singh, 1940 Pat. 252 : 189 I.C. 457 : 21 P.L.T. 652.

23. Oriental Government etc., Co., Ltd. v. Narasimha Chari, (1901) 27 M. 210.

24. Hasan Abdulla v. State of Gujarat, A.I.R. 1962 Guj. 214 : 1962 Guj. L.R. 107.

25. State of Orissa v. Parvathi-am, A.I.R. 1963 Orissa 58 : 29 Cut. L.T. 540.
1. 1968 Cr. L.J. 54 : A.I.R. 1968 Guj. 11 (no question of corroboration arose).

direct oral evidence in respect of that fact, and if he then spoke to some third person and the third person so says in Court, that would become hearsay type of evidence, which can be admissible under Sec. 157, inasmuch as it is sought to corroborate the testimony of a witness. But that can arise only, if the *sarpanch's* evidence of such fact is to be corroborated; if there cannot arise any question of corroboration, this section cannot come into play.

In a case for restitution of conjugal rights where the defence of wife was that her husband had threatened to kill her, a letter written by her to her father about the threat was produced to corroborate her testimony. It was held to be inadmissible in view of Section 21 as being an admission in favour of herself.² It is submitted that the letter should have been excluded only if it was not written near about the time when the threat was said to have been held out, and not on the ground of being admission in her own favour.

Where a witness does not support the case of the prosecution at the trial, there can be no question of using an earlier statement by that witness to a police constable in favour of the prosecution for purposes of corroboration.³

The statement recorded under Sec. 164, Criminal Procedure Code (same section of new Cr. P. C. of 1973) is not a substantive piece of evidence; it can be used only to corroborate or contradict the maker under Sec. 145, ante.⁴

The report of a Commissioner, not examined under Order XXVI, rule 10 (2), Civil Procedure Code, but as an ordinary witness, can be relied on to corroborate the evidence of inspection conducted by the Commissioner, even though there was a breach of Order XXVI, Rule 18, Civil Procedure Code; such reports are admissible in evidence even under the present section.⁵

The question as to whether the evidence of the person who executes the warrant under Sec. 6 of the Bombay Prevention of Gambling Act, 1867 (Bombay Act IV of 1887), requires corroboration, depends on the facts and circumstances of each case and no legal distinction can be made merely because the person who executes the warrant happens to be the person who made the complaint under the proviso to the aforesaid Sec. 6.⁶

4. "Statement". A "statement" under this section means "something that is stated". The word has not been defined in the Act, and its other provisions do not provide a clue to its exact connotation. Its primary (dictionary) meaning is "something that is stated". That is to say, a statement is none the less so, even if it be not communicated to any one. Sections 18 to 20, for instance, contemplate statements made by an individual, such as entries in account books, which are not communicated to other persons. [See also illustration (b) to Sec. 21]. Similarly, Sec. 32 (2) and (6) allude to

2. I.L.R. (1970) 1 Delhi 21.

3. Pratan Singh v. State of M. P., 1970 I.L.J. 797 (800) : 1970 M.P. L.J. 978 (980).

4. Harbans Lal v. State, 1967 Cr. L.J. 62 : A.I.R. 1967 H.P. 10 (11) ; Bisipati Padhan v. State, 35 Cut. L.T. 362 : 1969 Cr. L.J. 517 : A.I.R. 1969 Orissa 289 (291).

5. Jamir Ahmad v. Khair-ul-nisa, 1970 Ren. C.R. 391 : A.I.R. 1970 Delhi 205 (209) : see Kheru Ram v. Hans

Raj, 1969 Ren. C.R. 690 (Punj.) and Maroti Achuthan v. Kunhipathumma, A.I.R. 1968 Ker. 28.

6. State of Maharashtra v. Atma Ram (1966) 3 S.C.R. 613 : 1967 S.C.D. 1 : (1966) 2 S.C.J. 723 : (1967) : S.C.W.R. 275 : 1966 M.L.J. (Cr.) 759 : 1966 Cr. L.J. 1227 : A.I.R. 1966 S.C. 1633 (1635) reversing Th State of Gujarat v. Jagambhai Bhagwanbhai, 1964 Cr. L.J. 589.

statements which are definitely non-communicatory, as also Sec. 39. Section 145 enables previous statements by a witness, such as a diary kept by him, to be used for contradicting him. There is nothing in this section which in any way requires that an element of communication to another person is essential. Where the accused was tried for the offence of criminal breach of trust between 1-7-1954 and 1-12-1955, it was sought to put in evidence a record of the conversations which the company had with its solicitor between those dates. The solicitor gave evidence at the trial and he deposed as to what had been the subject-matter of the conversation between him and the management. Thereupon his 'notes' prepared on the occasion, being the record of the conversation, were produced in corroboration and admitted in evidence. The Supreme Court held that they were 'statements' within the meaning of this Section.⁷

5. "Fact." The word "fact" in the section is not used in the limited sense of "event", and includes a continuing fact such as possession.⁸

6. "At or about the time." It must be borne in mind that the section provides an exception to the general rule excluding hearsay evidence, and in order to bring a statement within the exception the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement.⁹ There can be no hard and fast rule. The main test is, whether the statement was made as early as can reasonably be expected in the circumstances of the case, and before there was opportunity for tutoring or concoction.¹⁰ The words "at or about the time" must mean that the statement must be made at once, or at least shortly after when a reasonable opportunity for making it presents itself. The object of the section seems to be to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them then would be accurate. The section says that the statement must be made "at or about the time", not "at any time after the event." It cannot possibly contemplate the admission of the statement long after the event. What is "a reasonable time" is a question of fact.¹¹ Where, in a murder case, witnesses who were in the neighbourhood of the place at the time of the crime said that they heard shots, went to the scene of murder, found deceased lying dead and were told by A and M that F had murdered him, it was held that the statements were admissible under this section to corroborate A and M in that they charged F it once.¹² A report made some twenty-four hours after the occurrence was

7. *Bogilal Chunilal v. State of Bombay*, (1959) Supp. (1) S.C.R. 310 : (1959) 1 Andh. W.R. (S.C.) 101; 61 Bom. L.R. 746 : 1959 Cr. L.J. 389 : 1959 A.W.R. (H.C.) 156 : 1959 M.L.J. (Cr.) 105 : (1959) 1 M.L.J. 101 (S.C.) : A.I.R. 1959 S.C. 356 : 1959 S.C.J. 240.
8. *Muthalagiri Reddy v. Pappi Naicken*, 1915 Mad. 249 : 25 I.C. 510.
9. *Mangat Rai v. Emperor*, 1928 Lah. 647 : 110 I.C. 676.
10. *Rameshwar v. The State of Rajasthan*, A.I.R. 1952 S.C. 54 at 58 : 1952 S.C.A. 40 : 1952 S.C.J. 46 : 1952 S.C.R. 377 ; *Dinkar Bhandu*

Deshmukh v. State, 72 Bom. L.R. 405 (408) : 1970 Mah. L.J. 634 : A.I.R. 1970 Bom. 438 (445) ; see also *Bhupati Ghose v. The King*, 1950 Cal. 327 : 54 C.W.N. 221, where the evidence of the witnesses who came to the scene several hours after the occurrence was held to be inadmissible.
11. *In re Jesudas Appadurai Pillai*, 1945 Mad. 358 : 1 I.L.R. 1945 Mad. 821 : 221 I.C. 193.
12. *Fakir Jumma Khan v. Emperor*, 1939 Pesh 4 : 180 I.C. 239 : 1939 Pesh L.J. 4.

held to be not made "at or about the time of the occurrence."¹³ In another Calcutta case, it was held that a statement made by a girl about her abduction ten days after the occurrence cannot be held admissible under Sec. 157 in a trial under Sec. 366, Penal Code, not having been made at or about the time of occurrence. Such a statement would, however, be admissible if made to a person legally competent to investigate the offence.¹⁴ Statement of injured recorded by a Magistrate as soon as he became conscious, satisfied the rule of "at or about the time". The main test is whether statement was made as early as could reasonably be expected in the circumstances of the case and before there was any opportunity of tutoring or concoction.¹⁵ A recital in a sale-deed, that a year before a partition was asked for and refused, was held to be inadmissible as it could not be said to be a former statement made at or about the time when the fact took place.¹⁶ An entry in a vaccination register, which includes a statement by a woman that a person, bearing the name of the alleged father of her illegitimate child, was the father of the illegitimate child, made three years after its birth, does not satisfy the terms of Sec. 157, and is not admissible in evidence.¹⁷ A statement made under Sec. 164, Criminal Procedure Code (same section of new Cr. P. C., 1973) can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement. An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition. But, in considering, whether the evidence of the approver given before the committing Magistrate was to be preferred to that which he gave in the Sessions Court, the Court is entitled to have regard to the fact that very soon after the occurrence he had made a statement in the same sense as the evidence which he gave before the committing Magistrate.¹⁸

If a statement that a particular property was in possession of a particular person in a particular period is relevant evidence of a fact that had taken place, the recital in a deed that the person owned it, also is a statement of fact that had taken place at the time when it was made. Possession is a legal conception as also ownership. If a particular statement about a particular individual that he was in possession of a property is relevant evidence of a fact that had taken place, then the fact that he owned it is also a similar recital of fact that had taken place. The statement in the document is relevant as corroborative evidence, being a statement made by the witness on a previous occasion. The recital is, therefore, admissible under this section to corroborate the testimony of the executant of the document.¹⁹

In India, perhaps more particularly than in other countries, the statements made by those who have knowledge of the circumstances connected

13. *Emperor v. Ram Chandra Roy*, 1928 Cal. 732 : I.L.R. 55 Cal. 879 : 111 I.C. 327.

14. *Tobarak Mondal v. The King*, 1949 Cal. 629 : 54 C.W.N. 8.

15. *State of Gujarat v. Naran Gigu Sangar*, (1976) 17 Guj. L.R. 574.

16. *Radhoba Baloba v. Abu Rao Bhagwan Rao*, 1929 P.C. 231 : 56 I.A. 316 : I.L.R. 53 Bom. 699 : 118 I.C. 1.

17. *Kannappa v. Kullammal*, 1930 Mad. 194 : 126 I.C. 613 : 1929 M. W.N. 696.

18. *Bhuboni Sahu v. The King*, 1949 P.C. 257 : 76 I.A. 147 : 1949 A.

L.J. 283.

19. *Rangayyan v. Innasimuthu*, 1956 Mad. 226 : (1955) 2 M.L.J. 687 69 L.W. 513 ; *K. Rosayya v. M. Rosayya*, 1947 Mad. 345 : (1947) M.L.J. 60 : 1947 M.W.N. 345 ; *Thyagarajan v. Narayana*, 1940 Mad 450 : 192 I.C. 95 ; *Mohim Chandr Basak v. Kanai Lal Saha*, 1930 Cal 311 : 124 I.C. 321 : 53 C.W.N 1085 ; *Kunda Singh v. Rangi Ran* 1956 Pepsu 7 ; *Ram Nandan Prasa v. Tilakdhari Lal*, 1933 Pat. 636 145 I.C. 944 ; *Sheikh Ketabuddi v. Nafarchand*, 1927 Cal. 230 : 9 I.C. 907 : 44 C.L.J. 582.

with the commission of an offence, immediately after the occurrence and before they can be tampered with by the police or others, are important to the ascertainment of truth.²⁰ A statement by a girl alleging that she was raped, made immediately after the rape, is admissible under this section as also under Sec. 8.²¹ But a statement made by a girl about her abduction ten days after the occurrence cannot be admissible under this section in a trial under Sec. 366, Penal Code not having been made at or about the time of occurrence. Such a statement would, however, be admissible, if made to a person legally competent to investigate the offence.²² Statement to another witness at or about the time of abduction, is admissible to corroborate her statement in Court, the value of such evidence however would depend on facts and circumstances of the case.²³ But the statement of a girl victim before her mother, sixteen hours after the occurrence, upon persistent questioning, is not admissible in evidence to corroborate her evidence at the trial.²⁴ Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration under Sec. 32, but it may be relied on under this section to corroborate the complainant, when examined in the case.²⁵

7. "Or before any authority legally competent to investigate the fact."

If the former statement was not made at or about the time when the fact took place, it must be shown to have been made before any authority legally competent to investigate the fact. The words "before any authority legally competent to investigate the fact" in the section are general and should not be restricted to police officers and to "investigations" in the technical sense in which the word is used in the Code of Criminal Procedure. The words are "competent to investigate" not a case but "the fact". The words "legally competent" do not mean only competent under some express provision of law.¹ In order that a person may be legally competent to investigate the fact, he must have power under some law, statutory or otherwise.² The word

20. See Markby, Ev., 100; "There is no doubt that this kind of evidence is extremely useful in criminal cases where there is a suggestion that a witness is telling a made-up story."
21. Soosalal v. Emperor, 1925 Nag. 74; 82 I.C. 142; Bechu v. The King, 1949 Cal. 613; 51 Cr. L.J. 153; Mohammad Afzal v. The Crown, 1950 Lah. 151; 51 Cr. L.J. 968; 1950 Pak. L.R. (Lah.) 294; Pak Cas 1950 Lah. 450; In re Boya Chinappa, 1931 Mad. 760; I.L.R. 1951 Mad. 973; (1951) 1 M.L.J. 110; 64 L.W. 265; Emperor v. Phaguna, 1926 Pat. 58; 89 I.C. 1043; State v. Rameshwar, 1951 Raj. 30; Rameshwar v. State of Rajasthan, 1954 S.C. 541; 1952 S.C.A. 40; 1952 S.C.J. 46; 1952 S.C.R. 377; 53 Cr. L.J. 547; (1952) 1 M.L.J. 440; 65 L.W. 351; 1952 M.W.N. 150; 1952 M.W.N. (Cr.) 26; V. B. Koli v. State, 1972 (2) Mys. L.J. 59. (It can be evidence of the conduct of prosecutrix but not of the facts

- complained of).
22. Tobarak Mondal v. The King, 1949 Cal. 629; 54 C.W.N. 8.
 23. Khali Sahu v. State, (1975) 41 Cut. L.T. 751.
 24. State v. Satya Pal, (1960) 10 Raj. 250.
 25. R. v. Rama, (1902) 4 Bom. L.R. 434; Namdas v. State of Maharashtra, 1976 Cr. L.J. 871; 1975 Mah. L.J. 36.
 1. King-Emperor v. Nilakantha, (1912) I.L.R. 35 Mad. 247 (F.B.); Muthu Kumaraswami Pillai v. King-Emperor, 1919 Mad. 487; 50 I.C. 884; 25 M.L.T. 379; 10 L.W. 239; 1919 M.W.N. 199.
 2. State v. Pareswar Ghosi, I.L.R. 1967 Cut. 980; 33 Cut L.T. 1193; 1968 Cr. L.J. 201; A.I.R. 1968 Orissa 20 (24); Kumaramuthu v. Emperor, A.I.R. 1919 Mad. 487; Emperor v. Ramachandra, A.I.R. 1928 Cal. 732; Tobarak Mondal v. The King, A.I.R. 1949 Cal. 629; 54 C.W.N. 8.

'investigate' in the section, defined neither in the Evidence Act nor in the General Clauses Act, 1897, is not to be understood in the narrow sense in which the word is used in the Criminal Procedure Code, 1898 [see now Section 2 (h) of Criminal Procedure Code, 1973 (Act 2 of 1974) which reproduces the old definition]. It must carry its ordinary dictionary meaning in the sense of ascertainment of facts, sifting of materials, search for relevant data.³ The statement before a *sarpanch*, who is not legally competent to hold a Test Identification Parade, is not such a 'former statement' as is contemplated by the section.⁴ It has been held by a Full Bench of the Madras High Court that previous statements of an accomplice may sometimes legally amount to corroboration of evidence given by him at the trial and that an inspector of the Criminal Investigation Department is "an authority legally competent to investigate" within the meaning of this section.⁵ A statement of a witness recorded by a competent Magistrate under Sec. 164, Criminal Procedure Code, is admissible under this section to corroborate the statement made by the witness in the Court of the committing Magistrate.⁶ But a statement made before a Collector, who had no authority to investigate, cannot be so used.⁷

As the restrictions imposed in the section do not find place in Section 145, ante or in Section 155, ante, a statement made by the informant to a person not 'legally competent to investigate the fact' within the meaning of the present section, being a former statement, can be used for contradiction under Section 145, ante and for impeaching his credit under Section 155, ante.⁸

Statements made to police during investigation. Under the Criminal Procedure Code, the Police have powers to investigate into an offence but, under the proviso to Sec. 162 of that Code, a statement made to the police in the course of the investigation can be used only to contradict the witness under Sec. 145 of this Act. The general provisions of this Act contained in this section are controlled by the special provisions of Sec. 162, Criminal Procedure Code, which followed it, and which is a special enactment, as against the wider and more general enactment in this Act.⁹ So, a statement made to the police cannot be used for any other purpose such as corroborating the witness under the section.¹⁰

3. *State v. Pareswar Ghosi*, I.L.R. 1967 Cut. 980 : 33 Cut. L.T. 1193 : 1968 Cr. L.J. 201 : A.I.R. 1968 Orissa 20 referring to *Sarju v. State of West Bengal*, (1961) 2 Cr. L.J. 71.
4. *State v. Pareswar Ghosi*, *supra*.
5. *Muthu Kumaraswami Pillai v. R.*, (1912) 35 M. 397 : 14 I.C. 896 : 1912 M.W.N. 549 : 12 M.L.T. 1 (F.B.).
6. *Manar Ali v. Emperor*, 1934 Cal. 124 : I.L.R. 60 Cal. 1339 : 147 I.C. 1203 ; relying on *Vellaiah Kone v. Emperor*, 1923 Mad. 20 : I.L.R. 45 Mad. 766 : 72 I.C. 529 ; see also *Bhuboni Sahu v. The King*, 76 I.A. 147 : 1949 P.C. 257 ; *Manik Gazi v. Emperor*, 1942 Cal. 36 : 197 I.C. 815 : 74 C.L.J. 208.
7. *Thakurji v. Parameshwar*, A.I.R. 1960 All 339.

8. *State v. Pareswar Ghosi*, I.L.R. 1967 Cut. 980 : 33 Cut. L.T. 1193 : 1968 Cr. L.J. 201 : A.I.R. 1968 Orissa 20 (24).
9. *In re M. Rangarajulu Naidu*, 1958 Mad. 368.
10. *Sheo Shankar Singh v. State*, 1953 All 652 : 1953 A.L.J. 720 ; *W. K. Wesley v. Emperor*, 1938 All 571 : 178 I.C. 183 ; *Ganga v. Emperor*, 1930 Oudh 60 : I.L.R. 4 Luck. 726 : 124 I.C. 444 ; *Shapurji Sorabji v. Emperor*, 1936 Bom. 154 : I.L.R. 60 Bom. 148 : 162 I.C. 399 ; *Bhagirathi v. King-Emperor*, 1926 Cal. 550 : 92 I.C. 174 : 30 C.W.N. 142 ; *Jitsingh v. The Crown*, 1949 E.P. 334 : 51 P.L.R. 65 ; *Emperor v. Girdhari*, 1940 Pat. 605 : 188 I.C. 429 ; *Sital Chandra v. Emperor*, 1942 Cal. 495 : 202 I.C. 153 : 46 C.W.N. 775 ; *Gahar*

It was held by the Calcutta High Court that Sec. 162 of the Criminal Procedure Code prohibits the use of the record of the statement of a witness taken under Sec. 161 as evidence, but does not override the general provisions of this Act as to proof of such statement by oral evidence, and such statement is admissible under this section in corroboration of the evidence of the witness given at the trial.¹¹ And a Full Bench of the Madras High Court later agreed with this ruling,¹² and in another case the Bombay High Court has followed it, though with hesitation.¹³ But the amended Code excludes both the written record and *viva voce* statement.¹⁴

Chief Justice Munir in his Principles and Digest of the Law of Evidence (Fourth edition, p. 898) has, if we may say so respectfully, lucidly summarised the different permutations and combinations which can arise in regard to contradicting witnesses with reference to statements made by them to the Police during investigation under Chapter XIV, Criminal Procedure Code (old) and has made the following instructive observations which, if carefully digested and followed by our criminal court practitioners, would vastly improve the cross-examination of prosecution witnesses and shorten the record of irrelevant evidence.

The following different positions, says the learned Judge, arise :

(i) The statement of the witness made to the police does not differ from the statement made by him in court. In such a case no use can be made by the defence of the copy of the statement of the witness made to the police; nor is the prosecution in such a case entitled to comment on the circumstance that the accused obtained the copy but did not show any contradiction, inasmuch as the statement made to the police in the course of investigation cannot be used for the purpose of corroborating the evidence of the witness.

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- Sheikh v. Emperor, 1947 Cal. 345 : 226 I.C. 476 : Zeta Narsingh v. State, 1952 M.B. 79 : 53 Cr. L.J. 700 : In re Packirisami Pillai, 1942, Mad. 288 (2) : 199 I.C. 833 : 55 I.W. 771 : Emperor v. Ajit Kumar Chosh, 1945 Cal. 159 : 220 I.C. 237 : 78 C.L.J. 217 : Maganlal Radhakishan v. Emperor, 1946 Nag. 173 : I.L.R. 1946 Nag. 126 : 226 I.C. 245 : Das Ram v. Emperor, 1941 Lab. 471 : 197 I.C. 801 : 43 P.L.R. 600 : Emperor v. Najibuddin, 1933 Pat. 589 : 147 I.C. 142 : 14 P.L.T. 543 : King-Emperor v. Vithu Balu Kharat, 1924 Bom. 510 : 83 I.C. 1007 : 26 Bom. L.R. 965 : Pritam Singh v. State, 1972 All Cr. R. 332 : 1972 A.L.J. 744 : 1972 A.W.R. (H.C.) 521.
11. Fanindra v. R., (1908) I.L.R. 36 Cal. 281 : 1 I.C. 970 : 9 C.L.J. 190 : 15 C.W.N. 197 : 5 M.L.T. 97.
12. Muthukumaraswami Pillai v. R., (1912) 35 Mad. 397 (F.B.), *per curiam*.
13. R. v. Hanumanreddi, 1914 Bom. 263 (2) : I.L.R. 39 Bom. 58 : 26 I.C. 138 : Per Shah, J., "I incline to this view. But this point is difficult and the cases opposed" : Rustam v. R., (1907) 7 A.L.J. 468 : R. v. Balaji, (1907) 9 Bom. L.R. 366.
14. See Criminal Procedure Code, s. 162 : China Thimappa v. Thimappa, 1928 Mad. 1028 : I.L.R. 51 Mad. 967 : 112 I.C. 682 : 28 L.W. 314 (F.B.) : In re Koganti Appayya, 1938 Mad. 893 : 178 I.C. 616 : 48 L.W. 322 : Ganga v. Emperor, 1930 Oudh 60 : I.L.R. 4 Luck. 726 : 124 I.C. 444 : Emperor v. Hari, 1935 Sind 145 : 157 I.C. 697 : 28 S.L.R. 397 : King-Emperor v. Vithu Balu Kharat, 1924 Bom. 510; but see Emperor v. Wahid Uddin, 1930 Bom. 158 : I.L.R. 54 Bom. 528 : 126 I.C. 333 (statement before Bombay Police Officer not excluded by s. 162, Cr. P.C. and so admissible to corroborate witness) : Emperor v. Mahadeo, 1946 Bom. 189 : 224 I.C. 261 : 47 B.L.R. 992.

(ii) The statement of the witness to the police is more detailed than his statement in court. In such a case, the accused is entitled, without showing the writing to the witness, to question him on matters which he mentioned to the police but which he has omitted to mention in his statement in court, provided such matters are relevant (Sec. 145). If the witness, in reply to the question thus put in cross-examination, mentions the facts as he mentioned them to the police, there is no occasion for the use of copy and the position does not differ in any way from No. (i) above. If, however, the witness gives an account of such additional facts which is inconsistent with the one given by him to the police then the procedure described in (iii) below must be followed.

(iii) The statement of the witness made to the police is different from his statement in court. The witness may, in such a case, be asked without the copy being shown to him, whether he made to the police the statement contained in the copy. If the witness admits that he made that statement, the matter need not be pursued further; it is not necessary in such a case either to confront the witness with the statement contained in the copy, or to prove the copy,¹⁵ and the defence may leave it to the prosecution to have the discrepancy explained in the course of re-examination. If, on the other hand, the witness denies having made the statement contained in the copy, or states that he does not remember having made any such statement, and the defence wishes to contradict the witness by his statement to the police, the defence counsel must read out to the witness the relevant portion or portions of the copy which are alleged to be contradictory to his statement in court and give him an opportunity to reconcile the two statements if he can. It is only when he has done so that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and it can then be proved in any manner permitted by law.¹⁶ It is of great importance to remember, that, when a witness is sought to be contradicted by his statement to the police, his attention has got to be drawn to that part of the statement which is inconsistent with his statement in court,¹⁷ by reading out to him a particular part of his statement from the copy,¹⁸ so that he may explain the inconsistency. Where a witness has made a long statement to the police and the only question put to him by the defence is whether a particular exhibit is his statement, it is impossible for the witness to understand what portion of it would be used for contradicting him.¹⁹ When a witness has thus been confronted with the statement or particular portions of it, only that much of the statement can be admitted in evidence with which he has thus been confronted and which has subsequently been duly proved.²⁰ Portions of the copy, therefore, which have been so used should be marked and exhibited in the case.²¹ The rule as to confirmation applies to illiterate witnesses.²²

(iv) The statement of the witness made to the police is less detailed, the witness having mentioned some more facts in court which he omitted to mention to the police. In such a case, it should be remembered that every

15. *Muzaffar Khan v. E.*, I.L.R. 1939 Lah. 509 : 182 I.C. 935 : 1939 I. 268.

16. *Hecambalal Ghosh v. E.*, 78 C.L.J. 217 : *Iqbal Ahmad v. E.*, 1942 A.L.J. 637.

17. *Raghuraj Singh v. E.*, 1934 A. 956 : 152 I.C. 873.

18. *E. v. Salik*, 166 I.C. 259 : 1937 O.

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19. *Raghuraj Singh v. E.*, 1934 A. 956 : 152 I.C. 873.

20. *E. v. Salik*, 166 I.C. 259 : 1937 O. 201 : *Samuel John v. E.*, 160 I.C. 162 : 1935 A. 935.

21. *Dharam Singh v. E.*, 1928 I. 507 : 108 I.C. 162.

22. *Muzaffar Khan v. E.*, 1939 I. 268

omission is not a contradiction.²³ The Investigating Officer is not expected to record all the unimportant details given by a witness and, therefore, the absence of details in the case diary is no proof that the fact omitted in the statement was not mentioned by the witness. Hence an omission can amount to a contradiction only when it is certain that the fact omitted in the record of the statement could not have been so omitted if it had been mentioned.²⁴ If an omission is sought to be used as an argument against the trustworthiness of a witness, it is necessary that, on the principle underlying Sec. 145 of the Evidence Act, an opportunity should be offered to the witness to explain the omission.²⁵ After the witness has been questioned as to an omission, it seems that the whole statement of the witness to the police shall have to be put in and proved, as the court can find only by comparing the two statements whether the omission is or is not so material as to amount to a contradiction.¹ In a Madras case, however, it has been ruled that a witness cannot be contradicted by an omission in the record of his statement to the police and that, therefore, the record of the witness's statement to the police cannot be proved or referred to at all to show that the witness omitted to mention a particular fact to the police.² The only procedure to be adopted in such a case is to question the investigating officer about the alleged omission.³ It is not permissible to ask the investigating officer whether the witness stated or did not state to him a particular matter, as, under Sec. 162 of the Criminal Procedure Code (same section in 1973 Code), a witness can be discredited only by proving what is or what is not contained in the duly proved record of the statement.⁴ But according to the view taken of this matter in a Patna decision an omission is properly proved by the investigating officer stating in court that the witness did not mention a particular fact to him.⁵ The question to a witness "Did you make a statement to the police?" or the question to a police officer "Did the witness make a statement to you?" is competent and not excluded by Sec. 162, Criminal Procedure Code (same section in 1973 Code).⁶ if the object be to prove the fact that the witness did not make any statement to the police. Similarly, the question to the investigating officer "Did you receive such and such information?" is not excluded by Sec. 162, Criminal Procedure Code (same section in 1973 Code).⁷

The conflict of judicial opinion set out above [head (iv)] has been resolved by the majority decision in *Tahsildar Singh v. State of U. P.*⁸

23. *Ponnusami Chetty v. E.*, I.L.R. 56 M. 475 : 143 I.C. 424 : 1933 M. 372 (2) ; *Deolal Mahton v. E.*, 1933 P. 440 : 145 I.C. 426.

24. *Guruva Vannan, In re*, 1944 M. 385 : I.L.R. 1944 M. 897 : 57 L.W. 171.

25. *Gopichand v. E.*, 11 L. 460 : 126 I.C. 573 : 1930 L. 491 ; *Mohinder Singh v. E.*, 1932 L. 103 : 135 I.C. 209.

1. *Mohinder Singh v. E.*, 1932 L. 103 : 135 I.C. 209 ; *King-Emperor v. Vithupalu Kharat*, 83 I.C. 1007 : 1924 B. 500.

2. *Ponnusami Chetty v. E.*, 56 M. 475 : L.E.—456

1933 M. 372 (2).

3. *In re Nadimpalli Bangaru Raju*, 1942 M. 58 : 201 I.C. 390.

4. *Jasimuddin Sarkar v. E.*, 134 I.C. 763 : 1931 C. 622 ; *Ponnusami Chetty v. E.*, 56 M. 475 : 1933 M. 372 (2).

5. *Bihari Mahton v. E.*, 10 P. 107 : 1931 P. 152.

6. *Mohan Banjari v. E.*, 1933 N. 384 : 30 N.I.R. 55.

7. *Mohanlal v. E.*, 1931 L. 177 : 131 I.C. 276.

8. 1959 S.C.J. 1042 : A.I.R. 1959 S.C. 1012 at pp. 1023-1026.

Their Lordships have observed :

"The object of the main Sec. (162, Criminal Procedure Code), as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by Sec. 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a Court of Law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statements which appear to him to be relevant. These statements are, therefore, only the summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is the correct statement.

"At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy *via media*, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Sec. 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence-witness or even a Court-witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar.

"If the provisions of the section are construed in the aforesaid background, much of the difficulty raised disappears. Looking at the express words used in the section, two sets of words stand out prominently which afford the key to the intention of the Legislature. They are 'statement in writing,' and 'to contradict'. 'Statement' in its dictionary meaning is the act of stating or reciting. *Prima facie* a statement cannot take in an omission. A statement cannot include that which is not stated. But very often to make a statement sensible or self-consistent, it becomes necessary to imply words which are not actually in the statement. Though something is not expressly stated, it is necessarily implied from what is directly or expressly stated. To illustrate: 'A' made a statement previously that he saw 'B' stabbing 'C' to death, but before the Court he deposed that he saw 'B' and 'D' stabbing 'C' to death. The court can imply the word 'only' after 'B' in the statement before the police. Sometimes a positive statement may have a negative aspect, and a negative one a positive aspect. Take an extreme example: if a witness states that a man is dark it also means that he is not fair. Though the state-

ment made describes positively the colour of a skin, it is implicit in that statement itself that it is not of any other colour. Further, there are occasions when we come across two statements made by the same person at different times and both of them cannot stand or co-exist. There is an inherent repugnancy between the two and, therefore, if one is true, the other must be false. On one occasion a person says, that when he entered the room, he saw 'A' shooting 'B' dead with a gun; on another occasion the same person says that when he entered the room he saw 'C' stabbing 'B' dead; both the statements obviously cannot stand together, for, if the first statement is true, the second is false and *vice versa*. The doctrine of recital by necessary implication, the concept of the negative or the positive aspect of the same recital, and the principle of inherent repugnancy, may in one sense rest on omissions, but, by construction, the said omissions must be deemed to be part of the statement in writing. Such omissions are not really omissions strictly so called and the statement must be deemed to contain them by implication. A statement, therefore, in our view, not only includes what is expressly stated therein, but also what is necessarily implied therefrom.

"'Contradict' according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. 'The cross-examining Counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police officer—in the sense we have indicated—and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

"It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the Legislature expressed in Sec. 162 of the Code and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose. The record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the object of the section would be defeated. By that process, if a part of a statement is recorded, what was not stated could go in on the sly in the name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the section by ignoring the only safeguard imposed by the Legislature, *viz.*, that the statement should have been recorded.

"We have already pointed out that under the amending Act of 1955, the prosecution is also allowed to use the statement to contradict a witness with the permission of the Court. If construction of the section as suggested by the learned Counsel for the appellants be accepted, the prosecution would be able to bring out in the cross-examination facts stated by a witness before a police officer but not recorded and facts omitted to be stated by him before the said officer. This result is not decisive on the question of construction, but indicates the unexpected repercussions of the argument advanced to the prejudice of the accused.

"As Sec. 162 of the Code of Criminal Procedure enables the prosecution in the re-examination to rely upon any part of the statement used by the defence to contradict a witness, it is contended that the construction of the section accepted by us would lead to an anomaly, namely, that the accused cannot ask the witness a single question, which does not amount to contradiction, whereas the prosecution, taking advantage of a single contradiction relied upon by the accused, can re-examine the witness in regard to any matter referred to in his cross-examination, whether it amounts to a contradiction or not. I do not think there is any anomaly in the situation. Section 145 of the Evidence Act deals with cross-examination in respect of a previous statement made by the witness. One of the modes of cross-examination is by contradicting the witness by referring him to those parts of the writing which are inconsistent with his present evidence. Section 162, while confining the right to the accused to cross-examine the witness in the said manner, enables the prosecution to re-examine the witness to explain the matters referred to in the cross-examination. This enables the prosecution to explain the alleged contradiction by pointing out that if a part of the statement used to contradict be read in the context of any other part, it would give a different meaning; and if so read, it would explain away the alleged contradiction. We think that the word 'cross-examination' in the last line of the first proviso to Section 162 of the Code of Criminal Procedure cannot be understood to mean the entire gamut of cross-examination without reference to the limited scope of the proviso, but should be confined only to the cross-examination by contradiction allowed by the said proviso.

"The conflict of judicial opinion on this question is reflected in the decisions of different High Courts in this country. One of the views is tersely put by Burn, J., in *Ponnusami Cheitay v. Emperor*:⁹

"Whether it is considered as a question of logic or of language, "omission" and "contradiction" can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To "contradict" means to speak against or in one word to "gainsay." It is absurd to say that you can contradict by keeping silence. Silence may be full of significance but it is not "diction", and therefore it cannot be "contradiction".

"Considering the provisions of Section 145 of the Evidence Act, the learned Judge observed thus at p. 477 (of I. L. R. 56 Mad.) and at p. 373 (of A. I. R. 1933 Mad.):

"It would be in my opinion sheer misuse of words to say that you are contradicting a witness by the writing, when what you really want to do is to contradict him by pointing out omissions from the writing, I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that "a witness cannot be confronted with the unwritten record of an unmade statement." The learned Judge gives an illustration of a case of apparent omission which really is a contradiction, i.e., a case where a witness stated under Sec. 162 of the Code that he saw three persons beating a man and later stated in Court that four persons were beating the same man. This illustration indicates the trend of the Judge's mind that he was prepared to treat an omission of that kind as part of the statement by necessary implication. A Division Bench of the Madras High Court followed this judgment

9. I. L. R. 56 Mad. 475 at p. 476 : A. I. R. 1933 Mad. 372 (2) at p. 373.

in *In re Guruva Vannan*.¹⁰ In that judgment Mockett, J., made the following observation at p. 901 (of I. L. R. 1944 Mad.) and at p. 386 (of A. I. R. 1944 Mad.):

'I respectfully agree with the judgment of Burn, J., in I. L. R. 56 Mad. 475,¹¹ in which the learned Judge held that a statement under Sec. 162 of the Code of Criminal Procedure cannot be filed in order to show that a witness is making statements in the witness-box which he did not make to the police and that bare omission cannot be a contradiction. The learned Judge points out that, whilst a bare omission can never be a contradiction, a "so-called" omission in a statement may sometimes amount to a contradiction, for example, when to the police three persons are stated to have been the criminals, and later at the trial four are mentioned.'

"The Allahabad High Court in *Ram Bali v. State*,¹² expressed the principle with its underlying reasons thus at p. 294 :

'Witness after witness was cross-examined about certain statements made by him in the deposition but not to be found in his statement under Sec. 162, Cr. P. C. A statement recorded by the police under Sec. 162 can be used for one purpose and one purpose only and that of contradicting the witness. Thereafter if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in Court that a certain fact existed but had stated under Sec. 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed, it is a case of conflict between the deposition in the Court and the statement under Sec. 162 and the latter can be used to contradict the former. But, if he had not stated under Sec. 162 anything about the fact, there is no conflict and the statement cannot be used to contradict him. In some cases an omission in the statement under Sec. 162 may amount to contradiction of the deposition in Court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negative its existence.'

"At a later stage of the judgment, the learned Judges laid down the following two tests to ascertain whether a particular omission amounts to contradiction: (i) an omission is not a contradiction unless what is actually stated contradicts what is omitted to be said; and (ii) the test to find out whether an omission is contradiction or not is to see whether one can point to any sentence or assertion which is irreconcilable with the deposition in the Court. The said observations are in accord with that of the Madras High Court in *In re Guruva Vannan*.¹³ The Patna High Court in *Badri Chaudhry v. Emperor*,¹⁴ expressed a similar view. At p. 22 of A. I. R. 1926 Pat. Macpherson, J., analysing Sec. 162, Cr. P. C., after its amendment in 1923, observed :

'The first proviso to Sec. 162(1) makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. "Any part of such statement" which has been reduced to writing may

10. I.L.R. 1944 Mad. 897 : A.I.R. 1944 Mad. 385.
11. Ponnusami Chetty v. Emperor, A.I.R. 1933 Mad. 372 (2) : I.L.R. 56 Mad. 475.

12. A.I.R. 1952 All 289.
13. A.I.R. 1944 Mad. 385 : I.L.R. 1944 M. 897.
14. A.I.R. 1926 Pat. 20 : 92 I.C. 874.

in certain limited circumstances be used to "contradict" the witness who made it. The limitations are strict: (1) only the statement of a prosecution witness can be used; and (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in Court; (6) it must be used as provided in Sec. 145, Evidence Act, that is, it can only be used after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction, and there are others. Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer.'

"In *Sakhawat v. Emperor*,¹⁵ much to the same effect was stated at p. 284 :

'The section [Sec. 162] provides that such statements can be used only for the purpose of contradiction. Contradiction means the setting up of one statement against another and not the setting up of a statement against nothing at all. An illustration would make the point clear. If a witness in Court says, "I saw A running away" he may be contradicted under Sec. 162 by his statement to the police "I did not see A running away." But by proving an omission what the learned Counsel contradicts is not the statement "I saw A running away" but the statement "I stated to the police that I saw A running away." As Sec. 162 does not allow the witness to depose "I stated to the police that I saw A running away" it follows that there can be no basis for eliciting the omission. Our argument is further fortified by the use of the words "any part" of such statement.....may be used to contradict." It is not said that "whole" statement may be used. But in order to prove an omission the whole statement has to be so used, as has been done in the present case.'

"The contrary view is expressed in the following proposition :

'An omission may amount to contradiction if the matter omitted was one which the witness would have been expected to mention and the Sub-Inspector to make note of in the ordinary course. Every detail is expected to be noted.'

"This proposition, if we may say so, couched in wide phraseology enables the trial Judge to put into the mouth of the witness things which he did not state at an earlier stage and did not intend to say, on purely hypothetical considerations. The same idea in a slightly different language was expressed by Bhargava and Sahai, JJ., in *Rudder v. State*.¹⁶

"There are, however, certain omissions which amount to contradictions and have been treated as such by this Court as well as other Courts in this country. Those are omissions relating to facts which are expected to be included in the statement before the police by a person who is giving narrative of what he saw, on the ground that they relate to important features of the incident about which the deposition is made.'

"A similar view was expressed in *Mohinder Singh v. Emperor*,¹⁷ *Yusuf Mia v. Emperor*¹⁸ and *State of M. P. v. Banshilal Behari*.¹⁹

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15. I.L.R. 1937 Nag. 277 : A.I.R. 1937 Nag. 50.
 16. A.I.R. 1957 All 239 at p. 240 : 1957 All. L.J. 116.
 17. A.I.R. 1932 Lah. 103 : 135 I.C.

209.
 18. A.I.R. 1938 Pat. 579 : 178 I.C. 934.
 19. A.I.R. 1958 M.P. 13 : 1957 M.P. L.J. 852.

"Reliance is placed by the learned Counsel for the appellant on a statement of law found in 'Wigmore on Evidence', Vol. III, 3rd edition, at p. 725. In discussing under the head 'What amounts to a self-contradiction,' the learned author tersely describes a self-contradiction in the following terms:

'.....it is not a mere difference of statement that suffices; nor yet is an absolute appositeness essential; it is an inconsistency that is required.'

'The learned author further states, at p. 733':

'A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact.'

"The said statement is no doubt instructive, but it cannot be pressed into service to interpret the provisions of Sec. 162 of the Code of Criminal Procedure. In America, there is no provision similar to Sec. 162 of the Code. It is not, therefore, permissible, or even possible, to interpret the provision of a particular Act, having regard to stray observations in a text-book made in a different context.

"It is not necessary to multiply cases. The two conflicting views may be briefly stated thus: (i) omissions, unless by necessary implication be deemed to be part of the statement, cannot be used to contradict the statement made in the witness-box, and (ii) they must be in regard to important features of the incident which are expected to be included in the statement made before the police. The first proposition not only carries out the intention of the Legislature but is also in accord with the plain meaning of the words used in the section. The second proposition not only stretches the meaning of the word "statement" to a breaking point, but also introduces an uncertain element, namely, ascertainment of what a particular witness would have stated in the circumstances of a particular case and what the police officer should have recorded. When the section says that the statement is to be used to contradict the subsequent version in the witness-box, the proposition brings in, by construction, what he would have stated to the police within the meaning of the word 'statement.' Such a construction is not permissible.

"From the foregoing discussion the following propositions emerge: (1) A statement in writing by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose; (2) statement not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases,—

(i) when a recital is necessarily implied from the recital or recitals found in the statement: illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied, i.e., the witness saw A only stabbing B;

(ii) a negative aspect of a positive recital in a statement : illustration : in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and

(iii) when the statement before the police and that before the Court cannot stand together : illustration : the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing, i.e., at the same point of time, towards the northern lane as well as towards the southern lane; if one statement is true, the other must necessarily be false.

"The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness-box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law."

(Cases referred to with approval : *In re Ponnusami Chetti*,²⁰ *In re Guruvu Vannan*,²¹ *Ram Bali v. State*,²² *Badri v. Emperor*²³ and *Sakhawat v. Emperor*.²⁴

Cases disapproved : *Rudder v. State*,²⁵ *Mohinder Singh v. Emperor*,¹ *Yusuf Mia v. Emperor*² and *State of M. P. v. Banshilal Behari*.³

In *Nagendra Bala Mitra v. Sunil Chandra Roy*,⁴ omissions in a previous police statement of a P. W. which amount to contradiction and omissions which do not so amount according to the principles laid down in *Tahsildar Singh's case* have been considered.

Section 162, Criminal Procedure Code (same section in 1973 Code) forbids the use of police statements of prosecution witnesses for comparing them with one another. It is not open to the accused to ask the Court to compare the police statement of different witnesses speaking to the same incident or to draw any inference adverse to the prosecution on the basis of similarity or identity of the language employed in different statements. Such a use of the police statement is forbidden by law.⁵ The effect of withdrawal, contradictions, omissions and discrepancies in the police statements on the value of evidence given by witnesses in Court have been considered by the Supreme Court in *Madan Mohan Singh v. State of U. P.*⁶ and in *Sarwan Singh v. State of Punjab*.⁷

20. I.L.R. 56 M. 475 : 143 I.C. 424:
A.I.R. 1933 Mad. 372 (2).

21. A.I.R. 1944 Mad. 385 : I.L.R.
1944 M. 897.

22. A.I.R. 1952 All 289.

23. A.I.R. 1926 Pat. 20 : 92 I.C. 874.

24. A.I.R. 1937 Nag. 50 : 167 I.C. 61.

25. A.I.R. 1957 All 239 : 1957 A.L.J.
11.

1. A.I.R. 1932 Lah. 103 : 135 I.C.
209.

2. A.I.R. 1938 Pat. 579 : 178 I.C.

934.

3. A.I.R. 1958 M.P. 13 : 1957 M.P.
L.J. 852.

4. A.I.R. 1960 S.C. 706 : (1960) 2
S.C.A. 458.

5. Guru Bachan Singh v. State of
Punjab, A.I.R. 1957 S.C. 623 :
1957 S.C.J. 539.

6. A.I.R. 1954 S.C. 637.

7. A.I.R. 1957 S.C. 637 : 1957 S.C.
J. 699.

This, of course, is the fact that the police record is faithful and accurate as otherwise contradictions, discrepancies and omissions in the police statement lose all significance.⁸

Section 162, Criminal Procedure Code (same section in 1973 Code), be it noted, hits only statements made to the Police "in the course of the investigation" and not during "the period of investigation" and which terms are not synonymous.⁹

Section 162, (same section in 1973 Code) statement: The Supreme Court has dealt with in *Ramkishan Mithanlal Sharma v. State of Bombay*,¹⁰ *Santa Singh v. State of Punjab*,¹¹ *Guru Bachan Singh v. State of Punjab*,¹² *Sarwan Singh v. State of Punjab*,¹³ and *Tahsildar Singh v. State of Punjab*,¹⁴ the use of a previous statement of a prosecution witness recorded under Sec. 162 (same section in 1973 Code) for the purpose of contradicting his evidence in Court.

Finally, it should not be overlooked as pointed out in *Emperor v. Nazer Ahmed*:¹⁵

".....in any case the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way; but their Lordships see no reason why the Police, if in possession through their own knowledge or by means of credible, though informal, intelligence which genuinely leads them to believe that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. Section 157, Criminal Procedure Code, supports this view."

Statements made before committing Magistrate. The provision contained in Sec. 145, Evidence Act, relates to cross-examination as to previous statements in writing, but does not militate in any way against such previous statements being used by way of corroboration of statements put in under Sec. 288, Criminal Procedure Code, which are substantive evidence in the case before the Court of Session.¹⁶

Section 288 confers power on the Sessions Judge to treat the evidence of a prosecution witness taken before the committing Magistrate as substantive evidence in the trial before him. It is, of course, not meant to be used in every case as a matter of course. The discretion is to be used by the Judge very sparingly and in those cases only where there is reason to believe that a wit-

8. *Baladin v. State of U. P.*, A.I.R. 1956 S.C. 181.

9. *Baleswar Rai v. The State of Bihar*, (S.C.) Notes of recent cases, (1962) 2 M.L.J. 40 dated 26-4-1962.

10. A.I.R. 1957 S.C. 104 : 1955 S.C. A. 110 : 1965 S.C.T. 129.

11. A.I.R. 1956 S.C. 526 : 1956 Cr. L.J. 980.

12. A.I.R. 1957 S.C. 623, *supra*.

13. A.I.R. 1957 S.C. 637, *supra*.

14. A.I.R. 1959 S.C. 1012 : 1959 S.C. J. 1042.

15. (1945) 1 M.L.J. 86 (P.C.).

16. *Manar Ali v. Emperor*, 1934 Cal. 124 : 1 L.R. 60 Cal. 1339 : 147 I.C. 1203.

ness is deliberately departing from the evidence given before the Magistrate,¹⁷ or where it appears that the statement before the Judge is substantially false and the previous statement is substantially true. The existence of minor discrepancies does not justify the use of Sec. 288 (omitted from the new Code).¹⁸ The discretion is exercisable by the Judge alone when he is convinced that the witness is not telling the truth. The prosecution or defence has no right to put the statement in. The object of the section is to enable the court, in the interests of justice, to make use of the former statement as substantive evidence for the purpose of the decision, if the witness resiled from the former statement and that statement is found to be more reliable. The section is not intended as a procedure for contradicting or corroborating witnesses at the Sessions trial which object may be attained by Secs. 145, and 157 of this Act. The real object is to make a statement before a committing Magistrate substantive evidence in certain cases.

The prerequisites for the use of the discretionary power are: (i) the previous evidence must have been "duly recorded", (ii) in the presence of the accused, and (iii) the witness must be examined in the Sessions Court.

When a witness alleges that his statement before the committing Magistrate was the result of improper influence or pressure, the Sessions Judge should investigate into the truth of his allegation before coming to the conclusion that his deposition in the Sessions Court which contradicts that in the committing Magistrate's court is false. The discretion once exercised under this section is final and it is not ordinarily open to the higher courts to interfere with it. The Sessions Judge should make a record of the fact that he admitted the former statement of the witness in preference to that given before him and should give cogent reasons in the final judgment for doing so in order to enable the superior courts to scrutinise that the discretion was wisely exercised.¹⁹

Before introducing into the record the statement of a witness made before the committing Magistrate, the Judge is bound to inform the accused and the prosecution of his intention to do so. The reason is that otherwise the parties will have no opportunity of testing the statement by cross-examination or of otherwise dealing with it as part of the material which may influence the decision of the Court. It has been held in a number of decisions that when the evidence of a witness before the committing Magistrate is inconsistent with his evidence in the Sessions Court, and it is proposed to use his previous statement under Sec. 288 for the purpose of contradicting him, it is the duty of the Judge to draw his attention to his previous statement and afford him an opportunity of explaining the inconsistency between his two statements [See Sec. 145 of the Evidence Act].

This view has also been endorsed by the Supreme Court in *Tara Singh v. State*,²⁰ in which it has been held that the words "subject to the provision

17. *Abdul Jalil v. Emperor*, 128 I.C. 593 : A.I.R. 1930 All 746 ; *Dodo v. Emperor*, A.I.R. 1942 Sind 139 ; I.L.R. 1942 Kar. 299 : 203 I.C. 482 ; *In re Shanmuga Kone*, (1942) M.W.N. Cr. 121 ; *Gopal v. The King*, A.I.R. 1949 Cal. 597.
18. *Manghan v. Emperor*, 167 I.C. 943 : A.I.R. 1937 Sind 61 ; *Deorao v.*

Emperor, I.L.R. 1946 Nag. 941 : 226 I.C. 377 : A.I.R. 1946 N. 521.
19. *Amalash v. State*, A.I.R. 1952 C. 481 : I.L.R. (1953) 1 Cal. 30 ; *Gunadhar Das v. State*, A.I.R. 1 Cal. 618.
20. 1951 M.W.N. (Cr.) 225 : A.I.R. 1951 S.C. 441 : 1951 Cr. L.J. 14

of the Indian Evidence Act, 1872" cover also Sec. 145 of this Act, under which the attention of the witness must be called to those parts of the writing (which records his previous statement) which are to be used for the purpose of contradicting him. In that case their Lordships observed :

".....the evidence in the committal Court cannot be used in Sessions Court unless the witness is confronted with his previous statement as required by Sec. 145, Evidence Act. Of course, the witness can be cross-examined about the previous statement and that cross-examination can be used to destroy his testimony in the Sessions Court. If that serves the purpose of the prosecution, then nothing more is required, but if the prosecution wishes to go further and use the previous testimony to the contrary as substantive evidence, then it must.....confront the witness with those parts of it which are to be used for the purpose of contradicting him. Then only can the matter be brought as substantive evidence under Sec. 288."

But the previous statement of a witness may be used to corroborate him also under this section, and for this purpose it is not necessary that the procedure under Sec. 145 of the Evidence Act should be followed. Where a witness in his examination-in-chief in the Court of Session gives the same story as in the committing Magistrate's Court but resiles from it in cross-examination, his version in examination-in-chief can be corroborated by using his previous statement in the committing Magistrate's Court and for this purpose it is not necessary to follow the procedure laid down by Sec. 145 of this Act.²¹

By force of the expression "may be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act," the previous deposition of a witness, admitted under Sec. 288, Criminal Procedure Code (omitted from the new Code) can be treated as substantive evidence in the case and not merely as evidence useful for the purpose of corroborating or contradicting a witness. The amount of weight to be attached to such evidence is not governed by the Code but is a matter to be decided by the Court in each case.²² It has been held that as a rule of caution it is safe to observe that, unless the Court comes to the conclusion that the evidence admitted under Sec. 288 is of such a nature that it must be accepted as wholly true and there is nothing to shake its veracity, the evidence should not be acted upon until there is some other independent evidence to corroborate it. The words "for all purposes subject to the provisions of the Evidence Act" did not occur in Section 288, Cr. P. C. (old) as it stood prior to the amendment of 1923. Hence, the view taken in some of the decisions prior to the said amendment that the evidence admitted under this section could only be used for the purpose of corroboration or contradiction of a witness and not as a substantive evidence is now no longer law.²³

21. *Bhagwan Singh v. State of Punjab*, 1952 M.W.N. (Cr.) 157 : A.I.R. 1952 S.C. 214 : 1952 Cr. L.J. 1131 distinguishing *Tara Singh's case*, 1951 M.W.N. (Cr.) 225 : A.I.R. 1951 S.C. 441 : 1951 Cr. L.J. 1491 : as there were no two versions there in the same testimony.

22. *In re K. Chinna Papiiah*, 1939 M.W.N. Cr. 174.

23. *Bhagwan Singh v. State of Punjab*,

1952 M.W.N. (Cr.) 157 : A.I.R. 1952 S.C. 214 : 1952 Cr. L.J. 1131; *Behari v. King-Emperor*, I.L.R. 49 A. 251 : 99 I.C. 485 : A.I.R. 1927 All 479 ; *Bachalal v. Nethipudi*, I.L.R. 47 M. 232 : 81 I.C. 203 : A.I.R. 1924 Mad. 379 ; *Basappa v. Emperor*, 86 I.C. 145 : A.I.R. 1925 Bom. 266 ; *Nebti v. Emperor*, A.I.R. 1940 Pat. 289 : I.L.R. 19 Pat. 369.

Thus, Sec. 288, Criminal Procedure Code (omitted from the new Code) is wide enough even to include the testimony of an approver. Hence, where an approver is examined as a witness in the committing Court and is again examined as a witness in the Sessions Court, his evidence before the committing Magistrate can be introduced under Sec. 288 (omitted from the new Code) into the record of the Sessions case, notwithstanding that he had repudiated his former statement. But it would be unsafe to base a conviction on the retracted statement of an approver in the absence of any corroboration.²⁴

When the entire deposition is repudiated in a sentence, strictly speaking it is not necessary to put the statement sentence by sentence.²⁵ But prudence and fairness require that it is better to put the deposition to the witness sentence by sentence. It will give also a *locus paenitentiae* to the perjuring witness and often before he comes to the end of the deposition, he realises his folly and wickedness and retracts his paths to truth.¹

Section 288, Criminal Procedure Code (omitted from the new Code), has no application when a witness is produced and examined in the Sessions Court. Only Sec. 33 of the Evidence Act applies to such a case and the conditions of the section must be fully satisfied before the deposition of that witness in the committal Court can be taken on record.² In regard to the use in the Sessions Court of a previous statement of a prosecution witness contained in his evidence in the committal Court for the purpose of contradiction or corroboration, when it is taken on re-record under Sec. 288, Criminal Procedure Code (omitted from the new Code) [see *Tara Singh v. The State*,³ and *Bhagwan Singh v. State of Punjab**].

First Information Report. Statements made in a first information report under Sec. 154(1), Criminal Procedure Code, are admissible under Sec. 155 of this Act to impeach the credit of a witness who made them or under this section to corroborate the testimony of the witnesses who made them, if the reports were made about the time when the fact took place, or before any authority legally competent to investigate the fact.⁴ But such a report, to

24. In re M. K. Thiagaraja Bhagavathar, 1946 M.W.N. (Cr.) 9; Kesava Pillai v. Emperor, 1929 M.W.N. 901.
25. Rano v. Emperor, I.L.R. 1944 Kar. 75 ; A.I.R. 1944 Sind 173.
1. Per Ramaswami, J., in Adimoola Padayachi v. State, 1960 M.W.N. (Cr.) 152.
2. Bihari Singh v. State of Bihar, A.I.R. 1954 S.C. 692.
3. A.I.R. 1951 S.C. 441 ; 1951 S.C. R. 729.
4. A.I.R. 1952 S.C. 214 ; 1952 S.C.R. 812 ; 1952 S.C.J. 284 ; 1952 S.C. A. 513.
5. Ram Naresb v. Emperor, 1939 All 242 ; I.L.R. 1939 All 377 ; 181 I. C. 646 ; Nisar Ali v. State, 1957 S. C. 366 ; 1957 S.C.A. 312 ; 1957 S. C.J. 392 ; 1957 S.C.R. 657 ; see also Emperor v. Khwaja Nazir Ahmed, 1945 P.C. 18 ; 71 I.A. 203 ; I.L.R. 1945 Lah. 1 ; I.L.R. 1945 Kar. (P.C.) 89 ; 217 I.C. 1 ; Pundlik v.

State, 1951 M.B. 72 ; 52 Cr. L.J. 278 ; Kari Mandal v. State, 1950 Cal. 412 ; 85 C.L.J. 196 ; Azim-uddy v. R., 1927 Cal. 17 ; I.L.R. 54 Cal. 237 ; 99 I.C. 227 ; Magan Lal Radha Kishen v. Emperor, 1946 Nag. 173 ; I.L.R. 1946 Nag. 126 ; 226 I.C. 245 ; Waris Khan v. Emperor, 1940 Oudh 209 ; I.L.R. 15 Luck 429 ; Dhirendra Nath v. State, 1952 Cal 621 ; 53 Cr. L.J. 1127 ; Abdul Latif v. Emperor, 1941 Cal. 533 ; 196 I.C. 439 ; 45 C.W.N. 763 ; Har-nam Singh v. Emperor, 1936 Lah. 833 ; 165 I.C. 146 (it is admissible under Sec. 156 or Sec. 145 or Sec. 8 of the Act) ; State of Rajasthan v. Shiv Singh, I.L.R. (1961) 11 Raj. 299 ; State of Gujarat v. Hiralal, I.L.R. 1964 Guj. 376 ; A. I.R. 1964 Guj. 261 ; Bhagirathi v. State, A.I.R. 1965 Orissa 99 ; Nagesia v. Bihar State, A.I.R. 1966 S.C. 119 ; (1966) 1 S.C.R. 134.

be admissible under this section, must have been made before the commencement of the investigation by the police. If made during the investigation, it would be hit by Sec. 162 of the Criminal Procedure Code and would not be admissible under this section." "If the circumstances indicate that after receiving some information, however incomplete, the police officer had commenced his investigation, any subsequent information given to him about the offence by any other person cannot be regarded as the first information report in the case and would not be admissible under Sec. 162, Criminal Procedure Code."⁷ But where there is a second report made to the police about the commission of an offence, which is made quite independently of, and in no relation to, any pending investigation, and is not designed to promote the pending investigation nor did it have any reference at all to the investigation which had in fact already begun, it is a document admissible for the purpose of corroborating the evidence of its maker, under this section, or to contradict him under Secs. 155 and 145, though it is not a substantive evidence of the facts stated therein.⁸ Where a report about the commission of an offence is given to the police at two different places by two different persons, and one is earlier in point of time than the other, the later report is not a statement made to a police officer in the course of investigation but is an independent first information report and therefore can be used in evidence by the prosecution.⁹ It frequently happens that more than one person goes to the police officer at the same time and makes statement relating to the same offence. The police officer uses his commonsense and records one statement as an information under Sec. 154. After doing that, if he chooses to record other statements, they will be in the nature of statements in the course of the investigation.¹⁰

In regard to the use of First Information Report under Section 154, Cr. P. C., for the purpose of contradiction or corroboration, see the following cases of the Supreme Court wherein the use of the F. I. R. for this purpose has been considered.¹¹ F. I. R. can only corroborate or contradict its maker

6. In re Rangarajulu Naidu, 1958 Mad. 368; *Shwe Pua v. The King*, 1941 Rang 209; 197 I.C. 350 (information by telephone message given before commencement of investigation); *Guruswami Naidu v. Villis Guruswami Naidu*, 1951 Mad. 842; 52 Cr. L.J. 857; (1951) 1 M.L.J. 426; 1951 M.W.N. 255.
7. *Moti Singh v. Emperor*, 1 I.L.R. 1918 A. 119; 1948 All 289; *D. Jainand v. Rex*, 1949 All 291; 1949 A.L.J. 60.
8. *Tika Ram v. State*, 1957 All 755; 1957 Cr. L.J. 1200; see also *Emperor v. Altab Mohammad Khan*, 1940 All 291; 188 I.C. 649; 1940 A.L.J. 206; *Suba Chowdhury v. The King*, 1950 Pat. 44; 1 I.L.R. 28 Pat. 762, but see *Mani Mohan Ghosh v. Emperor*, 1931 Cal. 745; 1 I.L.R. 58 Cal. 1312; 135 I.C. 289.
9. *Emperor v. Laljee Rai*, 1936 Pat. 11; 116 I.C. 181; 16 P.L.I. 730.
10. *Mani Mohan Ghose v. Emperor*, 1931 Cal. 745; 1 I.L.R. 58 Cal. 1312; 135 I.C. 289.
11. *Wilayat Khan v. State of U. P.*, A.I.R. 1953 S.C. 122; 1 I.L.R. (1953) 1 All 89; *Thakur Prasad v. State of M. P.*, A.I.R. 1954 S.C. 30; 1954 Cr. L.J. 261; *Abdul Gani v. State of M. P.*, A.I.R. 1954 S.C. 31; 1954 Cr. L.J. 323; *Karnail Singh v. State of Punjab*, 1954 S.C.R. 904; 1954 S.C.J. 269; A.I.R. 1954 S.C. 204; *Pandurang v. State of Hyderabad*, (1955) 1 S.C.R. 1083; 1955 S.C.J. 106; 1955 S.C.A. 228; 1955 S.C. 216; *Ram Janani v. State of Bihar*, A.I.R. 1956 S.C. 643; 1956 Cr. L.J. 1254; *Nisar Ali v. State of U. P.*, 1957 S.C.R. 657; 1957 S.C.J. 392; A.I.R. 1957 S.C.

and not the whole prosecution case.¹² F. I. R. cannot be used as substantive evidence.¹³ A complaint in a corruption case is F. I. R. and can be used under this section to corroborate the maker.¹⁴

When the First Information Report is not tendered by the prosecution as required by the Evidence Act at the time its maker was examined in court, it cannot be relied upon in evidence.¹⁵

The First Information Report is not a substantive piece of evidence. It can be used only to corroborate or contradict the evidence under this section and Sec. 145, ante.¹⁶

The fact that the First Information Report was lodged within thirty-five minutes of the occurrence and that in the aforesaid report the names of the accused as the real culprits as well as the names of the eye-witnesses were mentioned, lends considerable corroboration to the testimony of the prosecution witness regarding the participation of the accused in the occurrence.¹⁷ For the evidentiary value of a delayed F. I. R., see the following case of Allahabad High Court.¹⁸

Search memo. Contents of search memo signed by search witnesses can be used in evidence to corroborate their evidence in Court.¹⁹

8. Identification proceedings: Statements made in. The law does not allow the statements made by the witnesses at jail identification proceedings to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses. When these persons are called as witnesses, these previous statements become admissible, not as substantive evidence in the case, but merely as evidence to corroborate or contradict the statements made by these witnesses in Court.²⁰ But statements made by witnesses to the investigating police officer at the time when they picked out the accused by way of identification are hit by the prohibition contained in Sec. 162 of the Code and are rendered inadmissible.²¹ Evidence of police officers as to certain of the accused having been identified by prosecution witnesses in an identification parade is not inadmissible in evidence under Sec. 162, as their evidence does not relate to any statement made to the police but is

- 366 ; State of Bombay v. Mistri, A.I.R. 1960 S.C. 391 ; 1960 Cr. L. J. 532 ; Damodar Prasad Chandrika Prasad v. State of Maharashtra, A.I.R. 1972 S.C. 622 ; Hasib v. State of Bihar, A.I.R. 1972 S.C. 283 ; 1972 Cr. L.J. 233 ; Shanker v. State of U. P., 1975 Cr. L.J. 634 ; A.I.R. 1975 S.C. 757.
12. Sagar v. State, A.I.R. 1962 Cal. 85 ; 65 C.W.N. 808.
13. I.L.R. (1974) Him. Pra. 948 ; Mazidar Rahman v. State of Assam, 1977 Cr. L.J. 1293.
14. V. K. Belurkar v. State of Maharashtra, 1975 Cr. L.J. 517 (Bom.).
15. Damodar Prasad Chandrika Prasad v. State of Maharashtra, (1972) 1 S.C. C. 107 ; 1972 S.C.D. 186 ; 1972 Cr. L.J. 451 ; A.I.R. 1972 S.C. 622 (825).
16. Sarjug Mahton v. The State of Bihar, 1971 P.L.J.R. 107 (110).
17. Daigahi v. The State of U. P., 1973 S.C.C. (Cr.) 928 : (1973) 2 S.C. W.R. 357 ; A.I.R. 1973 S.C. 2675 ; 1973 Cr. L.J. 1828 (1832).
18. Gajjan Khan v. State, 1974 A.C.R. 21.
19. Satyanarayana Rao v. State of Mysore, 1972 Mad. L.J. (Cr.) 321.
20. Nagina v. Emperor, 1921 All 215 ; 90 I.C. 477 ; 19 A.L.J. 947 ; Maiden v. The Crown, 1950 Lah. 169 ; Pak. C. 1950 Lah. 385 ; Pak. L.R. 1950 Lah. 349 ; Sami Uddin v. Emperor 1928 Cal. 500 ; 109 I.C. 225 ; Chhutikan v. King-Emperor, 192 Oudh 36 ; 90 I.C. 440 ; Sarwa Khan v. Emperor, 1920 Pat. 334 ; 55 I.C. 273.
21. Krishna Kahar v. Emperor, 1940 Cal 182 ; I.L.R. (1939) 2 Cal. 569 ; 187 I.C. 129 ; In re Kahatri Rai Singh, 1941 Mad. 675 ; 196 I.C. 342 ; 54 L.W. 69 ; 1941 M.W.N. 521.

a simple exposition of a fact or circumstances witnessed by themselves.²² It has been held that where a witness deposes to the fact that he identified the accused before the police officer in the village, such evidence is admissible.²³ But, in a subsequent case, it has been held that the evidence of the fact of identification is nothing but evidence of the statements which constitute the identification in a compendious and concise form. Any identification of stolen property in the presence of a police officer during investigation is, therefore, within the scope of Sec. 162.²⁴ Although under Sec. 63(1), Bombay City Police Act, 1902, the documents containing statements of witnesses made before the police in the course of investigation cannot be tendered in evidence on behalf of the prosecution, yet the oral statements of witnesses recorded in the *panchnama* in the presence of the police at an identification parade in the course of investigation are admissible in evidence to corroborate the statements of those witnesses at the trial under this section.²⁵ It has been held, that the statement of a witness before a Magistrate holding a trial identification parade, can be used to corroborate under this section or to contradict under Sec. 145. The reason is that the word 'investigation' in its widest import is a fact-finding process by an authority legally competent to do so.¹

Police diaries. It is contrary to law to make use of the police diary for the purpose of corroborating the evidence of prosecution witnesses as given in Court, especially having regard to Sec. 162 of the Code.²

9. Panchnama. A *Panch* may see certain things or may hear certain statements made to him, and he may reduce into writing all that he has seen or heard. His writing is called a *panchnama*, which may be a statement for the purposes of this section.³ A *panchnama* relating to the discovery of stolen articles during police investigation, though not substantive evidence of the fact recorded therein can be used to corroborate the *panch* witness or to refresh his memory.⁴ But it is not admissible under this section, since under Sec. 162, Cr. P. C., it is forbidden to be used. Although it may be usable to refresh memory, it cannot be produced in evidence by the party.⁵

10. Inquest report. If, in an inquest report, the investigating police officer has stated a fact which he saw with his own eyes, it cannot be said that it should not be read in corroboration of the evidence of the eye-witnesses.⁶

11. Previous depositions, etc. A deposition admitted under Sec. 288 of the Criminal Procedure Code (omitted from the new Code), is "testimony"

22. *Ramadhin v. Emperor*, 1929 Nag. 36 : 112 I.C. 51.

23. *Lela Lalung v. Emperor*, 1939 Cal. 176 : 179 I.C. 642 : 42 C.W.N. 620 : dissenting from *Krishna Chandra v. Emperor*, 1935 Cal. 311 : I.L.R. 62 Cal. 918 : 158 I.C. 843.

24. *Khabiruddin v. Emperor*, 1943 Cal. 644 : 210 I.C. 409.

25. *Emperor v. Mahadeo*, 1946 Bom. 189 : 224 I.C. 261 : 47 Bom. L.R. 992.

1. *Sarju v. State of U. P.*, (1961) 2 Cr. L.J. 71.

2. *Sakal Ahir v. Palakdhari*, 1931 Pat. 96 : 131 I.C. 535 : *Sanmon Tewari v. Emperor*, 1936 Pat. 581 : 165 I.C. 761.

3. *Miyabhai Pirbhai v. State*, A.I.R. 1963 Guj. 188 : 1963 Guj. L.R. 253.

4. *Kadiya Kanbi Bhavan v. Ismail Mammad*, 1955 Sau. 32 : 6 Sau. L.R. 517.

5. *Naginal v. State of Gujarat*, (1962) 1 Cr. L.J. 142.

6. *Mukunda v. State* 1957 Raj. 331 : 1957 Cr. L.J. 1187.

within the meaning of this section.⁷ Previous depositions of a witness are admissible under this section for purposes of corroboration.⁸ Although an admission made by a party in a deposition in a previous suit may not carry substantial evidentiary value, it is relevant under this section to corroborate his statement in the subsequent suit.⁹ Even previous statements in a plaint¹⁰ or in an application to a competent Court,¹¹ have been held to be admissible under this section for the purpose of corroboration. In *Har Chand v. Dewan Singh*, (*supra*) it held, that a verified application, formerly made by a guardian containing his ward's date of birth, is admissible under this section; but, merely because the verified application for appointment of guardian is admissible under this section, that by itself cannot afford evidence in proof of the age or the date of birth of the ward.¹²

12. Accomplice—Previous statement of. The section makes no exceptions. Therefore, provided the conditions prescribed by the section, that is to say, "at or about the time, etc." are fulfilled, there can be no doubt that the previous statement of an accomplice is legally admissible in India as corroboration.¹³ The use of the previous statement of an accomplice is to make the accomplice corroborate himself. But an accomplice cannot corroborate himself. 'tainted evidence does not lose its taint by repetition'.¹⁴ The evidence of approver can also be corroborated by circumstantial evidence.¹⁵

13. Register of Births and Deaths. Where a *chowkidar* gives evidence as to the date of birth of a person, the entries in his Register of Births and Deaths, caused to be made by him, have been held to be admissible under this section.¹⁶

7. *Villiah Kone v. Emperor*, 1923 Mad. 20; I.L.R. 45 Mad. 766; 72 I.C. 529; dissenting from *Emperor v. Akbar*, 34 B. 599; 7 I.C. 933; 12 Bom. L.R. 663; followed in *Main Chand v. Emperor*, 1924 Lah. 609; I.L.R. 5 Lah. 324; 82 I.C. 129.
8. *Bhagawan Singh v. State of Punjab*, 1952 S.C. 214; 1952 S.C.A. 513; 1952 S.C.J. 284; 1952 S.C.R. 812 (deposition before committing Magistrate); *Jamal Momin v. King-Emperor*, 1925 Pat. 381; 86 I.C. 153; 7 P.L.T. 14; *Ponnuswami v. Kalyana Sundara*, 1930 Mad. 770; 125 I.C. 231; *R.H.F. Oats v. King-Emperor*, 1924 Cal. 104; 76 I.C. 417; 38 C.L.J. 163; *S. T. Sahib v. Hasan Ghani Sahib*, 1957 Mad. 646.
9. *Pandappa Mahalingappa v. Shivalingappa Murteppa*, 1916 Bom. 193; 224 I.C. 169; 47 Bom. L.R. 362.
10. *Firm Ralla Ram Raj Kumar v. Union of India*, 1952 Punj. 340; 54 P.L.R. 429.
11. *Emperor v. Rajni Kanta Bose*, 1922 Cal. 515; I.L.R. 49 Cal. 732; per Woodroffe, J.; *Kishori Lal v. Adhar Chandra*, 1912 Cal. 438; 199 I.C. 10; 76 C.L.J. 61; *Har Chand v. Dewan Singh*, 1929 All 550; 117 I.C. 832; 1929 A.L.J. 615.
12. *Gopi Nath v. Satish Chandra*, A.I.R. 1964 A. 53.
13. *Rameshwar v. State of Rajasthan*, 1952 S.C. 54; 1952 S.C.A. 40; 1952 S.C.J. 46; 1952 S.C.R. 377; *Gopi Shankar v. State of Rajasthan*, 1967 Raj. J.W. 326; 1967 Cr. L. J. 922; A.I.R. 1967 Raj. 159.
14. *Bhuboni Sahu v. The King*, A.I.R. 1949 P.C. 257 (259); *Haroon Haji Abdulla v. State of Maharashtra*, (1968) 2 S.C.R. 421; 1968 S.C. D. 391; (1968) 2 S.C.J. 534; (1968) 1 S.C.W.R. 243; 70 Bom. L.R. 540; 1968 M.L.J. (Cr.) 591; 1968 M.L.W. (Cr.) 116; 17 Law Rep 13; A.I.R. 1968 S.C. 832 (835).
15. *Maghor Singh v. State of Punjab*, A.I.R. 1975 S.C. 1320.
16. *Mst. Baldeo v. Abhey Ram*, 1914 All. 99; 24 I.C. 540; 12 A.L.J. 945; see also *Mst. Naina Koer v. Gobardhan Singh*, 1918 Pat. 40; 37 I.C. 424; 2 P.L.J. 42.

14. School Registers. Entries in a School Register as to the age of a pupil are admissible to corroborate the evidence of the Schoolmaster.¹⁷

15. "To corroborate." Evidence admissible under this section is only admissible in corroboration and not as substantive evidence.¹⁸ Ordinarily, before corroborative evidence is admissible, the evidence sought to be corroborated must be given.¹⁹ It is correct to state generally that an accused must be convicted upon evidence recorded by a judge in the course of the trial by him and that previous statements made by a witness out of Court, though repeated in Court, have only a limited purpose and effect and when they are not repeated but denied in Court, this purpose and effect may be more limited still.²⁰ In a case, the question, which came up before the Court in 1944, was whether the relationship between the plaintiff and defendant was that of partners or employer and employee. The plaintiff deposed in the witness-box that the relationship was one of employer and employee. In August, 1936, he wrote out the terms of the agreement entered into by the parties two months earlier, and this document was produced in evidence. The trial Court accepted this document as correctly stating the terms of the arrangement between the parties; but, on appeal, the learned Judges of the High Court held: "On the plaintiff's own admission it was subsequently written out by him. Therefore, to put it at its highest, it is only a piece of corroborative evidence. If the plaintiff's substantive oral evidence on the question of initial agreement is disbelieved, this document loses much of its value, because, if the substantive evidence is rejected, there cannot be anything to corroborate." On further appeal, their Lordships of the Privy Council observed: "With all respect to those learned Judges their Lordships are unable to follow the reasoning. Plainly a document written in 1936 could not corroborate evidence to be given by the writer eight years later. The fact that in 1944, when the parties were at arms length, the appellant gave untrue evidence in the witness-box, does not afford an adequate reason for supposing that in August, 1936, he deliberately misrepresented an arrangement arrived at two months earlier. In August, 1936, the parties were on friendly terms, and the appellant had no motive for misrepresenting the arrangement arrived at; whilst the fact that he handed the document to Engineer, the friend and legal adviser of the respondent, seems a sufficient guarantee that the appellant himself thought that he was correctly stating the arrangement arrived at."

17. *Kuram Krishnamachariar v. Krishnamachariar*, 1915 Mad. 815 : I.L.R. 38 Mad. 166 : 19 I.C. 452 : 24 M.L.J. 517.

18. *Bala Bhadra Misra v. Nirmala Sundari Devi*, 1954 Orissa 23 : I.L.R. 1953 Cut. 531 : 19 Cut. L.T. 402; *Mohammad Afzal v. The Crown*, 1950 Lah. 151 : 1950 Pak. L.R. (Lah.) 294 : 1950 Pak. Cas. 450 ; *Kadiya Kanbi Bhavan Manji v. Ismail Mamad*, 1955 Sau. 32 : 6 Sau. L.R. 517 ; *Sanika Munda v. Emperor*, 1935 Pat. 19 : 152 I.C. 832 ; *Sankaralinga Tevan v. Emperor*, 1930 Mad. 632 (2) : I.L.R. 53 Mad. 590 : 124 I.C. 506 ; *R. v. Akbar Badoo*, 7 I.C. 933 : 12 Bom. L.R.

663 ; *Abdul Latif v. Emperor*, 1941 Cal. 533 : 196 I.C. 439 : 45 C.W. N. 763 ; *Gajadhar v. Emperor*, 1932 Oudh 99 : I.L.R. 7 Luck. 552 : 137 I.C. 79 ; *Govind v. State*, A.I.R. 1967 Guj. 288.

19. *Muthu Goundan v. Chinniah Goundan*, A.I.R. 1937 Mad. 861 (862) ; *Sanika Munda v. Emperor*, A.I.R. 1935 Pat. 19 ; In re C.W. Cases, A.I.R. 1948 Mad. 489 ; *Public Prosecutor v. Kuraba Sanjeevamma*, A.I.R. 1959 A.P. 567 ; *Kshetrimayam Raghu Singh v. Union Territory of Manipur*, 1968 Cr. L.J. 690 (693) .

20. *Nur Muhammad v. Emperor*, 1944 Sind 38 : I.L.R. 1944 Kar. 86 : 211 I.C. 405.

Accordingly their Lordships, in agreement with the trial Judge, held that the document was a most important contemporary document which correctly stated the terms agreed upon between the parties.²¹ In the undermentioned case,²² in which the prisoner had been tried and convicted of an offence, the depositions of witnesses, given in a previous trial of other persons charged with having been engaged in the same offence, were used against him. The witnesses, instead of being examined in the ordinary way, were re-sworn and said, I gave evidence before in this Court, and that evidence is true. The irregularity and injustice of this mode of proceeding were commented upon, and it was pointed out that the depositions containing the statements of a witness as to the commission of the offence in the earlier trial would have been admissible to corroborate his testimony given in the trial of the prisoner. The evidence of the witness whose testimony it was proposed to corroborate should have been first taken, and after such witness had finished his evidence, and not before, the former deposition might have been put in, not to add to his testimony, but simply to corroborate it by showing that the statements made by him, while the facts were still fresh in his memory, correspond with those made by him in the Court of Session in the present case. In the case cited, at the time when each deposition was put in, the evidence of the witness not having been given in the Court of Session, there was nothing in the record which made it admissible. There was in fact nothing which was corroborated by it. In the undermentioned case,²³ a witness was asked with a view to corroborating another person intended to be called as a witness whether or not the latter person had made any statement to him with respect to one of the matters in suit. It was held that as this section refers to the corroboration of the testimony of a witness, ordinarily, before corroborative evidence is admissible, the evidence sought to be corroborated must have been given. The Court had no doubt a discretion to allow evidence to be given under this section out of the regular order upon an undertaking by Counsel to call the witness sought to be corroborated, though such a course will be found in most cases to be inconvenient. If necessary, a witness will be allowed to be recalled to give evidence under this section after the person sought to be corroborated has given his evidence.²⁴ And in the undermentioned case, where an advocate was charged with having advised bribery, and the charge was founded on conversation with another Counsel, it was held that evidence of persons to whom the latter had in the absence of the accused repeated the conversations was admissible under this section, but did not help the determination of the real issue (the truth of the charge).²⁵

An earlier statement of a witness cannot be let in under this section, if there is nothing in his statement in Court which may be corroborated by the earlier statement.¹ It can be used under this section only to corroborate the witness and not to contradict him.² The Supreme Court has however held,

21. *Hubert P. James v. Gulam Hussain*, 1949 P.C. 151 : 1949 A.L.J. 148 : 51 Bom. L.R. 945 : 62 L.W. 454.
22. *R. v. Bishonath*, (1869) 12 W.R. (Cr.) 3.
23. *Nistarini v. Nundo*, (1900) 5 C.W. N. xvi.
24. *Nistarini v. Nando*, (1900) 5 C.W.N. xvi : *Muthu Goundan v. Chinniah Goundan*, 1937 Mad. 861; see also *Khijiruddin v. Emperor*, 1926 Cal. 139 : I.L.R. 53 Cal. 372 : 92 I.C. 442.
25. *In the matter of Bomanjee*, 34 I.A.

- 55 : I.L.R. 34 Cal. 129 : 9 Bom. L.R. 3.
1. *Khijiruddin v. Emperor*, 1926 Cal. 139 : I.L.R. 53 Cal. 372 : 92 I.C. 442 : *Mst. Misri v. Emperor*, A.I.R. 1934 Sind 100 : 151 I.C. 437 : overruled in *Ramratan v. State of Rajasthan*, A.I.R. 1962 S.C. 424 : (1962) 1 S.C.J. 371.
2. *Jamal Momin v. Emperor*, 1925 Pat. 381 : 86 I.C. 153 : 7 P.L.T. 14 : but see *Abdul Latif v. Emperor*, 1941 Cal. 533.

overruling the view in *Mst. Misri v. Emperor*³ as well as the decision in A. I. R. 1951 Pepsu 66, that two conditions must be fulfilled before Sec. 157 could be applied; (1) the witness should have deposed to a certain fact and (2) he should have made a statement earlier with respect to the same fact at or about the time the fact took place, or before any authority in charge of investigation. The former statement would be admissible, even though the witness might not own that he had made the former statement.⁴ The post-mortem report of a doctor in his previous statement which can be used only to corroborate his statement under this section, or to refresh his memory under Sec. 159.⁵

It is not necessary, in order to make corroborating evidence admissible, that the witness to be corroborated must also say in his evidence that he had made such and such statement to the witness who is to corroborate him, at or about the time when the fact took place.⁶ It is incorrect to say that the statement of a ravished woman to other witnesses corroborates the incident itself.⁷

When the executant of a document containing recitals as to boundaries upon which reliance is placed is himself a witness in the case, the recitals can be put to him under this section as a former statement corroborating the deposition and he can also be confronted with the recitals under Sec. 155, ante.⁸

Recitals in sale-deeds which corroborate oral statements of witnesses are admissible under the present section.⁹

The prosecution cannot press into service the provisions of this section in order to seek corroboration of a witness's statement from that made before the Investigating Officer for this is clearly barred by Sec. 162, Criminal Procedure Code (same section in 1973 Code).¹⁰

16. Proof of former statements. Such statements must also be regularly proved by the person who received them or by someone who heard them given.¹¹ When it is desired to corroborate a witness by a previous deposition, or by a first information report recorded under Sec. 154, Criminal Procedure Code [now Section 154(1) of 1973 Code], these documents must be produced, for they are documents required by law to be reduced to writing

3. A.I.R. 1934 Sind 100 (*supra*).

4. *Ramratan v. The State of Rajasthan*, A.I.R. 1962 S.C. 424 : (1962) 1 S.C.J. 371; see also *Dwarka Nath v. Lalchand*, (1965) 1 S.C.W.R. 947; A.I.R. 1965 S.C. 1549 : (1966) 2 S.C.J. 95; I.L.R. (1965) 2 All 250; 1966 A.L.J. 129 : (1965) 3 S.C.R. 27; *Radha Kishan v. State*, 1973 Cr. L.J. 481 (484) : 1972 W.L.N. 309.

5. *Hadi Kirsani v. State*, I.L.R. 1965 Cut. 403 : A.I.R. 1966 Orissa 21 : 31 Cut. L.T. 823.

6. *Ramratan v. The State of Rajasthan*, (1962) 3 S.C.R. 590 : (1962) 1 S.C.J. 371 : 1962 A.W.R. (H.C.) 268 : 1962 M.L.J. (Cr.) 263 : A.I.R. 1962 S.C. 424 (426) ; *State*

v. Pareswar Ghosi, I.L.R. 1967 Cut. 980 : 33 Cut. L.T. 1193 : 1968 Cr. L.J. 201 : A.I.R. 1968 Orissa 20 (24) ; *Kina Behara v. The State*, 1968 C.L.T. 267.

7. *Vithappa Bhimappa Koli v. State*, (1972) 2 Mys. L.J. 59 (63).

8. *V. A. Amiappa Nainar v. Annamalai Chettiar*, (1972) 2 L.W. 691 (693).

9. *Salima Bibi v. Mariya Bibi*, A.I.R. 1972 Gauhati 148 (151).

10. *Pritam Singh v. State*, 1972 A. Cr. C. 330 : 1972 A.L.J. 744 : 1972 A.W.R. 52.

11. *R. v. Bissen Nath*, (1867) 7 W.R. Cr. 31 ; *C. A. Haymerdinguer v. Emperor*, 1920 Lah. 254 : 58 I.C. 344.

and secondary evidence of their contents cannot be given.¹² Where prosecution cross-examined its own witness with reference to statement made to police, but due to non-availability of case diary contradictions could not be proved, the so-called contradictions remained unproved and the statement of witness in Court could not be rejected.¹³ The case of a statement by way of complaint against the commission of a crime has been already dealt with by the eighth section, Illusts. (j) and (k) ante, as independent evidence of a fact, statements are, by that section, relevant as conduct, if they accompany and explain facts other than statements.¹⁴

158. *What matters may be proved in connection with proved statement relevant under Section 32 or 33.* Whenever any statement, relevant under Sec. 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

s. 3 ("Relevant.")	s. 3 ("proved.")
ss. 23, 33 (Statements by persons who cannot be called as witnesses.)	s. 157 (Corroboration.)
s. 135 (Evidence to contradict.)	s. 155 (Impeaching credit.)

Steph., Dig., Art., 135; Burr. Jones, Ev., s. 849; Norton, Ev., 335, 336; Cunningham, Ev., s. 158.

SYNOPSIS

1. Principle.
2. Corroboration or contradiction of statements under Sec. 32 or 33.

1. Principle. See Note, post.

2. Corroboration or contradiction of statements under Sec. 32 or 33.

This section refers to certain statements made by persons, who from some unavoidable cause cannot be produced, and of which under Sec. 32 or 33 evidence may, in the circumstances there described, be given. The present section has the effect of exposing any such statement, when admitted as far as may be, to all the scrutiny, and giving it the advantage of all the corroboration, which it would have had on the cross-examination of the person making it. The statements admissible under Sec. 32 or 33 are exceptional cases, and the evidence is only admitted from the impossibility, improbability or great inconvenience of producing the authors of the statements. It is only just, therefore, that all the same safeguards for veracity should be provided, as if the authors of the statements were themselves before the Court and subjected to oath and cross-examination.¹⁵ So, with regard to the impeachment of witnesses, the general rule applies where the witness whose testimony is attacked is deceased or absent. Thus, where the testimony given on a former trial by a witness, since deceased, was read to the jury, it was held

12. For an instance of the use of a deposition in corroboration, see R. v. Ishri Singh, (1886) 8 A. 672.

13. *Abhya Jena v. The State*, (1976) 42

Cut. L.T. 1028.

14. v. ante, S. 8.

15. *Norton, Ev.*, 335, 336; *Cunningham, Ev.*, s. 158.

competent to show that such witness had stated since the trial that such statement was untrue.¹⁶ This section places a person, whose statement has been used as evidence under Sec. 32, in the same category as a witness actually produced in Court for the purpose of contradicting his statement by a previous statement made by him.¹⁷ When the statement of a witness previously made is used as evidence under the provisions of Secs. 32 and 33, Evidence Act, then any other statement made by that witness can be used by virtue of this section, for the purpose of contradicting that witness, as if such witness had appeared in Court and was cross-examined on such previous statement and on question being asked had denied the facts mentioned in the same.¹⁸ Where a report about the commission of an offence is given to the police at two different places by two different persons and one is earlier in point of time than the other, the later report is not a statement made to a police officer in the course of investigation but is an independent first information report and therefore can be used in evidence by the prosecution.¹⁹ A statement, otherwise falling under Sec. 162, Cr. P. C. (same section in 1973 Code) would not become admissible merely because it can be brought under Sec. 158 or Section 159, Evidence Act. The provisions of Sec. 162, Cr. P. C., (same section in 1973 Code) are specific provisions on the admissibility of statements made to the police and control the general provisions contained in Secs. 158 and 159, Evidence Act. But, if after the first information report regarding theft, which report mentions merely the fact of the theft without giving any list of articles stolen or names of culprits suspected, the complainant hands over a list of the stolen property to the Sub-Inspector; as soon as he arrives on the spot for investigation, such a list is not covered by Sec. 162 (same section in 1973 Code) but is a part of the first information report under Sec. 154, Criminal Procedure Code [now Section 154(1) of 1973 Code], and is admissible in evidence.²⁰ A list given to implement and complete the first report is certainly admissible. No doubt there may be cases where a description of property given during police investigation cannot be proved in view of the provisions of Sec. 162, Criminal Procedure Code (same section in 1973 Code). But a list might be made for the informant's own benefit shortly after the crime which could certainly be referred to under Sec. 158 and proved under Sec. 159 of the Indian Evidence Act.²¹ The question whether a witness is entitled to credit or not must be decided by a Court on the evidence before it, and not on what another Court thought of the witness in another case.²²

A subsequent statement may be relevant and admissible in view of this section to contradict an earlier statement. But two questions arise, namely—

16. *Craft v. Com.*, 81 Ky. 250 (Amer.) cited with other American cases in *Burr. Jones, Ev.*, s. 849, where the passage reads "incompetent", but this appears to be a mistake. For another instance of the application of this section, see the case of *Fool v. Nobin*, 23 C. 441. See *Naina v. Gobardhan*, 1918 Pat. 40 : 37 I.C. 424.
17. *Hari Ram v. Emperor*, 1926 Lah. 122 : 89 I.C. 897.
18. *ib.*, *Niamat Khan v. Emperor*, 1930 Lah. 409 : 127 I.C. 850 ; *Hari Ram v. Emperor*, *supra*.
19. *Emperor v. Lalji Rai*, 1936 Pat. 11 : 160 I.C. 181 : 16 P.L.T. 730.
20. *Bhundu v. Rex*, 1949 All 364 : 1949 A.L.J. 174 ; see also *Autar v. Emperor*, 1931 Oudh 74 : 126 I.C. 493 ; *Emperor v. Narain*, 1931 Oudh 83 : 131 I.C. 72.
21. *Amrit Lal v. Emperor*, 1933 Lah. 987.
22. *Chandeshwar Prasad v. Bisheshwar Pratap*, 1927 Pat. 61 : I.L.R. 5 Pat. 777 : 101 I.C. 289.

(1) What is the statement made in the later deed and whether it contradicts the earlier statement? and

(2) What is the value to be attached to the subsequent statement?

The decision should turn on the answer to the above two questions.²³

159. *Refreshing memory.* A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory. Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

160. *Testimony to facts stated in document mentioned in Section 159.* A witness may also testify to facts mentioned in any such document as is mentioned in Sec. 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept although he has forgotten the particular transactions entered.

²⁴161. *Right of adverse party as to writing used to refresh memory.* Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

23. *Ramrati Kuer v. Dwarika Prasad Singh*, A.I.R. 1967 S.C. 1134 : (1967) 1 S.C.W.R. 647 : (1967) 1 S.C.R. 153 : (1967) 2 S.C.J. 789; 1967 A.L.J. 277 : 1967 M.P.W.R.

1 : 1967 B.L.J.R. 278.
24. As to the application of S. 161 police diaries, see the Code of Criminal Procedure, 1898 (Act 5 of 1898) S. 172 (same section in 1973 Cod

s. 3 ("Court.")

s. 3 ("Documents.")

Steph., Dig., Art. 136; Taylor, Ev., ss. 1406—1413; 2 Ph. & Arn., Ev., ss. 480, 487; Greenleaf, Ev., ss. 437—439; Wharton, Ev., ss. 516—526; Stewart Rapalje's Law of Witnesses, ss. 279—285; Burr. Jones, Ev., ss. 877—886; Powell, Ev., 9th Ed., ss. 169—172; Dickson's Ev., ii, s. 1779; Wood's Practice, Ev., ss. 129—146; Goodeve, Ev., ss. 207, 209; Wigmore, Ev., ss. 758—764; Phipson, Ev., 11th Ed., p. 635.

SYNOPSIS

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|---|--|
| 1. Principle. | 8. "While under examination". |
| 2. Refreshing memory. | 9. "Made by himself or by any other person." |
| 3. Cases in which refreshing memory may be allowed. | 10. Time when writing must have been made. |
| 4. Distinction between Secs. 159 and 160. | 11. Use of copy. |
| 5. Obligation to refresh memory. | 12. Right to production and inspection. |
| 6. Report of speech, proof of. | 13. Other modes of refreshing memory. |
| 7. "Any writing." | |

1. **Principle.** Though there are some objections to such a course,²⁵ it is yet clear that an important aid to exactness would be neglected, if, human memory and inaccuracy being what they are, a witness were not at liberty to justify his recollection of facts by reference to written memoranda concerning them.¹ It is desirable to secure the full benefit of the witness's recollection as to the whole of the facts,² and that a witness should not suffer from a mistake and may explain an inconsistency.³ Indeed a witness is under an obligation to refresh his memory, if he can and is invited by the Court to do so, it being his duty to lay the whole truth before the Court to the best of his ability.⁴ It is further to be observed that the committing of a statement to writing calls forth unavoidably a greater degree of attention than the exhibition of it *viva voce* in the way of ordinary conversation. If this be done honestly at the time of the occurrence which forms the subject of the statement, or so soon afterwards that the incidents must have been fresh in the writer's memory, the writing is a most reliable means of preserving the truth, more reliable indeed than simple memory itself. The law, however, here prescribes certain conditions with a view to securing that the memoranda so employed shall be trustworthy. These conditions are laid down by the sections abovementioned.⁵ The witness may be cross-examined as to the paper in his hands, since in no other way can the accuracy and recollection of the witness be ascertained, and it is only by the production and inspection of the document and by such cross-examination that it can be ascertained whether the memorandum does assist the memory or not.⁶ The right of production, inspection and cross-examination is necessary to check the use of improper documents and to compare the witness's oral testimony with his written statement.⁷

25. See Goodeve, Ev., s. 207, citing Bentham; see also his Judicial Evidence, Chap. 11. "Notes whether consultable."

1. Cunningham, Ev., s. 377; for the grounds of admission where the document cannot be said strictly to refresh the memory, see Notes, post.

2. The Empress v. Jhubboo Mahton, (1882) 8 C. 739, 744, 745, per Field, J.

3. Halliday v. Holgate, (1868) 17 L.T. O.S. 18.

4. Harkhu v. Emperor, 1921 All 86 (1): 65 I.C. 575; 19 A.L.J. 76; but see In re Kali Churn, 12 C.L.R. 233.

5. Cunningham, Ev., s. 377.

6. Wharton, Ev., s. 525; Burr. Jones, Ev., s. 879.

7. The Empress v. Jhubboo Mahton, (1882) 8 C. 739, 745, per Field, J.

2. Refreshing memory. A witness will be allowed to have his memory, respecting anything upon which he is questioned refreshed by means of written memoranda. It is not necessary that the document referred to should be one which is admissible in evidence.⁸ So, where, in an action for money lent, an insufficiently stamped promissory note purporting to be signed by the defendant and expressed to be given for money lent was put into the defendant's hands by the plaintiff's Counsel, for the purpose of refreshing his memory and obtaining from him an admission of the loan it was held that the plaintiffs were entitled to use the note for that purpose notwithstanding the provisions of the Stamp Act, that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever."⁹ A witness, for the purpose of refreshing memory, may refer to a book of account kept under his supervision, although it has been excluded from evidence on the ground that it has been produced too late.¹⁰ At the same time, a statement, otherwise inadmissible,¹¹ would not become admissible merely because it can be brought under this section.¹² Nor does Sec. 159 render evidence,¹³ otherwise admissible, inadmissible.¹⁴ There is a practice of referring to statements in the first information reports, medico-legal reports, and so forth, as if they were evidence. This is not justified by law. The proper course is for the witness to refer to the document which he has prepared at the time under Sec. 159, and state in Court everything which the prosecution or counsel for defence or the trying Magistrate or Judge considers material.¹⁵ If a witness wants to refresh his memory, the facts which entitle him to do so ought to be first elicited from him, namely, that he had no clear independent recollection but wanted to refresh his memory by seeing the writing and that the writing was made in his presence at or about the time when the incident took place, and that he had read that writing at that time and found the contents to be correct.¹⁶ Before a witness is allowed to refresh his memory from any writing made by him, the requirements of Sec. 159 should be complied with. It must be shown that the writing was made by the deponent at the time when he examined the complainant, or so soon after, that the Court considers it likely that the transaction was at that time fresh in his memory.¹⁷

3. Cases in which refreshing memory may be allowed. It is open to a witness to refresh his memory by reference to a document, as provided under Secs. 159 and 160 and within the limitations prescribed therein. If the witness has refreshed his memory with reference to any such document, there is a right to inspect and use the same for purpose of cross-examination, as provided under Sec. 161 of the Act.¹⁸ In the last-cited case the defence wit-

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| <p>8. See <i>Bhika v. Emperor</i>, 1924 Lah. 605 : 76 I.C. 31 ; <i>Emperor v. Mahadeo Dewoo</i>, 1946 Bom. 189 : 224 I.C. 261 : 47 Bom. L.R. 992; <i>Abdulla v. Emperor</i>, 1933 Lah. 716 : I.L.R. 14 Lah. 290 : 145 I.C. 647 (F.B.).</p> <p>9. <i>Birchall v. Bullough</i>, (1896) 1 Q.B. 325 ; <i>Baloch v. Emperor</i>, 1933 Sind 220 : 144 I.C. 772 ; <i>Choudhri Ram Prasad v. Nathu Ram</i>, 1923 Nag. 32 : 68 I.C. 494.</p> <p>10. <i>Jewan v. Nilmani</i>, 1928 P.C. 80 : 55 I.A. 107 : I.L.R. 7 Pat. 305 : 107 I.C. 337 (P.C.).</p> <p>11. e.g., as by failing under S. 162, Cr. P.C.</p> | <p>12. <i>Bhonglu v. Rex</i>, 1949 All 364 : 1919 A.L.J. 174.</p> <p>13. Note; of a speech in the case cited.</p> <p>14. <i>Om Prakash v. Emperor</i>, 1930 Lah. 867 : 127 I.C. 209.</p> <p>15. <i>Mohammad Salabat v. Emperor</i>, 1937 Lah. 475 : 170 I.C. 253 : 39 P.L.R. 290.</p> <p>16. <i>Sabitri Thakurain v. F.A. Savi</i>, 1933 Pat. 306 : I.L.R. 12 Pat. 359 : 145 I.C. 1.</p> <p>17. <i>Pannalal Shaw v. Nanigopal Biswas</i>, 1949 Cal. 103 : 52 C.W.N. 922.</p> <p>18. <i>Republic of India v. Rajan</i>, I.L.R. 1967 Cut. 148 : A.I.R. 1967 Orissa 115 (116) : 33 Cut L.T. 259 (245)</p> |
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ness, it was alleged, used an exercise book for refreshing his memory and the prosecution could insist upon the production of that document for use in cross-examination. Though under Sec. 159 a witness may refresh his memory by looking into a document and give evidence in the ordinary way, the document by itself is not evidence. It can acquire some value under Sec. 160, if it satisfies the conditions therein.¹⁹ It has been said²⁰ that there are three classes of cases in which this may be allowed :

(a) Where the writing serves only to revive or assist the memory of the witness and to bring to his mind a recollection of the facts. This is the case referred to in Sec. 159. Here the writing is, in the stricter sense, used to refresh the memory, that is, the witness has a present memory of the facts after the inspection of the writing. In this case, the document is resorted to to revive a faded memory and the witness swears from the actual recollection of the facts which the document evokes.²¹ Memory is, in other words, restored.

(b) Where the witness recollects having seen the writing before, and though he has no independent recollection of the facts mentioned in it, yet remembers that, at the time he saw it, he knew the contents to be correct; see Sec. 160, Illust.²² In this case, the witness has no present memory of the fact itself, but if the witness be correct in that which he does positively state from present recollection, *viz.*, that at a prior time he had a perfect recollection, and having that recollection, says, it was truly stated in the document produced, the writing, though its contents are thus but mediately proved, must be true.²³

(c) Where it brings to the mind of the witness, neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing which he knows to be genuine. In this case, the testimony of the witness is admissible to prove a fact, although he has neither any recollection of the fact itself, nor mediate knowledge of the fact by means of a memorial of the truth of which he has a present recollection. This happens when the memorandum is such as to enable the witness to state with certainty that it would not have been made had not the fact in question been true. Here the truth of the evidence does not wholly depend on the content of the document itself or on any recollection of the witness of the document itself or of the circumstances under which it was made, but upon a conviction arising from the knowledge of his own habits and conduct, sufficiently strong to make the existence of the document wholly irreconcilable with the non-existence of the fact, and so to convince him of the affirmative.²⁴ Thus, in proving the execution of an instrument (one of the most ordinary and cogent cases within this class) where a witness, called to prove the execu-

19. Mohan Singh Laxman Singh v. Bhanwarlal Rajmal, A.I.R. 1964 M.P. 137; Aswini Kumar v. Union Territory of Tripura, A.I.R. 1969 Tripura 137.

20. 2 Ph. & Arn. Ev., ss. 480, 481; followed in Greenleaf, Ev., s. 437; Burr Jones, Ev., ss. 878, 884; Stewart Rapalje's op. cit., 461, 462; Starkie, Ev., 177, 178; Taylor, Ev.

s. 1412; Powell, Ev., 9th Ed. 169 and other writers. These sections substantially follow the English rules in these matters.

21. Goodeve, Ev., ss. 209, 213; Burr. Jones, Ev., s. 884.

22. And cases cited in Taylor, Ev. s. 1412.

23. Starkie, Ev., ss. 177, 178.

24. Starkie, Ev., s. 178.

tion of the deed, sees his signature to the attestation, and says he is thereby sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, although the witness should add that he has no recollection of the fact of the execution of the deed.²⁵ The admission of such evidence is, however, not confined to attestations of the execution of written instruments.¹

4. Distinction between Secs. 159 and 160. These last two classes, which may logically be considered together, are the subject-matter of Sec. 160.² In the two latter classes of cases, it is of course essential that the witness should, on seeing the writing, be able to depose positively to the facts to which he is examined, although he may have no present recollection of them independently of the writing.³ In Secs. 159 and 160 of the Evidence Act a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing and the testimony which he can give of facts stated in the document. If it is merely a question of a man refreshing his memory, the document itself is not tendered in evidence, and the witness merely gives evidence in the ordinary way after reading what has been written. Section 160 deals with the case where, in spite of having written or read a document under the circumstances described in Sec. 159, the witness has got no specific recollection of the facts therein recorded, but is sure that they were correctly recorded. Section 160 applies equally when the witness states in so many words that he does not recollect and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts, he can only testify to the effect that he recorded correctly what the deponent said at the time.⁴ Section 159 deals with cases in which the witness really does refresh his memory. In the cases referred to in Sec. 160, the document is resorted to "give a record of the past, the life of a present deposition by the witness's attestation of its truth, even where memory itself may wholly have vanished."⁵ This is perhaps hardly logically termed "refreshing the memory", though undoubtedly it is so called in practice. So Sec. 160 speaks of "testify to facts" instead of "refresh his memory" in Sec. 159. But the witness can only testify in the manner mentioned in the text.⁶ The witness, after referring to the writing, swears as to the fact, not because he remembers it but because of his confidence in the correctness of the writing.⁷ The correct legal position is somewhat like this. Normally a police officer

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25. Per Bayley, J. in *Maugham v. Hubbard*, (1828) 8 B. & C. 14; and see *Bringloe v. Goodson*, (1839) 5 Bing N.C. 758; see *Taylor, Ev.*, s. 1412.
 1. *Maugham v. Hubbard*, *supra*.
 2. The want of recollection of the facts mentioned in the two latter classes, though it does not affect the admissibility of the evidence, must yet be considered in deciding upon the amount of value to be assigned to it.
 3. 2 Ph. & Arn. Ev., 481; *Starkie*, 719; *Maugham v. Hubbard*, (1828) 8 B. & C. 14; *R. v. St. Martins Leicester*, (1834) 2 A. & E. 210.
 4. *Partap Singh v. Emperor*, 1926 Lah. 310; I.L.R. 7 Lah. 91; 92 I.C. 167; *Krishnamma Naicken v. Emperor*, 1931 Mad. 430; I.L.R. 54 Mad. 678; 135 I.C. 337; see also the cases cited in these two cases.
 5. *Goodeve, Ev.*, 209. In the first of the three classes memory is restored, and in the second history is verified, *ib.*, 213.
 6. See *Markby, Ev.*, 111, 112.
 7. *Davis v. Field*, 56 Vt. 426 (Amer.). It has also been said that the witness is allowed to testify to the matter so recorded, because he knows he could not have made the entry unless the fact had been true; *Costello v. Crowell*, 133 Mass. 352 (Amer.); see *Abdul Salim v. King-Emperor*, 1922 Cal. 107; I.L.R. 49 Cal. 573; 69 I.C. 145.

should reproduce the contents of the statement made by the accused under Sec. 27 of the Act in Court by refreshing his memory under Sec. 159 from the memo earlier prepared thereof by him at the time the statement had been made to him, or in his presence, which was recorded at the same time or soon after the making of it, and that would be perfectly unexceptionable way of proving such a statement. But it would not be correct to say that he can refer to the memo under Sec. 159 only, if he establishes a case of lack of recollection and not otherwise, and where the police officer swears that he does not remember the exact words used by the accused from lapse of time or a like cause; even where he does not positively say so but it is reasonably established from the surrounding circumstances (chief of which would be the intervening time between the making of the statement and the recording of the witness's depositions at the trial) that it could hardly be expected in the natural course of human conduct that he could or would have a precise or dependable recollection of the same, then under Sec. 160 it would be open to the witness to rely on the document itself and swear that the contents thereof are correct, where he is sure that they are so, and such a case would naturally arise where he happens to have recorded the statement himself, or where it has been recorded by someone else but in his own presence, and in such a case the document itself would be acceptable substantive evidence of the facts contained therein.⁸ As to the use of a copy in the cases dealt with in Sec. 160, v. post. The meaning of the expression "if he is sure" is that the witness must satisfy the Court with reference to ordinary probabilities of his right to be sure that the record relied upon by him is correct.⁹

5. Obligation to refresh memory. If, upon any question, a witness suffers from a *bona fide* lapse of memory, and that failure of memory can be remedied by reference to any memorandum or other writing prepared by the witness at the time, and the Court invites the witness to refresh his memory with reference to the writing, the witness is under an obvious obligation to do so.¹⁰ The court can and should compel him to do so.¹¹

6. Report of speech, proof of. Written reports of speeches can only be used in two ways:

- (1) to refresh a witness's memory under Section 159; and
- (2) under Section 160 after satisfying two conditions:
 - (i) that the witness has no specific recollection of the facts themselves; and
 - (ii) the witness says that the facts were correctly recorded in the document.

In the case before the Supreme Court the written reports were used under Section 160. The Supreme Court held that it was clear that the reports were written by the witnesses themselves at the time of the speeches or soon afterwards when the speeches were fresh in their memory. It is not necessary that

8. *Dharma v. The State*, I.L.R. 1965 Raj 989 : A.I.R. 1966 Raj 74 : 1965 Raj L.W. 418.

9. *Yesuvadiyan v. Subba Naiker*, 1919 Mad. 132 : 52 I.C. 704. The statement of law given in the first two paragraphs was approved in *Abdul Salim v. Emperor*, 1922 Cal. 107,

supra.

10. *Harkhu v. Emperor*, 1921 All. 86 (1) : 65 I.C. 875 : 19 A.L.J. 76; *Fatnaya Lal Khan v. Emperor*, 1942 Lah. 89 : I.L.R. 1942 Lah. 470 : 199 I.C. 870.

11. *Mohiuddin Khan v. King-Emperor*, 1924 Pat. 829.

a witness should specifically state that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded in the document before the document can be used under Section 160. It is enough if it appears from his evidence that these conditions are established. The second requirement would be satisfied if the court comes to the conclusion that the witness was in a position correctly to record the facts in the document. It is not essential that the witness must state orally before the court that although he had no specific recollection of the facts themselves he was sure that the facts were correctly recorded in the document.¹² In the circumstances of the last cited decision of the Supreme Court, though the exact words were not taken by the reporters (police constables); it was held that the notes correctly reproduced the substance of the speeches.¹³

Officers (in the instant case a police officer) deputed to transcribe in shorthand the speeches of persons at public meetings, under departmental instructions, should not generally be permitted through the procedure prescribed under statute to object to the production of the transcript as relating to affairs of State. The mere fact, that the record was made by a police officer and confidentially forwarded to his superior, would not render the document privileged under Section 123, *ante*, read with Section 162. The position now is, even in England, that the document must be produced for inspection by the court¹⁴ and that the court will order disclosure if it is satisfied that there is no prejudice, or possibility of prejudice, to the public interest.¹⁵

The evidence of the witness can be of no value, in view of the provisions of Sections 159 and 160, if the notes, which the witness said he took down, cannot be regarded as primary evidence of what was said. If the witness did not state orally what was alleged to have been stated and of which he took down notes, and when the witness did not use the notes to refresh his memory, there can be no question of their having been used under Section 159 of the Act. Under that provision, the witness refreshes his memory by looking at the notes and giving his evidence in the ordinary way. The notes are not in themselves evidence. Under Section 160, the memory of the witness is not refreshed. Here the notes themselves are tendered in evidence and the witness testifies to the facts mentioned in them if he has no specific recollection of the facts themselves and if he is sure that the facts were correctly recorded in the notes. It is only subject to the conditions mentioned in Sec. 160 that the notes themselves acquire some evidentiary value. So, where the witness does not give a resume of what was said, and he does not say that he was unable to state by memory what was said, and he does not even make the statement that the notes contained a correct record of what was said, and on the other hand admits that the notes contained his impressions of what was absolutely said, in these circumstances, the notes do not become primary evi-

12. Kanti Prasad Jayashanker Yagnik v. Purshothamdas Ranchhoddas Patel, (1969) 3 S.C.R. 400 : (1969) 1 S.C.C. 455 : (1969) 2 S.C.J. 351: A.I.R. 1969 S.C. 851 (853) overruling Sodhi Pindi Das v. Emperor. A.I.R. 1923 Lah. 629 and Jagan Nath v. Emperor, A.I.R. 1932 Lah. 7 and approving Public Prosecutor v. Venkatarama Naidu, A.I.R. 1943 Mad. 542.

13. Kanti Prasad Jayashanker Yagnik v. Purshothamdas Ranchhoddas Patel, (1969) 3 S.C.R. 400 : (1969) 1 S.C.C. 455 : (1969) 2 S.C.J. 351 : A.I.R. 1969 S.C. 851 (858).
14. Conway v. Rimmer, (1968) 2 W. L.R. 998 : (1968) 1 All E.R. 874 (H.L.).
15. R. Ramasrinivasan v. P. Shanmugam. 1968 M.L.W. (Cr.) 211 : A. I.R. 1969 Mad. 378.

dence of what was said and cannot be used as such.¹⁰ In *Mylapore Krishnasami v. Emperor*,¹⁷ it has been held that where a person records, not the actual words used, but simply notes of the impressions made on his mind by a speech, such notes are inadmissible under Section 160 of this Act to prove the actual words used. Where the witness does not make any notes of speeches delivered at any other meeting, but takes special unusual precautions of having his notes jotted by some persons, and the notes only contained those statements which are found objectionable, that goes to show that the notes were taken down for a particular purpose and raise a reasonable suspicion that what was recorded in the notes was not a correct record of what was said, and such notes must be excluded from consideration.¹⁸

7. "Any writing". The section says the witness may refer to any writing. It is immaterial, therefore, what the document is, whether it be a book of account, letter, bill of particulars of articles furnished, including such items as dates, weights and prices, way-bills, notes made by the witness, or any other document whatsoever which is effectual to assist the memory of the witness.¹⁹ As to the significance of the words "while under examination," v. post, note to Sec. 161. "Writing" includes printed matter.²⁰ If the witness has become blind, the paper may be read over to him for the purpose of exciting his recollections.²¹ And it has been held in America that where a paper is signed with the mark of a witness, who cannot read or write, it may be read over to him for the same purpose.²²

A statement reduced to writing by a police officer under Sec. 162 of the Criminal Procedure Code cannot be used as evidence. But though it is not evidence, the police officer to whom it was made may (it was held) use it to refresh his memory under Sec. 159 of this Act, and may be cross-examined upon it by the party against whom the testimony aided by it is given.²³ A police diary can be used to assist the Court, as by suggesting means of elucidating points otherwise left in doubt, but cannot be used as containing entries which can by themselves be accepted as evidence of any date, fact or statement recorded in it.²⁴ Only the police officer who kept such diary

16. *Mohan Singh v. Bhanwarlal*, A.I.R. 1964 M.P. 137 : 1963 M.P.L.J. 498 : 1963 Jab. L.J. 553.

17. I.L.R. 32 M. 384.

18. *Mohan Singh v. Bhanwarlal*, A.I.R. 1964 M.P. 137 : 1963 M.P.L.J. 498 : 1963 Jab. L.J. 553.

19. See cases in Taylor, Ev., ss. 1406—1410 ; Burr. Jones, Ev., ss. 878, 880, 881 ; e.g., a horoscope ; *Harbahadur v. Chandraj*, 1918 Oudh 371 : 48 I.C. 400 ; 21 O.C. 298 ; *Shankergir v. Chinnuji*, 1923 Nag. 164 : 71 I.C. 140 : 6 N.L.J. 1 (a horoscope can be used to help in proving the date of birth stated in it only under S. 159 or S. 160) ; *Banwari Lal v. Mahesh*, 1918 P.C. 118 : 45 I.A. 284 : I.L.R. 41 All 63 : 49 I.C. 540 (a Memorandum by witness) ; *Keyarasp v. Garbad*, 1930 Nag. 24 (1) : 120 I.C. 224 ; *Maikunda Ram v. Gaya Ram*, 23 I.C. 893 : 10 N.L.R. 44.

20. *Ram Chandra v. Emperor*, 1930

Lah. 371 : 120 I.C. 798.

21. Taylor, Ev., s. 1410.

22. *Commonwealth v. Fox*, 7 Gray (Mass.) 558 (Amer.), cited in *Stewart Rapalje's op. cit.*, s. 285, it should not be read before the jury, but the witness should withdraw with one of the Counsels for each side and have it read to him by them without comment ; ib., and see Burr. Jones, Ev., s. 883.

23. *R. v. Sitaram Vithal*, (1887) 11 B 657 ; following *R. v. Uttamchand Kapurchand*, (1874) 11 Bom. H. C.R. 120. And see to same effect, *R. v. Ismail Valad Fataru*, (1887) 11 B. 659 ; *Roghuni Singh v. R.*, (1882) 9 C. 455, 458. But see *Kashi Ram v. Emperor*, 1928 All 280 : 109 I.C. 120 : 26 A.L.J. 139.

24. *Dal Singh v. R.*, 1917 P.C. 25 : 44 I.A. 137 : I.L.R. 44 Cal. 876 : 39 I.C. 311 ; approving *R. v. Mannu*, (1897) 19 A. 390 (F.B.).

can be confronted with it.²⁵ The statement of a person recorded under Sec. 161 of the Criminal Procedure Code is inadmissible under that section, though it may be used by the police officer who recorded it to refresh his memory.¹ It has been held that lists of stolen property given to the police can be used by the persons who actually wrote them in order to refresh their memory at the time of giving evidence.² Under the amended Criminal Procedure Code a statement made to the Police cannot be used for any purpose except as provided in Sec. 162 of that Code. A statement made to the police during investigation cannot be used to refresh the memory of the witness who made the statement.³

The dying statement of a deceased person, if not taken in the presence of the accused and as a formal deposition, must before it is admitted in evidence be proved to have been made by the deceased. The statement may be proved in the ordinary way by the person who heard it, and the writing may be used for the purpose of refreshing the witness's memory.⁴ The oral statement itself is admissible under Sec. 32 (clause 1) and not merely the record of it.⁵

A *panchnama* is neither a statement made by the Panchas to the police officer nor a statement made by the police to the Panchas. The Panchas can make a *panchnama* of a scene of offence in the absence of any police officer. A *panchnama* is not a statement but a note made by the Panchas of what they have seen at the time of the *panchnama*. Sections 159 to 161 of the Act apply to a *panchnama* and a Panch witness can refresh his memory by referring to the *panchnama* as provided in Sections 159 to 161.⁶ A *panchnama* cannot be used either to corroborate the evidence of the police officer or the evidence of the Panch. A certificate attached to the *panchnama* by the Panchas is part of the *panchnama* and cannot be used to corroborate.⁷ But a *panchnama* may be a statement for the purpose of Sec. 157. It may be a note. If it is a note, it can be used to refresh the memory of the Panch under Sections 159, 160 and 161, but it would not be a statement made to the police officer in the course of the investigations, because the Panch himself has reduced it into writing. Where a Panch hears certain statements made to him and himself reduces what is stated into writing, the writing is a statement made by a person to the Panch. But if a Panch sees something and tells a police officer what he had seen and the police officer then reduces into writing what the Panch had told him of what he had seen, then that writing would be a record made by the police officer of a statement made to him by the Panch of what the Panch had seen. Such a *panchnama* would be hit by Section 162, Cr. P. C. Whether a *panchnama* is one which is hit or not hit by

25. *Dal Singh v. R.*, 1917 P.C. 25 : 44 I.A. 137 : 1 L.R. 44 Cal. 876 : 39 I.C. 311 : approving *R. v. Mannu*, (1897) 19 A. 390 (F.B.).

1. *R. v. Stewart*, 31 C. 1050 : 8 C.W.N. 528.

2. *Hazara Singh v. Emperor*, 1924 Lah. 727 : 82 J.C. 707 : 6 L.L.J. 370 : *Amrit Lal v. Emperor*, 1933 Lah. 987.

3. *Superintendent and Remembrancer of Legal Affairs, Bengal v. Zahiruddin*, 1946 Cal. 483 : 223 I.C. 408 : see also *Zahiruddin v. Emperor*, 1947 P.C. 75 : 74 I.A. 80 : 231 I.C. 86 : 1947 A.L.J. 379.

4. *R. v. Samiruddin*, (1882) 8 C. 211:

10 C.L.R. 11 ; see also *Nga Mya Da v. Emperor*, 1936 Rang 42 : 16 I.C. 597 ; *Saveruddin v. Samiruddin* 1923 Cal. 378 : 72 I.C. 985.

5. *Gowridas Namasudra v. R. A. C.* (1909) 36 C. 665 : 1 I.C. 502 : 1 C.W.N. 596.

6. *State v. Rajibhai*, A.I.R. 1960 Guj 24 ; *Kanbi Bhasan v. Ismail*, A.I.R. 1955 Sau. 32 : 6 Sau. L.R. 517 see also *In re Kolli Seetha Rami*, 18 I.C. 327 : A.I.R. 1939 M. 766 *Kajaji Ramji v. State of Gujarat* 1966 Cr. L.J. 331 (332).

7. *State v. Rajibhai*, A.I.R. 1960 Guj 24

Section 162, Cr. P. C. or whether it is one which can be used under the provisions of Sections 159 to 161,⁸ would depend on the facts of each case. A police officer may himself see or hear certain things and himself reduce into writing what he himself had seen or heard. In that case, it may be a statement of the police officer for the purpose of Sec. 157.⁹ *Panchnamas* are not themselves evidence. They can only be used by persons who signed them or prepared them to refresh their memory.¹⁰

A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination but the report itself cannot be treated as evidence and no facts can be taken therefrom.¹¹ In Scotch law, in the case of medical or other scientific reports or certificates which are lodged, in process before the trial and libelled on as productions in the indictment, the witness is allowed to read the report as his deposition to the jury, confirming it at its close by a declaration on his oath that it is a true report.¹² A certificate of age of a private patient is not relevant as a public record under Sec. 35 of this Act, but could only be used for the purpose of refreshing the doctor's memory.¹³

In order to be useful for the purpose of refreshing the memory, a document need not be admissible itself as independent evidence. So, though *umma-wasilbaki* papers are not admissible as independent evidence to prove the amount of rent mentioned therein, yet it is right that a person who has prepared such papers, on receiving payment of the rents, should refresh his memory from such papers when giving evidence as to the amount of rent payable.¹⁴ Nor does a writing used to refresh the memory thereby become evidence of itself. Consequently, it is not necessary that it should even be admissible, and a document which cannot be read for want of a stamp may be referred to by the witness in giving his evidence.¹⁵ The question sometimes arises whether memoranda used for refreshing memory are themselves to be admitted in evidence. When the witness after reference, finds his memory so refreshed that he can testify recollection independently of the memorandum,

8. *Mivabhai v. State*, A.I.R. 1963 Guj. 188 : 1963 Guj. L.R. 253.

9. *Ibid.*

10. *Bhagirath v. State of Madhya Pradesh*, A.I.R. 1959 M.P. 17 : 1958 M.P.L.J. 745 : 1958 Jab. L.J. 900.

11. *Roghuni Singh v. R.*, (1882) 9 C. 455, 460, 461 ; s.c. 11 C.L.R. 569; see 2 W.R. Cr. Let 14 : 6 W.R. Cr. Let 3 : *R. v. Jadab Das*, (1899) 4 C.W.N. 129 ; *Muhammad Sadiq v. Emperor*, 1926 Lah. 51 : 89 I.C. 458 : 26 P.L.R. 533 ; *Vidyamati v. State*, 1951 H.P. 82 : 53 Cr. L.J. 33 ; *Rangappa Goundan v. Emperor*, 1936 Mad. 426 : 1 I.L.R. 59 Mad. 349 : 161 I.C. 663 ; *In re Ramaswami*, 1938 Mad. 336 : 47 L.W. 272 : 1938 M.W.N. 36 ; *Mohammad Yusuf v. Emperor*, 1930 Sind 225 : 126 I.C. 449 ; *State v. Jawan Singh*, 1971 Cr. L.J. 1656 (1961) (Raj.).

12. *Dickson's Law of Evidence in Scotland*, Vol. II, s. 1779 ; *Alison's Cri-*

minal Law, 540-542, cited in *Taylor, Ev.*, s. 1413, p. 1019, note (1), where the reasons are given for the rule.

13. *Venkata Rangappa v. Subbaraya Goundan*, 1917 Mad. 535 ; 33 I.C. 142.

14. *Akhil Chandra v. Nayu*, (1888) 10 C. 248 ; and see as to collection papers ; *Mahomed Mahmood v. Safar Ali*, (1885) 11 C. 407, 409, so though neither statements under S. 161, Cr. P.C. (ante) nor police diaries (*supra*) are evidence in the case, they may still be used for the purpose of refreshing memory. And see *Tarucknath Mullick v. Jeamat Nosya*, (1879) 5 C. 353 ; see *Wharton, Ev.*, s. 519.

15. *Taylor, Ev.*, s. 1411 ; *Wharton, Ev.*, s. 520 ; as to want of stamp, see *Phipson, Ev.*, 11th Ed., 635, citing *Burchell v. Bullough*, (1896) 1 Q.B. 325 ; *Maugham v. Hubbard*, (1828) 8 B. & C. 14 and ante.

there is no reason or necessity for the introduction of the paper or writing itself; and it is not admissible. But another rule prevails when the witness cannot testify to the existing knowledge of the fact independently of the memorandum, but can testify that, at or about the time the writing was made, he knew of its contents and of their truth or accuracy. In such cases, both the testimony of the witness, and the contents of the memoranda are held admissible. "The two are the equivalent of a present positive statement of the witness affirming the truth of the memorandum."¹⁶ A witness may refresh his memory from a writing made by another person and inspected and signed by him at the close of the day on which it was made, when it brings to his mind neither any recollection of the facts mentioned therein, nor of the writing itself, but when it nevertheless enables him to testify to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine.¹⁷ In a case in the Madras High Court, the relevancy of the notes of a speech was considered, and it was held that while it was best to set out the words as fully as possible in such a report, it was not necessary that the speech should be proved verbatim, and it was held that such notes were admissible, if the witness was sure that they were substantially accurate.¹⁸

Any criminal court may send for the police diaries of a case under inquiry or trial, and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial. As to their use for refreshing memory, see Note.¹⁹ It has been held that a witness, who has the means of aiding his memory by a recourse to memoranda or papers in his power, can lawfully be required to look at such papers, to enable him to ascertain a fact with more precision, to verify a date, or to give more exact testimony than he otherwise could as to times, number, quantities and the like.²⁰

8. 'While under examination.' These words, which occur in Sec. 159, evidently mean 'While under examination in court.' They do not preclude a witness from referring to any writing before his examination. The English rule that in all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable that they should be produced at the trial, does not appear to be strictly necessary.²¹

9. "Made by himself or by any other person." The writing may have been either "made by himself or by any other person", provided the witness examined it and knew it to be correct when the facts were fresh in his mind.²² In the witness-box a surgeon can refresh his memory relating to an operation by the notes dictated by him to his junior soon after performing the operation.²³ It is immaterial that the document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction to

16. *Burr. Jones, Ev.*, s. 886.

17. *Abdul Salim v. Emperor*, 1922 Cal. 107.

18. *Mylapore Krishnasami v. R.*, (1909) 32 M. 384; 2 I.C. 33; 5 M.L.T. 393 [Sankaran Nair, J., dissenting and holding that the actual words were the facts to be proved; see *R. v. Rankin*, 7 St T.N.S. 190; and *Subramania Siva, In re*, (1909) 32 M. 12].

19. See "Criminal Procedure in India." S. 149.

20. *Chapin v. Lapham*, 23 Pick 467 (Amer.); *State v. Staton*, 114 N.C. 813 (Amer.) cited in *Burr. Jones, Ev.*, s. 877.

21. *Taylor, Ev.*, p. 927, citing *Kensington v. Inglis*, (1807) 8 East 273 and *Burton v. Plummer*, (1834) 2 A. & E. 341.

22. *Taylor, Ev.*, s. 1410; *Wharton, Ev.*, s. 522; *Burr. Jones, Ev.*, s. 880, and numerous cases there cited.

23. *Manchida v. State*, 1972 W.L.N. 867 (Raj.).

which it relates.²⁴ It is not necessary that the writing should have been made by the witness; for it is the recollection and not the memorandum which is evidence. Thus, a seaman has been allowed to refer to a log-book which, though not written by himself, had from time to time, and while the occurrences were recent, been examined by him.²⁵ So, it has been said that a witness at Sessions might be shown his former deposition before the committing Magistrate in order to refresh his memory a couple of months after, if such first deposition were taken immediately after the occurrence.¹ So also a deposition recorded under Sec. 512, Criminal Procedure Code (now Section 299 of 1973 Code), may be used to refresh the memory of the witness.² But it is clear that a witness should not be allowed to use any document to refresh his memory which was made by another person, unless he knows it to be correct.

10. Time when the writing must have been made. Section 159 substantially follows the English rule as to the time when the writing must have been made, this rule being that a writing can be used to refresh the memory of a witness only where it has been made, or its accuracy recognised, at the time of the fact in question, or at furthest so recently afterwards as to render it probable that the memory of the witness had not then become defective.³ So, where a doctor wishes to depose as to the injuries received by a complainant by refreshing his memory from a slip of paper, it must be shown that the writing was made by the deponent at the time when he examined the complainant, or so soon after that the Court considers it likely that the transaction was at that time fresh in his memory.⁴ Its own peculiar circumstances and the discretion of the trial Judge must govern each case raising this question, which in part also depends on the mental character and capacity of the witness. It is clear that the memorandum must not be used to convey original information to the witness. It is, however, impossible to lay down any precise rule as to how nearly contemporaneous with the fact or facts recorded, the memorandum must be.⁵ It has, however, been said,⁶ that usually, "If the witness swears positively that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will be allowed to use them, though drawn up a considerable time after the transaction had occurred." But, if there are any circumstances casting suspicion upon the memoranda, the Court should hold otherwise, as when the subsequent memorandum is prepared by the witness at the instance of an interested party or his attorney,⁷ or if the memorandum has been revised or corrected by such party or attorney.⁸ A witness can refresh his memory

24. *Ram Chandra v. Emperor*, 1930 Lah. 371.

25. *Burrough v. Martin*, (1809) 2 Camp 112.

1. *R. v. Williams*, 6 Cox. 343. As to the use of depositions for refreshment, see *Vaughan v. Martin*, (1796) 1 Esp. 440; *Wood v. Cooper*, (1845) 1 C. & K. 645; *Wharton Ev.*, s. 524.

2. *Bhika v. Emperor*, 1924 Lah. 605; 76 I.C. 31.

3. *Ph. & Arn., Ev.*, s. 484. For a criticism of this rule, see *Wigmore*.

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Ev., s. 761.

4. *Panna Lal Shaw v. Nanigopal Biswas*, 1949 Cal. 103; 52 C.W.N. 922.

5. Recently an expression of some latitude; see *Greenleaf, Ev.*, s. 488.

6. *Taylor, Ev.*, s. 1407; and see *Burr. Jones, Ev.*, s. 882.

7. *Steinkeher v. Newton*, (1838) 9 C.P. 1. j. 313.

8. *Anon*, cited by Lord Kenyon in *Doc v. Perkins*, (1830) 3 T.R. 752, 754.

by the shorthand notes and full shorthand transcripts made by him at the time when he heard the election speeches.⁹ A mazahar prepared immediately after raid and attested by search witnesses can be used for refreshing the memory of attesting witness under this section.¹⁰

With regard to the use of a copy of the document, the section lays at rest a doubtful question of English law.¹¹ The Act treats the copy as primarily inadmissible, though it provides for its reception under the leave of the Court in a case in which the non-production of the original is sufficiently accounted for. The copy should not be used so long as the original is in existence and its absence unexplained,¹² and it should appear that the copy was made by the witness himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy.¹³ The words "such document" in Sec. 160 might be thought to include "a copy of such document" to which reference is made in the last paragraph of Sec. 159. But whatever may be held to be the rule in the second,¹⁴ of the three classes of cases above-mentioned,¹⁵ a copy is clearly inadmissible in the third class.¹⁶ Where the witness neither recollects the fact, nor remembers to have recognised the written statement as true, and the writing was not made by him, his testimony so far as it is founded upon the written paper, is but hearsay, and a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said.¹⁷ But, the Court will not compel a witness to refresh his memory when the result of his doing so would enable cross-examining counsel to see a document which is otherwise privileged.¹⁸

11. Use of copy. The rule of exclusion on the ground of a document being a copy (and the original not being accounted for) does not apply when though in form a copy, the paper is, in reference to the question of refreshing, in the nature of an original or a duplicate. Thus, in the case undermentioned,¹⁹ which was one of a transcript from a waste-book kept by the clerk, copied thence into the ledger day by day under his checking, the ledger was admitted without production of the waste-book. And though a mere extract from the original is sufficient, if the original is but a partial statement only, as for example, such a case as that of recording a speech, a conversation or the like, where it failed to set out the whole verbatim, it might still be used to refresh should the witness swear to its substantial correctness.²⁰

9. *Bukhari v. B. R. Mehra*, A.I.R. 1975 S.C. 1788; *Lakshmi Narayan v. Returning Officer*, (1974) 3 S.C. C. 425; (1974) 1 S.C.R. 822; A.I.R. 1974 S.C. 66.

10. *T. S. Satyanarayana Rao v. State of Mysore*, 1972 Mad. L.J. (Cr.) 321 (Mys.).

11. *Taylor, Ev.*, s. 1408.

12. *Taylor, Ev.*, s. 1408; *Burton v. Plummer*, (1834) 2 A. & E. 341. It has been held in America in some cases that the "best evidence" rule has here no application; *Burr. Jones*, s. 881.

13. *Taylor, Ev.*, s. 1408.

14. *v. ante*, "The English rule is that if the copy be an imperfect extract, or be not proved to be correct copy or if the witness have no indepen-

dent recollection of the facts narrated therein, the original must be used"; *Taylor, Ev.*, s. 1409.

15. *v. ante*.

16. *v. ante* (copy not allowed under S. 150); *Cunningham, Ev.*, 378 (the same); *Norton, Ev.*, 339 (S. 159 read with S. 160 would admit the copy). The Act says nothing about the use of copy under s. 160.

17. *Greenleaf, Ev.*, s. 436.

18. *Nemi Chand v. Wallace*, 4 C.L.J. 268.

19. *Burton v. Plummer*, (1834) 2 A. & E. 344; and see *Horne v. Mackenzie*, 6 C. & F. (1839) 628, 630, 645; *Phipson, Ev.*, 11th Ed., 634.

20. *The O'Connell case*, (1843-44) *Armstrong and Trevor*, 275.

In the undermentioned case,²¹ arbitration proceedings had been held some years prior to suit, and at their close a draft minute of the proceedings was prepared by the arbitrators and then fair copies by their clerk. A witness who was present at the arbitration, who had compared the draft and fair copy of minutes made by the clerk, and had found the latter to be correct, was allowed under Sec. 159 to refresh his memory as to what occurred at the arbitration by reference to the fair copy of minutes made by the arbitration clerk.

Experts may refresh their memory by reference to professional treatises,²² tables, calculations, lists of prices and the like.²³ So, an actuary may refer to "the Carlisle Tables" when called upon to give evidence respecting the value of an annuity on joint lives; an architect may refresh his memory with any price-list of generally acknowledged correctness; a medical man may strengthen his recollection by referring to books which he considers to be works of authority and so forth.²⁴

In a case, at the stage of trial for an offence under Section 409, Indian Penal Code, the prosecution wanted to rely upon some loose sheets of accounts said to be the copies of the cash book prepared by the auditor at the time of his audit and to produce the same in court obviously to be used by way of evidence by the auditor when examined; unless and until the auditor came to the witness-box and said in what manner he wanted to utilize the loose sheets of paper in evidence, the court could not decide under what provision of law, Sections 68 (3), 159 or 160, the accounts would be admissible in evidence. It was therefore held that it was premature to reject the petition of the prosecution in this regard.²⁵

12. Right to production and inspection. This section awards to the adverse party a right to the production and inspection of, and cross-examination upon, all that is made use of for the purpose of refreshing the memory of the witness. The grounds upon which the right is given have been adverted to in the note dealing with the principle upon which these sections are founded.¹ According to English law, the memory may be refreshed previously to the trial, without the production of the document there, however much its absence might be matter of observation,² though if produced, the other side has a right to see it and cross-examine upon it. This Act, however, by the use of the words "while under examination" in Sec. 159, apparently contemplates the use of the document in Court, whether or not it has also been previously referred to; and Sec. 161 enacts that the document referred to while under examination "must be produced and shown to the adverse party." It would seem, therefore, that in every case where a document is used to refresh the memory, it must be produced at the trial.³

21. *Nistarini Dassee v. Nundo Lall*, (1900) 5 C.W.N. xvi.

22. S. 159. In this instance, there is of course no condition attached as to the persons by whom or the time when the document must have been made.

23. *Taylor, Ev.*, ss. 1422, 1426.

24. *ib.*, v. ante, p. 1066.

25. *State v. Harish Chandra Kar Mohapatra*, I.L.R. 1965 Cut. 426 : 1966 Cr. L.J. 1042 : A.I.R. 1966 Orissa 189 (190).

1. v. ante, Notes under the heading "Principle."

2. *Kensington v. Inglis*, 8 East, 273 ; *Burton v. Plummer*, 2 A. & E. 341; 2 Ph. & Arn., Ev., 841, it is however, usual and reasonable to produce the document ; *Taylor, Ev.*, s. 1413.

3. See observation, in *Goodeve, Ev.*, s. 212, on S. 46, Act 11 of 1855, which ran : "A witness shall be allowed before any such Court or person aforesaid to refresh his memory." With regard to police diaries v. ante, and *Lachmi v. Emperor*, 1922 Pat. 562 (1) : I.L.R. 2 Pat. 74 : 68 I.C. 623 and Code of Criminal Procedure, S. 172.

Even a *panchnama* or *mashinama*, which is not admissible under Sec. 35, can be used for refreshing the memory of a witness, and if used in that manner, it must be shown to the opposite party under Sec. 161. But neither Sec. 159 nor Sec. 160 renders the document itself admissible as evidence.⁴

The police diary kept under Sec. 172, Criminal Procedure Code, may be used by the Court to help it in the inquiry or trial and it may be referred to by the police officer, who kept the diary to refresh his memory. The accused can only see the diary, if it is used by the police officer to refresh his memory, or if the Court uses it to contradict the police officer.⁵ But the accused has no right to insist upon a police witness referring to his diary in order to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used, except strictly in accordance with the provisions of Secs. 162 and 172, Criminal Procedure Code. The latter section shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the Judge whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced.⁶ Section 127 no doubt confers an absolute right on the Court to inspect all police diaries in connection with the investigation of an offence which is under inquiry or trial before it, but this use is permitted to the Court and to the Court alone. It is not possible to hold that the Court can delegate its duties in this matter to the Counsel for the defence.⁷ The adverse party is apparently entitled under the section to cross-examine not only on the particular part referred to, but on the document generally.⁸ As to cross-examination on matters other than those referred to *v. post*.

The section says the document must be shown to the adverse party, if he requires it; or, if the object of the question be attained, it may be unnecessary for the Counsel for the other side to ask to look at the document.⁹ The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but, if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.¹⁰ And it does not follow that because a party is entitled to see a writing which contains the statements of a witness taken down by the police, he is, therefore, entitled to see other writings which contain the statements of person other than that witness, and which have no connection with the witness's statement, except that they were taken in the course of the same enquiry by the police.¹¹ It is not necessary for adverse party to put in the document as part of his evidence, merely because he has looked at it or has

4. Balloch v. Emperor, 1933 Sind 220: 144 I.C. 772.

5. Hafiz Mohammad Sani v. Emperor, 1931 Pat. 150 : 131 I.C. 17.

6. Mohinder Singh v. Emperor, 1932 Lah. 103 at 112 : 135 I.C. 209 : 33 P.L.R. 891.

7. Emperor v. Dharam Vir, 1933 Lah. 498 : 142 I.C. 854 : 34 P.L.R. 541.

8. See Goodeve, Ev., 212 and Taylor, Ev., s. 1413, cited, *post*, but In re Jhubboo Mahton, (1882) 8 C. 739, 745, Field, J. said : "The opposite party may look at the writing to see what kind of writing it is, in order

to check the use of improper documents ; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matters contained in the same series of writing. The Court may limit the right of inspection to such portions of the paper as are relevant, Wharton, Ev., s. 525.

9. See for example, In re Jhubboo Mahton, (1882) 8 C. 739, 743.

10. In re Jhubboo Mahton, (1882) 8 C. 739, 744.

11. *ib.*

cross-examined the witness respecting entries which have been previously referred to.¹² It has, however, been held in England that if he goes further and cross-examines as to other parts of the memorandum, he thereby makes it his own evidence,¹³ a matter as to which the section is silent.

Where notes of election meetings were taken in shorthand and transcribed copies were given to the cross-examiner, the notes would not become inadmissible merely because they were taken in shorthand which could not be deciphered by that party.¹⁴

It is to be observed that it is only when a document is used for purpose referred to in Secs. 159, 160, that the adverse party has a right to see and cross-examine upon it; and, therefore, "if a paper be put into the hands of a witness, merely to prove handwriting, and not to refresh his memory, or if being given to the witness for the purpose of refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it, except sufficiently to enable him to recognise it, if it be subsequently offered in evidence, or to re-examine upon it, and may not comment upon its contents. Indeed, if under these circumstances he read it or commented on it, he may be required by his adversary to put it in."¹⁵

13. Other modes of refreshing memory. There are other modes of refreshing the memory of witnesses than the use of memoranda in writing. While a party cannot, as a rule, cross-examine his own witness if a witness has given an ambiguous or indefinite answer, or if his memory is at fault, the Court, in the exercise of a proper discretion, may allow verbal enquiry as to statements, or circumstances, which may tend to enable the witness to recollect more clearly the fact sought to be proved.¹⁶

162. Production of documents. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents. If for such a purpose it is necessary to cause any document to be translated the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under Sec. 166 of the Indian Penal Code.

s. 3 ("Document.")

s. 121-131 (Privilege.)

s. 3 ("Court.")

s. 123 (Documents referring to matters of State.)

12. Taylor, Ev., s. 413.

13. *ib.*

14. Laxmi Narayan v. Returning Officer, A.I.R. 1974 S.C. 66.

15. Taylor, Ev., s. 1413, and cases there cited.

16. Burr. Jones, Ev., s. 886, and v. ante, S; 143. "Defective Memory."

Taylor, Ev., s. 1240; 2 Ph. & Arn., Ev., 425; Roscoe, Nisi Prius, Ev., 154—156.

SYNOPSIS

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| 1. Principle. | 6. Inspection of document. |
| 2. Production of documents. | 7. Power to take evidence. |
| 3. Secondary evidence of document not produced. | 8. Production of documents by party to suit. |
| 4. "If it be in his power or possession." | 9. Documents referring to matters of State. |
| 5. Validity of objection to be decided by Court. | 10. Miscellaneous. |

1. Principle. The summons to produce a document is, like the summons to appear as a witness, of compulsory obligation, and must be obeyed by the witness, who has no more right to determine whether the documents shall be produced than whether he shall appear as a witness. It is his duty, therefore, to attend and bring with him the documents according to the exigency of the summons, it being for the Court alone to determine both as to the admissibility of the documents and whether they should be produced and exhibited.¹⁷

Section 162 authorises the Court, and indeed it is its obligation, to decide on the validity of the objection to produce the document. Chapter IX provides for all claims of privileges; Sec. 123 is only one of such privileges. Under Sec. 124, the Court would have first to determine whether the communication in question has been made in official confidence; if it is not so, the document has to be produced; if so, it will be for the officer concerned to decide whether the document should be disclosed or not. The words "matters of State" are identical with the words "affairs of State" in Sec. 123. Section 162 empowers the Court to inspect the document while dealing with the objection. But this power cannot be exercised, when the objection relates to documents having reference to "matters of State," and is raised under Sec. 123. In such a case, the Court is empowered to take other evidence to enable it to determine the validity of the objection. Sections 123 and 162 should be harmoniously construed. Regard should be had to the fact that the position in India is not identical with that in England and in America. In the latter country, it is within the power of a Court to overrule the claim of privilege on the ground that the disclosure would be essential for the defence of the accused and if the Government insists on the privilege, the Court can acquit the accused. But this Act does not provide for that being done, when privilege has been claimed for unpublished official records relating to any "affairs of State."¹⁸

2. Production of documents. This section deals with the production of documents in answer to summons, and it seems that the section makes it obligatory on the witness to produce the documents called upon by the Court and he has no right to determine whether the document shall be pro-

17. Burr. Jones, Ev., s. 801, citing *Amey v. Long*, (1808) 9 East 473; *Doe v. Kelly*, (1835) 4 Dowl 273; *R. v. Russell*, (1839) 7 Dowl 693; *R. v. Dixon*, (1765) 3 Burr. 1687; 97 E. R. 1047.
18. *State of Punjab v. Sodhi Sukhdev Singh*, (1961) 2 S.C.R. 371; (1961)

1 S.G.A. 494; A.I.R. 1961 S.C. 493, overruling *W.S. Irwin v. D.J. Reid*, 1 L.R. 48 Cal. 304; A.I.R. 1921 C. 332; *Lakshmandas Chaganlal Bhatia v. State*, 69 Bom. L.R. 808; 1968 Cr. L.J. 1584; A.I.R. 1968 Bom. 400 (425).

duced.¹⁹ The rule of English law is similar. For when a witness is served with *subpoena duces tecum*, he is bound to attend with the documents demanded therein, and he must leave the question of their actual production to the Judge who will decide upon the validity of any excuse that may be offered for withholding them.²⁰ Clause (3) of Sec. 94, Criminal Procedure Code, does not exempt documents protected under Sec. 126 of this Act, and the production of such documents is incumbent under this Section, notwithstanding any objection which there may be to its production or admissibility. The validity of the objection has to be decided by the Court after production.²¹ When brought into Court the production of the document in evidence will be excused, where it has been declared to be privileged from disclosure under this Act, as where it is the third party's title-deed,²² or a confidential communication professionally made between a legal adviser and his client,²³ or the like.

A document, which was produced at the time of deposition by a witness though it was not called for from him, should not be put into evidence.²⁴

3. Secondary evidence of document not produced. Where a document is shown or appears to be in the possession or power of a person legally bound to produce it, and he does not produce it when summoned, secondary evidence of the document may be given under Sec. 65 (a), *ante*.²⁵ But secondary evidence is inadmissible if the original is a privileged document. If the original of the document is privileged, surely that privilege cannot be got over by litigants getting hold of copies surreptitiously of the document from the Secretariat and asking the Court to look at the secondary evidence of the document.¹

4. "If it be in his power or possession." It is obvious that a witness cannot be compelled to produce a document by a summons, unless such document is under his control or possession. So, a mere clerk in a bank is under no obligation to produce its books when they are under the control of the cashier,² and it was so held as to the secretary of a railway company, as

19. Bhalchandra v. Chanbasappa, 1939 Bom. 237 : 183 I.C. 225 : 41 Bom. L.R. 391 ; In re Mantubhai Mehta, 1945 Bom. 122 : 219 I.C. 290 : 46 Bom. L.R. 802 ; see also P. Joseph John v. State, 1953 T.C. 363 : I. L.R. 1952 T.C. 857 : 1952 K.L.T. 417.
20. Amey v. Long, (1808) 9 East 473 : Roscoe, N.P., Ev., 154, 156 ; Taylor, Ev., s. 1240 ; 2 Ph. & Arn. 425. An attachment will lie for contempt in cases of disobedience even though it may be very questionable whether the person summoned would be bound to submit the document to examination in the event of his bringing it into Court. R. v. Greenway, (1845) 7 Q.B. 126 ; R. v. Carey, ib. ; as to the penalty for non-production, see Penal Code, S. 175. As to care in summoning Government officials for production of documents ; see Laxman Rao v.

- Vithoba, 1917 Nag. 48 : 45 I.C. 898.
21. Ganga Ram v. Habibullah, 1936 All 212 : I.L.R. 58 All 364 : 159 I.C. 524.
22. S. 130, *ante*.
23. Ss. 126-127, *ante*, and see generally, Ss. 121-131, *ante*.
24. Kishori Mohan v. Uma Sashi, (1970) 74 C.W.N. 694 (695) distinguishing and explaining Baikuntha Nath v. Umanath, 88 I.C. 496 (Cal.).
25. See pp. 1591-1600 *ante*.
Lady Dinbai Dinshaw Petit v. The Dominion of India, 1951 Bom 72 : 53 Bom. L.R. 229 ; see also Jaffarul Hossain v. Emperor, 1932 Cal. 468 : I.L.R. 59 Cal. 1046 : 138 I.C. 351 and notes under S. 123, *ante*.
2. Bank of Utica v. Hillard, 5 Cow 154 (Amer) ; United States Exp. Co. v. Henderson, 69 Iowa 40 (Amer) cited in Burr Jones, Ev., s. 802.

he was only the employee of the director,³ nor are documents filed in a public office so in the possession of a clerk there, as to render it necessary, or even allowable for him to bring them into Court without the permission of the head of the office.⁴ But, one, having the actual custody of documents, may be compelled to produce them although they are owned by others.⁵

5. Validity of objection to be decided by Court. The validity of any objection made by the person producing the document has to be decided by the Court.⁶ The Court has the power under Section 162 to decide not only the question of privilege raised under Section 123 but of all claims of privilege.⁷ This section deals with production of documents and it makes it incumbent upon a witness, summoned to produce a document, if it is in his possession or power, to bring it into Court, notwithstanding any objection which there may be to its production or its admissibility. He may put forward his objection but the validity of such objection has to be decided by the Court. The section gives the power to the Court to inspect the document or to take other evidence to enable it to determine on its admissibility. But the section precludes the Court from inspecting any document which refers to matters of State. Therefore, again under this section, the validity of an objection to the production of a document has to be determined by the Court. The only limitation on the power of the Court is that in cases of documents where privilege is claimed under Sec. 123, the Court may not look at those documents but must determine the validity of the claims of privilege on materials other than the document itself.⁸

In *State of Punjab v. Sodhi Sukhdev Singh*,⁹ the Supreme Court has held that the Court cannot hold an enquiry into the possible injury to public interests which may result from the disclosure of the document in question, that matter being left for the authority concerned to decide; the Court is competent to hold a preliminary enquiry and determine the validity of the objection to its production, and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State under Sec. 123. But the heads of departments should act with scrupulous care in exercising their right under Sec. 123.¹⁰ It is within the province of the Court to determine whether a certain document sought to be let in evidence relates to affairs

3. *Crowther v. Appleby*, L.R. (1873) 9 C.P. 23.

4. *Thornhill v. Thornhill*, (1820) 2 J. & W. 347; *Austin v. Evans*, (1841) 2 M. & Gr. 430.

5. *Amey v. Long*, (1807) 1 Camp. 17; s.c. (1808) 9 East. 473; *Corsen v. Dubois*, (1816) 1 Holt 239.

6. *Governor-General-in-Council v. Peer Mohammad Khuda Bux*, 1950 F.P. 228 : 52 P.L.R. 153 (F.B.) : *Ijrat Ali Talukdar v. Emperor*, 1943 Cal. 559 : 209 I.C. 124—approved in *State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493; *In re Mauntubhai Mehta*, 1945 Bom. 122 : 219 I.C. 290 : 46 Bom. L.R. 802; *Chamaibaghwalla v. Palpia*, 1950 Bom. 280 : 52 Bom. L.R. 231; *Lady Dinbai Dinshaw Petit v. Dominion of India*, 1951 Bom. 72; *Khwaja Nazir Ahmad v. Emperor*,

1944 Lah. 434 : 46 P.L.R. 273; *Bhaiya Saheb Dajibabhan v. Ram Nath*, 1938 Nag. 358; *Ganga Ram v. Habib Ullah*, 1936 All 212 : I.L.R. 58 All 364 : 159 I.C. 524; *Iqbal Ahmed v. State of Bhopal*, 1951 Bhopal 9 : 55 Cr. L.J. 602; *but see I. M. Lall v. Secretary of State*, 1944 Lah. 209 : 216 I.C. 89.

7. *Orient Paper Mills v. Union of India*, 83 Cal. W.N. 328 : A.I.R. 1979 Cal. 114.

8. *Lady Dinbai Dinshaw Petit v. Dominion of India*, 1951 Bom. 72 at 80 : 53 Bom. L.R. 229.

9. (1961) 2 S.C.R. 371 : A.I.R. 1961 S.C. 493 : (1961) 1 S.C.A. 434 : (1961) 2 S.C.J. 691 : (1961) 2 Andh W.R. (S.C.) 203 : (1961) 2 M.L.J. (S.C.) 203.

10. See also *Amar Chand v. Union of India*, A.I.R. 1964 S.C. 1658.

of State. It may not be open to it to inspect the document, but it can take other evidence in that behalf. It is only when the Court holds that the document is of the kind, the question of permission would arise. It would then be for the head of the department to decide whether he should permit its production or not.¹¹ If the document is privileged, the trial Court cannot indirectly, by calling upon the Union of India to admit or deny the same, have its contents proved. On the other hand, if the authorities improperly form an opinion and claim privilege, the claim may be disallowed.¹² Where a public officer declines to produce certain documents claiming privilege under Secs. 123 and 124, it is for the Court trying the suit in which the documents are required, in the first instance to satisfy itself that the documents relate to any State affair or that their production will be detrimental to public interests, and it is not for the public officer to decide whether the documents are privileged. The privilege regarding production of documents is a narrow one and the mere fact that their production is likely to prejudice the Crown's case is no reason for their non-production.¹³ And the Court has jurisdiction to punish disobedience to a subpoena by attachment, even when the disobedience is not wilful.¹⁴

6. **Inspection of document.** The provision that the Court may, if it sees fit, inspect the document (unless it refers to matters of State) appears not to be in accordance with the rule as laid down in some English cases. For in England when the witness declines to produce a document on the ground of professional confidence, the Judge should not inspect it to see whether it was one which he ought to withhold; and it seems that the mere assertion on oath by the solicitor that it is a title-deed or other privileged document is conclusive.¹⁵

7. **Power to take evidence.** The Court may also, in order to decide on the validity of the objection, take other evidence to enable it to determine on its admissibility. "All questions as to the admissibility of evidence are for the Judge. It frequently happens that this depends on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the Judge,—and however complicated the facts or conflicting the evidence—must be adjudicated on by him alone."¹⁶ Thus, the Judge must equally (for example) decide whether a confession should be excluded by reason of some previous threat or promise and whether a document is protected from disclosure as being a confidential communication, or the like.¹⁷

11. See *Subbarao v. K. B. Reddy*, A.I.R. 1967 A.P. 155 : (1966) 2 Andh W.R. 401.

12. See *Union of India v. Raj Kumar*, A.I.R. 1967 Punj. 387 ; see *H. S. Bande v. State Industrial Court*, A.I.R. 1967 B. 174 : 68 Bom. L.R. 731.

13. *Ibrahim Sheriff Yazdani v. Secretary of State*, 1936 Nag. 25 : 161 I.C. 668.

14. *R. v. Daye*, (1908) 2 K.B. 333 (Divn. Ct.).

15. *Roscoe, N.P. Ev.*, 156, citing *Doe v. Jones*, 2 M. & Rob. 47 ; *Wolant v. Soyer*, 13 C.B. 231. There have, however, been cases in which the Judge has inspected documents in

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order to decide upon their admissibility. If it be objected on the one side that it is impossible for a Judge who discharges the functions of Judge and jury, to avoid receiving some impression from the document if he does look at it, it may be urged on the other side that the rule of inspection provides a safeguard against futile or dishonest objections and effects a great saving of the time of the Court.

16. *Taylor, Ev.*, s. 23-A : see also *Governor-General-in-Council v. Peer Muhammad Khuda Bux*, 1950 E.P. 228 at 234.

17. *Id.*

8. **Production of documents by party to suit.** Order XI, Rule 14 of the Civil Procedure Code empowers the Court during the pendency of the suit to order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in such suit as the Court thinks right. Under a similar rule in England, it has been held that the right to the production and inspection of documents does not apply to documents which are not in the sole possession or power of the party to the suit who is called upon to produce them, but are only in his possession or power jointly with some other person, who is not before the Court.¹⁸ The provision, that the translator may be ordered to keep the contents of a document secret, refers to cases where a document is claimed to be privileged from production in evidence, but its translation is necessary in order that the Court may ascertain whether the claim of privilege is well founded or not. Section 166 of the Penal Code deals with the case of a public servant disobeying a direction of the law with intent to cause injury to any person. Of course, secrecy is unnecessary, if the document is to be given in evidence. In connection with this subject, it may be noted, that when documents are put in for the purpose of formal proof, it is in the discretion of the Court in criminal proceedings to interpret as much thereof as appears necessary.¹⁹

9. **Documents referring to matters of State.** Documents referring to matters of State stand upon a peculiar footing. Section 123 makes the giving of evidence derived from unpublished official records relating to affairs of State entirely dependent upon the discretion of the head of the department concerned.²⁰ As to what are unpublished records relating to affairs of State see the following case and the notes under Section 123.²¹ It may be, therefore, perhaps said to be unnecessary for the Judge to have the right of inspecting any document of this character,²² though he must necessarily have such right in the case of other privileged documents in order that he may judge as to their admissibility and obligatory production in evidence. The person in custody of what he considers a privileged State document must bring it with him to Court, that the latter may decide whether it is a document of that character or not. The position of the words "unless it refers to matters of State" in the second paragraph of the section appears to show that the Court, although it may not inspect a document relating to matters of State,

18. *Kearsley v. Phillips*, (1883) 10 Q.B. D. 465, followed in *Murray v. Walter*, 1889 Cr. & Ph. 114; see the latter and kindred cases discussed with reference to the procedure to be adopted in this country in *Haji Jakaria v. Haji Casim*, (1876) 1 B. 496, where it was held that one partner of a firm represents the other partners for the purposes of production of documents. See also *Taylor v. Rundell*, (1841) Cr. & Ch. 104; 1 Phillips, 222; 26; *Kettlewell v. Barstow*, (1872) L.R. 7 Ch. App. 686 (the fact that persons not parties to the suit are interested in the document is no ground for resisting production); *London and Yorkshire Bank, Ltd. v. Cooper*,

(1885) 15 Q.B.D. 473 (custody of liquidator).

19. Cr. P.C., S. 361 (now section 279 of 1973 Code); see also *R. v. Amiruddin*, (1871) 7 B.L.R. 36, 71.

20. Being in this in accordance with *Beatson v. Skene*, (1860) 5 H.N. 838; see *Nagaraja Pillai v. Secretary of State*, 1915 Mad. 1113; 1 I.L. R. 39 Mad. 304; 26 I.C. 723.

21. *State of U. P. v. Raj Narayan. A. I.R.* 1975 S.C. 865.

22. *Cunningham, Ev.*, 380; *Hennesy v. Wright*, (1882) 21 Q.B.D. 509, 515; *Field, J.* said that he should consider himself entitled privately to examine the document to see whether the fear of injury to the public service was the real motive for the objection.

may yet take other evidence to enable it to determine on its admissibility.²³ Apparently, upon the objection and statements of the person appearing with the document, the Court will determine whether it is or is not a State document. If the Court decides that it is a State document, then it is for the head of the department alone to determine whether evidence shall be given on it or not.²⁴ Claim of privilege can be made under Section 123 in respect of official file relating to grant of mining lease.²⁵ The Court will decide the claim of privilege on evidence if the claim is made under Section 123 and allow or reject it accordingly.¹

Under Order XI, Rule 19 (2), Civil Procedure Code, where, on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege. But this provision does not repeal *pro tanto* the provisions of this section. Sub-rule (2) of Rule 19 is a general provision of law and the general never abrogates the particular. Moreover, the prohibition with regard to the inspection of a State document arises out of the privilege of the Crown and is not a procedural matter with which alone sub-rule (2) of Rule 19 deals.²

It has been said that in the case of State proceedings, the Court cannot inspect them for the purpose of seeing if they are privileged, and must take their character upon the word of the public officer, who has them in his custody.³ But, by this, it is conceived, is meant that the officer states those facts touching the document which in his opinion show that it is one coming within the purview of Sec. 123, and the Court then (though bound by the officer's statement and forbidden to inspect the document), determines whether those facts do or do not give the document the character claimed for it. Otherwise, it does not appear that there is any function assigned to the Court in the matter, or that there is any reason why such a document is required to be produced in Court, unless it be that the officer may publicly and in the presence of the Judge claim privilege from production. The oath of secrecy which is taken by Income-tax Officers does not apply to cases in which they are summoned to give evidence in a Court of Justice.⁴ Rule 16 of the Rules

23. Governor-General-in-Council v. Peer, Mohammad Khuda Bux, 1950 E.P. 228 at 234 (F.B.) where also other tentative interpretations of this section so far as it concerns State documents are to be found, which appear to the author to be hardly supportable.

24. Cunningham, Ev., 390; but there is no necessity, as has been held in England [Kain v. Farrer, (1877) 37 L.T.N.S. 469 doubted in Hennessey v. Wright, (1888) 21 Q.B.D. 509, 523], for him to give his reasons for the non-production of the document (assuming that it is found to be in fact a document of State), and to come and say that he objects to the production on grounds of public policy; *ib.*, see S. 123, ante and notes thereunder.

25. Durga Prasad v. Parveen, A.I.R. 1975 M.P. 196.

1. State of Bihar v. Shree V. D. Kumar and others, 1975 Cr. L.J. 1411.

2. Governor-General-in-Council v. Peer Mohammad Khuda Bux, 1950 E.P. 228 at 234 (F.B.), *supra*; I. M. Lall v. Secretary of State, 1944 Lah. 209, approved in State of Punjab v. Sodhi Sukhdev Singh, A.I.R. 1961 S.C. 493.

3. Mayne's Criminal Law, 86.

4. *ib.*, citing Lee v. Birrell, (1813) 3 Camp 337 and stating that Scotland, C.J. in R. v. Yakataz Khan, 2 Mad. Sessions 1863, compelled the production of income-tax schedules, though the objection was taken by the officer who appeared, and see Venkatachella Chettiar v. Sampathu Chettiar, I. L.R. 32 Mad. 62; 1 T.C. 705; referred to in Collector of Jaunpur v. Jamna Prasad, 1922 All 37; I.L.R. 44 A. 360; 66 I.C. 171; 20 A.L.J. 140.

made by the Local Government under Sec. 38 of the Income-tax Act (II of 1886) does not apply to the production of Income-tax papers in a Court of law in a suit between partners.⁵ In a later case in the Privy Council, it was said that a presiding Judge should endorse with his own hand on every document proved or admitted in evidence a statement that it was so proved against or admitted by the party against whom it was used, as enjoined by the Civil Procedure Codes of 1877 and 1882 and practically re-enacted by the present Civil Procedure Code (Order XIII, Rule 4) and that for the future, the Privy Council in hearing Indian Appeals would refuse to read or to permit to be read any such document not so endorsed.⁶

In the undermentioned case,⁷ the Magistrate of a district refused to produce a written report made to him by a Magistrate in charge of a division of a district as to the result of an enquiry made by the latter under the provisions of Sec. 135 of the Criminal Procedure Code, into the cause of a sudden and unnatural death. When the case came before the High Court the District Magistrate appeared, through Counsel, with the report, ready to produce it, if the High Court held it not to be privileged or to show it to the Judges, if they desired to see it before making their order, but submitted, amongst other grounds, that the report was a communication privileged under Sec. 124 of this Act. It was held that this report was not a Judicial proceeding and that the District Magistrate was justified in refusing to produce it.

10. Miscellaneous. The comprehensive language of Sec. 25 of the Bengal Finance (Sales Tax) Act (as extended to the Union Territory of Delhi) prevents production of all kinds of documents and returns which have been filed with the sales-tax authorities. When the documents so to be produced are of the kind covered by the said section and in the circumstances the Sales Tax Officer was justified in claiming that the production of the documents was privileged.⁸

163. Giving as evidence, of document called for and produced on notice. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

s. 3 ("Document.")

ss. 65, 66 (Notice to produce.)

Taylor, Ev., s. 1718; Wharton, Ev., s. 156.

SYNOPSIS

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|-------------------------------------|----------------------------------|
| 1. Principle. | 3. Notice to produce. |
| 2. Documents produced after notice. | 4. Documents produced in appeal. |

5. *Jadobram Dey v. Bulloram Dey*, (1899) 26 C. 281, referred to in *Collector of Jaunpur v. Jamma Prasad*, 1922 All 37 : I.L.R. 41 A. 360; 20 A.L.J. 140 : 66 I.C. 171.
6. *Sadik Husain Khan v. Hashim Ali Khan*, 1916 P.C. 27 : 43 I.A. 212 : I.L.R. 38 All. 627 : 36 I.C. 104. Order XIV, R. 4 only provides that

certain particulars shall be endorsed and that the Judge shall sign on initial such endorsement ; see Civil Procedure Code.

7. *In re Troylokhanath Biswas*, (1878) 3 C. 742.
8. *Daulat Ram v. Som Nath*, 69 P.L.R. (D.) 222 (224).

1. Principle. See Notes, post.

2. Documents produced after notice. This section applies not only to civil cases but also to criminal trials, and even if the Crown is the prosecutor.⁹ The production of papers upon notice does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence, at least if they be in any way material to the issue.¹⁰ The reason for the rule is that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.¹¹ Where a party to a case calls for a document from the other party and inspects the same, he takes the risk of making it evidence for both parties. It rests, however, upon the party who calls for and inspects a paper to adduce evidence of its genuineness, if that be not admitted.¹² This section does not render proof of the document to be exhibited unnecessary, or alter the normal incidence of that burden.¹³ But, an inspection of documents by the adversary entitles the party producing them to tender them as evidence of both parties. Such documents need no further proof and should be admitted *in toto*.¹⁴ Where the defendant, seeking her defence in the books of the plaintiff, called for those books and inspected them, but in defence put in certain extracts only and withheld the rest of the account, their Lordships of the Privy Council observed that, "it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff, and extract from them just such items as proved matters of defence on her part and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted *in toto*. Their Lordships think that the High Court was entirely right."¹⁵ There is, however, no authority for the proposition that evidence which is admitted under the special provisions of Sec. 163 must be deemed to be conclusive evidence against the party who has inspected the documents. There is certainly nothing in the language of the section itself to justify such a conclusion. All that happens is that the documents which the other party has produced become evidence

9. *Government of Bengal v. Shantiram Mondal*, 1930 Cal. 370 : I.L.R. 58 Cal. 96 : 127 I.C. 657 ; *Emperor v. Makhan Lal*, 1940 Cal. 167 : I.L.R. (1939) 2 Cal. 429 : 187 I.C. 188.
10. *Taylor, Ev.*, s. 1817, and cases there cited. If the party giving the notice declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party ; *Sayer v. Kitchen*, 1 Esp. 210 for if notice to produce invested the instrument called for with the attribute of evidence, testimony, incapable of proof might be brought into a case by such notice ; *Wharton, Ev.*, s. 156 ; though it is otherwise, as the section says, if the papers are inspected by the party calling for them, see *Norton, Ev.*, 252. A person is not obliged to put in evidence the papers called for by him ; *Wharton, Ev.*, s. 156.
11. *Taylor, Ev.*, s. 1817 ; in *Wharton v. Routledge*, 5 Esp. 235, Lord Ellenborough said : "You cannot ask for a book of the opposite party and be determined on the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side, if they think fit to use it."
12. *Mahomed v. Abdul*, (1903) 5 Bom. L.R. 380.
13. *Rajagopala Iyengar v. Ramanuja Iyengar*, 1923 Mad. 607 : 72 I.C. 459 : 18 L.W. 165.
14. *Kisan Ghule v. Puransa*, 1928 Nag. 119 : 106 I.C. 305.
15. *Rajeshwari Kuar v. Rai Bal Krishna*, 14 I.A. 142 : I.L.R. 9 All 713 : 5 Sau. 80 (P.C.) followed in *Badri Prasad v. Shanti Lal*, 1941 Lah. 226 : 195 I.C. 275 : 43 P.L.R. 128.

in the case for what they are worth.¹⁶ Where during the cross-examination of a prosecution witness counsel for the accused called for the signed statement of the witness recorded by the police during investigation and inspected it and used portions of it for purposes of contradiction in accordance with Sec. 145 of this Act, it was held that the entire signed statement of the witness to the police excluding only such portions as were not relevant to the case would go in evidence, so that it would bring on the record those parts of the signed statement which were corroborative of the witness's evidence at the trial, in addition to those brought on the record by Counsel for the accused as being contradictory of the evidence but no others.¹⁷ In respect of the record of the previous statement of a witness, such portion of it only would be relevant as is actually used for the purpose of contradicting under Sec. 145, Evidence Act or corroborating under Sec. 157, Evidence Act.¹⁸

Three conditions should co-exist for the section to apply: (1) The document should be required by the party to be produced in evidence. (2) It should be inspected by the party. (3) The party producing the document should require the party calling for it, to put it in evidence. Hence, if one only of these requirements is complied with, the documents cannot be treated as evidence of the party.¹⁹

The party inspecting the document is bound to give it as evidence only, if the party producing the same requires him to do so.²⁰

When A calls upon B to produce a document and B produces it, this *prima facie* avoids the necessity of proving such document on A's part where it is relied on by B as part of his title.²¹ Where notice has been given to the opponent to produce papers in his possession or power, the regular time for calling for their production is not until his case has been entered upon by the party who requires them; till which time the other party may, in strictness, refuse to produce them and no cross-examination as to their contents is then allowable. Still, it is considered rigorous to insist upon this rule, and as due adherence to it would be productive of inconvenience, the Judges are very unwilling to enforce it.²² And, according to the English practice, a party who has given his opponent notice to produce certain documents is allowed to call for them at any stage of the hearing.

3. Notice to produce. The notice to produce documents mentioned in this section refers to a notice to produce documents as mentioned in Order XI, C. P. C. Such a notice may be given by a party privately to the other party concerned; and, if the other party does not produce the documents, an order of the Court for the production of the documents for inspection may also be made. The mere fact that the agency which has ordered the production of the documents in the Court is immaterial.²³

4. Documents produced in appeal. A respondent, producing documents in appeal at the instance of the appellant cannot insist on their being used as evidence all at once under this section.²⁴

16. *Ramadhin v. Ram Dayal*, 1919 Oudh 8 : 57 I.C. 973 : 23 O.C. 156.

17. *Emperor v. Makhau Lal*, 1940 Cal. 167.

18. *Natabar Jana v. State*, 1955 Cal. 158: 59 C.W.N. 729.

19. *Liladhar Ratanlal v. Holikarmal, A.* I.R. 1959 Bom. 528 : I.L.R. 1959 Bom. 29.

20. *Shrinarain v. Chuni Lal*, 1957 Raj. 159 : 1957 Raj. L.W. 214.

21. *Wharton, Ev.* s. 157.

22. *Taylor, Ev.*, s. 1817.

23. *Union of India v. Firm Vishudh Ghee Vyopar Mandal*, 1953 All 689: 1953 A.L.J. 306.

24. *Trimbak v. Sitaram*, 1926 Nag. 60 : 89 I.C. 1016.

164. *Using as evidence, of document production of which was refused on notice.* When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

s. 3 ("Document.")
ss. 56, 66 (Notice to produce.)

s. 89 (Presumption as to document not produced.)

Taylor, Ev., s. 1818, Wharton, Ev., s. 157.

SYNOPSIS

1. Principle.

2. Documents not produced after notice.

1. **Principle.** See notes, post.

2. **Documents not produced after notice.** It is doubtful if this section applies to criminal proceedings. At any rate, it does not contemplate the production of documents for inspection. What it contemplates is, that one party should call upon another in Court to produce a document of which the first party has given the other notice to produce. It does not give him any right, at any stage of the case, to call upon his opponent to produce the document and use it or not as he sees fit.²⁵ A party is not permitted after declining to produce a paper, to put in it evidence after it has been proved by his opponent by parol. Should he be allowed to do so, he would be able to hold back the paper, until he saw whether its parol rendering would be favourable or unfavourable to him, and thus to obtain an unjust advantage over his opponent. The same rule is applied, when the party calling for the paper has proved a copy, in which case the holder of the paper cannot produce it and object to the reading of it without proof by an attesting witness. Nor can he, after refusing to produce, put the paper into the hands of his opponent's witness for cross-examination or produce and prove it as part of his own case.¹ He is, in effect, bound by any legal and satisfactory evidence produced on the other side.²

It has been declared as the rule that the mere non-production of documents on notice has no other legal effect than to allow secondary evidence,

25. Sham Das v. Emperor, 1933 Cal. 65; I.L.R. 60 Cal. 341; 142 I.C. 57.

1. Wharton, Ev., s. 157; Taylor, Ev., s. 1818; Burr. Jones, Ev., ss. 117, 223.

2. Norton, Ev., 252, where it is also stated that the document cannot be used to refresh the memory of a

witness; citing Till v. Ainsworth, Bristol, 1847; Wilde, C.J.M.S.S. As to the prevalence of a similar rule when a party determines upon keeping back a chattel, see Lewis v. Hartley, 7 C. & P. 405; or refusing to give inspection, see Civ. P.C., Order XI, r. 15.

but the weight of authority sustains the view that there may also be a presumption that the evidence withheld would have operated unfavourably to the party refusing to produce it.³ There is a presumption further that a document called for and not produced after notice was attested, stamped and executed in the manner required by law.⁴

165. *Judge's power to put questions or order production.* The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question :

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved :

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or produce any document which such witness would be entitled to refuse to answer or produce under Secs. 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Sec. 148 or 149: nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

s. 3 ("Relevant.")
ss. 60, Prov. 2 (Production of chattel.)
ss. 133, 145-154 (Cross-examination.)
s. 3 ("Document.")
ss. 148, 149 (Questions to credit.)

s. 3 ("Fact.")
s. 3 ("Court.")
s. 3 ("Proved.")
ss. 121-131 ("Privilege.")
ss. 61-65 (Primary evidence.)

Steph., *Introd.* 161-163, 73; *Best, Ev.*, ss. 86, 93; *Wharton, Ev.*, s. 281; *Taylor, Ev.*, ss. 1477, 23-27; *Roscoe. Cr. Ev.*, 16th Ed., 115; *Norton, Ev.*, 323, 342, 65; *Markby, Ev.*, 114, 115.

SYNOPSIS

1. Principle.
2. Questioning by the Judge :
 - Extent of Judge's powers.
 - Leading questions.
 - Irrelevant questions.
3. Time to put questions.

4. Statement made to the Police.
5. Order for production.
6. Cross-examination.
7. Witness called by Court.
8. Proviso (1).
9. Proviso (2).

1. **Principle.** "This section is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The

3. *Burr. Jones, Ev.*, 17.
4. S. 89, ante ; see *Kashibai v. Vinayak*,

1956 Bom. 65 : I.L.R. 1955 Bom.;
999 : 57 Bom. L.R. 918.

OR ORDER PRODUCTION

effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and enquire into every fact whatever"⁵ and thus possibly acquire valuable indicative evidence (v. post) which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements, because such a permission would lead to reliance on second-hand reports, would waste time and open a wide door for fraud.⁶ And the discretion given is exercisable subject to correction by the Court of appeal.⁷

The sporting theory of the common law in which litigation was a game of skill to be conducted according to the specific rules and to be decided by the combined effects of skill, strength and luck tended to place the Judge primarily in the position of the umpire of a game, whose duty it was to interfere only so far as needed to decide whether the rules of the game had been violated. This tendency never dominated (so far as the Judge's functions were concerned), in the orthodox English practice; the Judge there has never ceased to perform an active and virile part as a director of the proceedings and as an administrator of Justice. One of the natural parts of the judicial function in its orthodox and sound recognition, is the Judge's power and duty to put to witnesses such additional questions as seem to him desirable to elicit the truth more fully. This just exercise of his function was never doubted at common law; the Judge could even call a new witness of his own motion and could seek evidence to inform himself judicially; much more could he ask additional questions of a witness already called but imperfectly examined. Fortunately, in spite of the strong but subtle tendency to force the purely judicial function into the background, the tradition of the common law has never been lost; the right of the Judge to interrogate, as he thinks best, has always been preserved in theory.⁸

So, Mr. Edmund Burke in arguing in Mr. Warren Hastings' Trial said: "It is the duty of the Judge to receive any offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should not bring it forward. He has a duty of his own, independent of them, and that duty is to investigate the truth. If no prosecutor appears (and it has happened more than once), the court is obliged, through its officer, the clerk of the arraigns, to examine and cross-examine every witness who presents himself; and the Judge is to see it done effectively, and to act his own part in it."⁹

In *Bartly v. State*,¹⁰ Harrison, C. J., said: "It is undoubtedly necessary that the Judge who presided should acquire as full a knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litigated matters, that Justice may not miscarry, but may prevail; and doubtless, it is allowable at times, and under some circumstances, for the presiding Judge to interrogate a witness. The exact extent (or times) when the exigencies may warrant an exercise of this right are matters which are not capable of very precise statement, but it may be said that the right here in

5. Steph. Introd. 162 and see Best, Ev., ss. 86, 93.

6. Steph. Introd. 162, 163.

7. Surendra Krishna Mandal v. Rance Dasce, 1921 Cal. 677; 59 I.C. 814.

L.E.—462

33 C.L.J. 34.

8. Wigmore, Ev., 784.

9. Report of Committee on Warren Hastings' Trial, 31 Part Hist 348.

10. 55 Nebr 294; 75 N.W. 832.

question is one which should be very sparingly exercised, and generally, counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the Judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause."¹¹

Sir James Fitzjames Stephen in his speech said: "Passing, however, from the case of English barristers to the case of pleaders and vakils, and the courts before which they practise, I would appeal to every one who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the court to ask what questions it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into court, so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in an enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that Sec. 165, which has been so much objected to, has been framed."¹²

If the object of a trial is, first to ascertain truth by the light of reason, and then, do justice—conventionalised, indeed—justice according to law—upon the basis of this truth, then the Judge is not only justified but required to elicit a fact, wherever these interests of truth and justice would suffer, if he did not.¹³

It should, however, be borne in mind that the Courts must act within the limits which the law places upon their powers in dealing with cases before them. Just as it is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading, so also it is beyond its competence to virtually oblige a party to produce and examine any particular witness. While it is the duty of the Court not only to do justice but to ensure that justice is done, it should bear in mind that it must act only according to law, not otherwise.¹⁴ The interference or order of the Court must not be of a character as to indicate a certain frame of mind of the Judge, which would militate against his duty of conducting a fair and impartial trial, or to occasion a reasonable apprehension in the mind of a party that a fair and impartial trial cannot be had at the hands of the Judge.¹⁵ The judgment of the Court must be based upon facts declared by this Act to be relevant and to be duly proved.¹⁶ Irregular evidence not relevant and not specifically authorised by the Act, and not duly proved, cannot form the basis of the judgment.¹⁷

11. Wigmore, Ev., s. 784.
12. Speech of the Hon'ble Sir James Fitzjames Stephen on the 12th March, 1872, in submitting the Report of the Committee to the Council.
13. Chamberlayne's Evidence, s. 534.
14. Municipal Corporation of Greater Bombay v. Pancham, (1966) 1 S.G.J. 49 i A.I.R. 1965 S.C. 1000,

15. State of Mysore v. Hanmantha, A.I.R. 1966 Mys. 231 : (1966) 1 Mys. L.J. 433.
16. Nathubhai v. Chhotubhai, A.I.R. 1962 Guj. 68 : 1962 Guj. L.R. 418.
17. Hasanabdulla v. State of Gujarat, A.I.R. 1962 Guj. 214 : 1962 Guj. L.R. 107.

2. Questioning by the Judge. There is a marked contrast between the functions of the Judge in England and in other European countries. On the continent, it is the Judge's duty to arrive at the truth by his own exertions in conjunction with those of the official prosecutor. In France, for example, there is the interrogatoire of the accused by the Presiding Judge who also takes a leading part in examining witnesses. In England, on the other hand, and in other countries following the common law tradition, the examination of all witnesses (including the accused, if he offers himself as a witness) is conducted principally by the advocates for the parties. The Judge does not himself examine witnesses, except that he can put supplementary questions.

At the present day, the tradition of judicial self-restraint is regarded as a fundamental part of criminal procedure. Bacon expressed it pithily when he declared that "an over-speaking Judge is no well-tuned cymbal. It is no grace to a Judge first to find that which he might have heard in due time from the Bar." The classic advice to a newly appointed Judge is that he should take a sup of holy water in his mouth at the beginning of a case and not swallow it until the evidence on both sides has been heard. Lord Hewart said in the same vein that "the business of a Judge is to hold his tongue until the last possible moment, and to try to be as wise as he is paid to look."

Two passages may be quoted to show the reasons for the English practice. The first is taken from a chapter of Sir James Fitzjames Stephen's *History of the Criminal Law*, where the author examines and criticises the French system. This, he thinks, places the Judge—

"....in a position essentially undignified and inconsistent with his other functions..... The duty most appropriate to the office and character of a Judge is that of an attentive listener to all that is to be said on both sides, not that of an investigator. After performing that duty patiently and fully, he is in a position to give a jury the full benefit of his thoughts on the subject, but if he takes the leading and principal part in the conflict—and every criminal trial is as essentially a conflict and struggle for life, liberty from imprisonment, or character, as the ancient trials by combat were—he cannot possibly perform his own special duty. He is, and of necessity must be, powerfully biased against the prisoner."¹⁸

The other explanation was given by Lord Justice Birkett, when he said:

"People unaccustomed to the procedure of the courts are likely to be overawed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding Judge. Moreover, when the questioning takes on a sarcastic or ironic tone, as it is apt to do, or when it takes on a hostile note, as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence as they may wish, but the parties may begin to think, quite wrongly it may be, that the Judge is not holding the scales of justice quite evenly." (Anon. *The Times*, April 9, 1952).

18. H.C.L. 1, 544. (To much the same effect see the remark of Lord Greene, M.R. in *Yuill v. Yuill*, 1945 P.

15 at 20, cited with approval in later cases.

This does not mean that all questioning by the Judge is improper. When judicial interruptions have been frowned upon on appeal, it has generally been because they were so numerous as to make it impossible for the defence to be fairly presented,¹⁹ or because an apparently honest witness had been badgered and bullied into committing himself beyond his professed recollection,²⁰ or because the Judge's questioning is conducted in such a way as to give the impression that he is satisfied that the accused is guilty. Provided that he acts judicially and with due regard for the rights of the defence, a Judge is permitted to question a witness at some length, preferably after both sides have finished their examinations. Lord Goddard said: "If a Judge thinks that a case has not been thoroughly explored he is entitled to put as many questions as he likes."²¹ But he added that it was a pity that the trial Judge had asked as many questions as he had done.²²

The Judge may question the witness either in the manner and with the object followed by the parties, or he may avail himself of the more extended power of interrogation which is given to him under the terms of this section. Trials are conducted by the Courts and it is their duty to see that they are full and proper. They have the power and the duty to question witnesses themselves in order to elicit relevant matters. It is wrong to allow a case to suffer by failure to elicit relevant matters from witnesses.²³ A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty.²⁴ It has been a matter of juristic dispute whether a Judge can, on his own motion, put to the witness questions independently of Counsel, so as to bring out points Counsel designedly or undesignedly overlook. On one side, it has been urged, in conformity with the scholastic view, that the Judge is confined to the proof adduced by the parties. On the other side, it is insisted that it is absurd for a Judge with a witness before him not to do what he can to elicit the truth. So far as concerns the abstract principle, writers on the English Common Law repeatedly affirm the scholastic view that the Judge must form his judgment exclusively on the proof brought forward by the parties. So far as concerns the practice, Judges both in England and in the United States, do not hesitate to interrogate a witness at their own discretion, eliciting any facts they deem important to the case.²⁵ Again, "the Judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions in any form and at any stage of

19. Clewer, (1953) 37 C.A.R. 37; cf. Gibson, (1944) 29 C.A.R. 174; Ingram, *The Times*, October 12, 1954.

20. Bateman, (1946) 171 L.T. 336; 110 J.P. 133; 31 C.A.R. 106.

21. Per Lord Goddard, C.J. in Williams. *The Times*, April 26, 1955.

22. Cf. Merrifield. *The Times*, September 4, 1953. (Glennville Williams, *The Proof of Guilt*. A study of the English Criminal Trial (The Hamlyn Lectures) (Seventh Series) (Stevens & Sons, Ltd., London) (N. M. Tripathi, Ltd., Bombay).

23. *Mandharia Alana Umar v. The Kutch Government*, 1950 Kutch 59, 51 Cr. L.J. 1319.

24. *Emperor v. Ram Singh*, 1948 Lah. 24; 49 P.L.R. 42.

25. Wharton Ev., s. 281. See Taylor, Ev., s. 1477; Roscoe, Cr. Ev., 16th Ed., 115; R. v. Remnant, (1807) R. & R. 136; Coulson v. Disborough, (1894) 2 Q.B.D. 316. "The Court always may, and often does, examine a witness at the close of his examination. The Court is not bound by the same rules as to leading questions, etc. The Court may put what questions it pleases and in what form it pleases; and most usefully so where the examination has not been scientifically or skilfully conducted." Norton, Ev., 323. As to the recall and examination of witnesses by the Court. See Order XVIII, R. 17, C.P.C. and S. 540, Cr. P.C. (now section 311 of 1973 Code).

the cause and to a certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure; for if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the Bench but it is a power necessary to prevent justice being defeated by technicality, to secure indicative evidence, and in criminal cases, to assist in fixing the amount of punishment.¹ And it should be exercised with due discretion."² It is this latter object (the securing of indicative evidence) which is the main ground for the enactment of this section. "It may be objected (and indeed, Bentham's Treatise on Judicial Evidence is founded on the notion) that by exclusionary rules like the above (i.e. rules of evidence) much valuable evidence is wholly sacrificed. Where such even the fact, the evil would (it is replied) be far outweighed by the reasons already assigned for imposing a limit to the discretion of tribunals in declaring matters proved or disproved. But when the matter comes to be carefully examined it will be found that the evidence in question need seldom be lost to justice; for however dangerous and unsatisfactory it would be as the basis of final adjudication, it is often highly valuable as indicative evidence,³ that is, evidence not in itself receivable but which is 'indicative' of better. Take the case of derivative evidence; a witness offers to relate something told him by A; this would be stopped by the Court; but he has indicated a genuine source of testimony, A, who may be called or sent for. So, a confession of guilt which has been made under promise of favour or threat of punishment is inadmissible by law; yet any facts discovered in consequence of that confession,—such, for instance, as the finding of stolen property—are good legal evidence. Again, no one would think of treating any anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crime also, conjectural evidence is often of the utmost importance, and leads to proof of the most satisfactory kind, sometimes even amounting to demonstration. It is chiefly, however, on inquisitorial proceedings—such as Coroner's inquests, inquiries by Justices of the Peace before whom persons are charged with offences, and the like—that the use of 'indicative' evidence is most apparent, though even these tribunals cannot act on it."⁴

This, therefore, "is a most important section. Its provisions, though they may be in some respect not in accordance with English ideas, are wholly suited to the state of things which exists in India out of the Presidency-town."⁵ In his Introduction to the Evidence Act,⁶ Sir J. F. Stephen remarks: "When

1. Wigmore, *Ev.*, s. 784.

2. Best, *Ev.*, s. 86.

3. In one place Bentham also calls it "Evidence of Evidence," 3rd *Jud. Ev.*, 554.

4. Best, *Ev.*, s. 93.

5. In Norton, *Ev.*, 342, it is said of this section that it "merely embodies the existing law as to the power of the Judge to put questions." Sir William Markby also in his edition of the Act (p. 115) is of opinion that on the construction of the section given in the text (v. post) every Magistrate in India possesses already all the powers of seeking after evidence which this section gives him.

See C.P.C., Order XVI, R. 14 (Court may of its own accord summon as witnesses strangers to suit); and see Order X, R. 4, p. 748; *ib.*, by which the Court may direct any party to a suit to appear in person for examination, and Order XVIII, R. 17, p. 822, *ib.* by which the Court may recall, and examine a witness, and Cr. P. C., S. 540 (new Sec. 311) (power to summon witness and examine). As to the examination of accused persons, see *Gaya Singh v. Mohamed Soliman*, (1901) 5 C.W.N. 864.

6. Pages 161, 162, see page 86 ante.

a man has to inquire into facts of which he received in the first instance very confused accounts, it may, and often will, be extremely important for him to trace the most cursory and apparently futile report; and facts, relevant in the highest degree to facts in issue, may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether, if he shuts his ears to everything which was not relevant within the meaning of the Evidence Act. A Judge or Magistrate in India frequently has to perform duties, which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can, and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that, in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever."

And in the Select Committee the framer of the Act observed as follows :

"That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases, he has to represent the interests of the public much more distinctly than he does in England. In many cases, he has to get at the truth, or as near to it as he can by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him but to inquire to the utmost into the truth of the matter.⁷ We do not think that the English theories, that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded, mainly, in the light of private questions between the prosecutor and the prisoner at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England."

Extent of Judge's powers. It is obvious that the Judge contemplated by the section is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. It has been said that it is particularly necessary that the Judge should exercise this power in a jury trial, because it is his duty to aid the jury in obtaining a proper comprehension of the facts which they, as laymen, can do only if the facts are laid bare, with the implications not left as such but fully brought out and with the false suggestions eliminated. If, therefore, the Judge finds

7. The Bill was subsequently somewhat modified in this respect.

that the examination of a witness is not being conducted in such a way as to unfold the truth, it is not only his right but his duty to intervene with his own questions, particularly at a jury trial.

But, while theoretically the powers of the Judge are limitless and unfettered, certain principles have come to be recognised which he must follow as to the manner in which he exercises the power. It need hardly be pointed out that he must not take side; but he must not also "descend into the arena" and forsake the judicial calm for the zeal of a combatant. If he does so and questions witnesses in the spirit of beating them down or encouraging them to give an answer, his action may have an intimidating or inflatory effect upon them and their evidence may not be the evidence they would have given, if not so intimidated or encouraged.⁸ The consideration that the Judge by indulging in a general examination of witnesses may disable himself to take a detached view of their demeanour, has not much force in the case of a jury trial because the ultimate judge of their credibility are the jurors who are left free to watch them. But the demeanour of the witnesses may itself be affected by the authority of the Judge, if he exercises it excessively in questioning them.⁹

In a striking passage Lord Greene, Master of the Rolls, in *Yuill v. Yuill*,¹⁰ observed as follows :

"A Judge who observes the demeanour of the witnesses while they are being examined by Counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the Judge from what it is when he is being questioned by Counsel, particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue." If the Judge of the trial Court has taken the witnesses out of the hands of Counsel and examined and cross-examined them himself any significance that might attach to the observations of the trial Court as to the demeanour of the witnesses is entirely lost.¹¹

The wide discretion given to the court must be exercised with circumspection to further the ends of justice and should not be used in an inquisitorial manner. Nor should the power be exercised in such a way as to create an apprehension in the mind of one or the other party that the court is biased.¹²

Section 540, Criminal Procedure Code (now Section 311 of the Criminal Procedure Code, 1973) and Section 165 of the Act between them confer jurisdiction on the Judge to act in justice. As Section 540 Criminal Procedure Code stands (the corresponding Section 311 in the Code of 1973 is practically

8. *Sunil Chandra Roy v. The State*, 1954 Cal. 305 at 317 : 57 C.W.N. 962.
9. *Ib.*
10. 1945 P. 15 at 20 : (1945) 1 All E. R. 189 : 172 L.T. 114 : 61 T.L.R. 176 : 80 S.J. 100.

11. *Yusuf H. Abbas v. Bhagwandas P. Nangpal*, 1949 Bom. 346 : 51 Bom. L.R. 523.
12. *State of Mysore v. Sabjansab*, 18 Law Rep 218 : 1969 M.L.J. (Cr.) 499 (804).

a *verbatim* reproduction), there is no limitation on the power of the court arising from the stage to which the trial may have reached, provided the court is *bona fide* of the opinion that for the just decision of the case the step of examining any person as witness may be taken.¹³

Leading questions. Under this section which applies to both criminal and civil proceedings, the Judge may ask any question in any form; as for instance, a leading question,¹⁴ and he has equal liberty with regard to the substance of his question which may be about any fact, relevant or irrelevant. But it is to be noted that the section only empowers the Judge to ask irregular questions "in order to discover or obtain proper proof of relevant facts," that is, in order to discover or obtain regularly admissible evidence.¹⁵

Irrelevant questions. "The object of allowing the Judge to ask irrelevant questions under this section is to obtain 'indicative evidence' which may lead to the discovery of relevant evidence.¹⁶ He may not introduce into the case any irregular evidence he pleases. This is indicated by the first Proviso, which requires that the judgment be based upon facts declared by the Act to be relevant and duly proved. So, in a trial for murder, where the weapon had not been found, a witness might state in answer to the Judge that he had heard that the accused had secreted it in a certain ditch. This statement, being hearsay, would be inadmissible as evidence in the case itself, but the Judge by means of it might be able to direct an inquiry which would lead to the weapon being found.¹⁷ If also a Judge should doubt as to the relevancy of a fact suggested, he can, if he thinks it will lead to anything, ask about it himself under this section.¹⁸ There is accordingly no relaxation of the rules previously laid down as to relevancy. The section merely authorises questions the object of which is to ascertain whether the case is or is not (or may be) proved in accordance with those rules.¹⁹ Even if some over-interrogation by the Judge took place on relevant matters introduced by the defence itself, such over-interrogation cannot be said to have affected the merits of the trial.²⁰

13. *Jamatraj Kewalji Govani v. State of Maharashtra*, (1967) 3 S.C.R. 415 : (1969) 2 S.C.A. 59 : 1967 S.C.D. 1185 : (1968) 1 S.C.J. 293 : (1967) 2 S.C.W.R. 996 : 70 Bom. L.R. 134 : 1968 Cr. L.J. 231 : 14 Law Rep 563 : 1968 M.P.L.J. 377 : 1968 M.L.J. (Cr.) 91 : 1968 Mah. L.J. 371 : 1968 M.L.W. (Cr.) 65 : A.I.R. 1968 S.C. 178 (180, 181) : (1972) 1 Cut. L.R. (Cr.) 188.
14. *Norton, Ev.*, 323.
15. *See R. v. Lakshman*, (1885) 10 B. 185.
16. *Krishna Ayyar v. Balakrishna Iyyar*, 1934 Mad. 199 (2) : I.L.R. 57 Mad. 635 : 148 I.C. 79.
17. *Markby, Ev.*, 114, 115 where it is pointed out that the construction of this section is not free from difficulty. That the true construction is that given in the text appears to the authors to be indicated by the words of the first Proviso, "But then", as

Sir William Markby says, "it is not easy to see why the last clause of the second Proviso was inserted. This clause would be quite intelligible if the sections were intended as general relaxation of the rules of evidence, but why should not a Judge who was merely hunting up evidence look at a copy in order to see whether it was worthwhile to endeavour to procure the original?" "It may further be observed that if that clause on the other hand refers to the evidence to be accepted in the case itself, it appears to be mere surplusage as the first proviso has already declared that the facts must be 'duly proved', i.e., where the fact is contained in a document primary evidence of that document must as a general rule be given."

18. *Steph., Introd.*, 73.
19. *Cunningham, Ev.*, 381.
20. *Sunil Chandra Roy v. The State*, 1954 Cal. 305 : 57 C.W.N. 962.

The Supreme Court has settled this question by observing that the Judge can put question at any time, in any form, to any witness or party irrespective of the fact whether the question is relevant or irrelevant, but he must remember that such power is to be used only to discover or obtain evidence of relevant facts.²¹ This has also been emphasised in the following case with the addition that this unlimited right of Court to put questions to discover relevant facts or to obtain proper proof of relevant facts can be exercised only when the witness is put in the witness-box or if the party is before the Court.²²

3. Time to put questions. It has, however, been held, that it is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in Sec. 138 of this Act. In the case, now cited, at a trial before Sessions Court,²³ the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed; a course which, it was observed, must have rendered the greater part of the cross-examination ineffective. Although the law allows the Judge to put any question at any time, the time generally considered proper for an extended examination is when the lawyers for the parties have finished their questions or at least when the lawyer examining the witness at the time, is passing on to a new subject. The Judge may always intervene in the course of examination by Counsel to put a question in a clearer form or to have an obscure answer clarified or to prevent a witness being unfairly misled, but if he does more and stops Counsel again and again to put a long series of his own questions, he makes an effective examination or cross-examination impossible and diverts the trial from its natural course. The Judge has a duty to intervene by way of questions or otherwise at any time that he deemed it necessary, so to do. He might wish to make obscurities in the evidence clear and intelligible; he might wish to probe a little further into matters that he deemed important and in a score of ways his interventions might be both desirable and beneficial. But it is safe to say that all his interventions must be governed by the supreme duty to see that a fair trial is enjoyed by the parties. His interventions must be interventions and not a complete usurpation of the functions of Counsel.²⁴ The Judge ought to put questions to clarify matters left obscure or unintelligible by the Counsel, whether inadvertently or otherwise.²⁵ When the accused has not engaged any Counsel but the Court has appointed *amicus curiae* for him, it is the duty of Court to put questions to prosecution witnesses to clarify obscure matters.¹

21. Nepal Chandra Roy v. Netai Chandra Das, (1971) 3 S.C.C. 303 : 1971 S.C. (Notes) 354.

22. Bhappu v. Parasamal Manaji Bhimani, (1976) 78 Bom. L.R. 500.

23. Noor Bux v. R., (1880) 6 C. 279 : 7 C.L.R. 385 and see Surendra Krishna Mandal v. Ramee Dassee, 1921 Cal. 677 : 59 I.C. 814 : 35 C.L.J. 34 ; In re Sivasubbu Nadar, 1951 Mad. 772 (1) : (1951) 1 M. L.J. 207 : 64 L.W. 303

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24. Sunil Chandra Roy v. The State, 1954 Cal. 305 : 57 C.W.N. 962.

25. I.L.R. (1970) 2 Delhi, 854; Damiseti Subbanna v. The State of Andhra Pradesh, 1976 Cri L.J. 1242 : (1975) 2 An. W.R. 255.

1. Sessions Judge v. I. R. Reddy, (1972) 1 Andh. W.R. 340 : (1972) Mad. L.J. (Gr.) 307 : I.L.R. (1972) Andh. Pra. 688 : 1072 Cr. L.J. 1485.

4. Statement made to the police. It has been held that "the power conferred on the Judge under Section 165, Evidence Act, cannot be exercised for the purpose of introducing evidence in contravention of the law. The last paragraph of Sec. 2 of this Act leaves the provisions of the Criminal Procedure Code unaffected. Under Sec. 162, Criminal Procedure Code (same Section in 1973 Code) statements made to a police officer are prohibited from being used for any purpose save as provided in the section; and there is no provision for allowing the Judge to use such statements for confronting the witnesses with them. To use the statements for this purpose is to contravene the provisions of Sec. 162 of the Code" (same section in 1973 Code).² But, it has been held that the Proviso to Sec. 162, Criminal Procedure Code (same section in 1973 Code), does not, in any way, purport to take away the power that lies in the Court to look into any document that it considers necessary to look into for the ends of justice and to put such questions to a witness as it may consider necessary to elicit the truth. The Proviso would prevent the Court from using statements made by a person to a police officer in the course of investigation for any other purpose than that mentioned in the Proviso, but it does not, in any other way, affect the power that lies in the Court to look into documents or put questions to witnesses *suo motu*.³ The trial Judge should remember that he owes a duty not only to the prosecution but also to the defence. He has the police diary in front of him and should use his greater experience to cross-examine the witnesses when he sees that the defence lawyer is incompetent. He should not do this unnecessarily but only when it is desirable in the interest of justice.⁴ The bar contained in Section 162, Cr. P. C. does not operate against the powers conferred on a Court under Section 165, Evidence Act.⁵ As to the power of Court to take out papers from police diaries and place them on record, see the undernoted case.⁶

5. Order for production. The Judge is also empowered to order the production of any document or thing in order to discover or obtain proof of relevant facts, where Order XIII, Rules 1 and 2, or Sec. 151 of the Civil Procedure Code do not serve his purpose.⁷ But this is subject to the condition in the second Proviso that the Judge is not hereby authorised to compel the production of any document which the witness would be entitled to refuse to produce under Secs. 121—131, ante, if the document were called for by the adverse party. The Court cannot compel the defendant to produce account, which are not connected with the suit, simply in order that the plaintiff, if he gets a decree, may be in a better position to realise his decree debt.⁸ Courts' power under Section 165 to order production of documents is wide. Any party can be compelled to produce any document with a view that jus-

2. Keramat Mondal v. King-Emperor, 1926 Cal. 147 : 92 I.C. 453 : Rahi-Jaddi v. Emperor, 1931 Cal. 189 : I.L.R. 58 Cal. 1009 : 132 I.C. 159 : Maung Hitin Gyan v. Maung Po Sein, 1927 Rang 74 : I.L.R. 4 Rang 471 : 99 I.C. 1019 : see also Emperor v. Ahmad, 1928 L. 144 : 106 I.C. 350.
3. Emperor v. Lal Mia, 1943 Cal. 521 : I.L.R. (1943) 1 Cal. 543 : 209 I.C. 206 : see also Natabar Jana v. State, 1955 Cal. 138 : 59 C.W.N. 729.

4. Drapan Patdarin v. Emperor, 1938 Pat. 153 : 173 I.C. 833 : Dikson Mali v. Emperor, 1942 Pat. 90 : 196 I.C. 597.
5. Raghunandan v. State of U. P., 1974 Cr. L.J. 453 : A.I.R. 1974 S.C. 463.
6. 1974 J. & K. L.R. 622.
7. Shankar Lal v. Mahbub Shah, 1923 Oudh 59 : 70 I.C. 278 : 25 O.C. 286.
8. Krishna Ayyar v. Balakrishna Iyar, I.L.R. 57 Mad. 635 : 148 I.C. 79 : 1934 Mad. 199 (2).

tice could be done in a case, subject to the limitations placed in the section itself.⁹ If material evidence is being suppressed, the Court has power to direct production of documents both in civil as well as criminal cases. If a party is in possession of relevant documents and there is danger of its being tampered with or destroyed, the Court has undoubtedly the power under Section 165 to direct production of such document, but it is not permissible to do so with a view to permit the other side to inspect and take copies of the document, because inspection can be allowed only when a party has right to make inspection and not otherwise.¹⁰ It has, however, been held that the accused can request the Court to direct the other side to produce copies of statements of witnesses examined in an enquiry under Section 8(2) of Railway Property Unauthorised Possession Act and to inspect them in the interest of justice and fairplay although Section 173(4), Criminal Procedure Code denies the right to the accused.¹¹ As to the production of chattels, see also the second Proviso to Sec. 60, ante.

6. Cross-examination. The parties have no power of cross-examination without the leave of the Court upon any answer given by the witness in reply to any question of the Judge put under this section, and it makes no difference whether the cross-examination be directed to the witness's statement of fact or to circumstances touching his credibility. The principle that parties cannot, without the leave of Court, cross-examine a witness, whom the parties, having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact or to circumstances touching his credibility; for any question meant to impair his credit tends (or is designed) to get rid of the effect of each and every answer just as much as one that may bring out an inconsistency or contradiction.¹² In granting or refusing permission, the Court's discretion will have to be exercised judicially, and ordinarily the Judge would give the requisite permission, if the answers given are adverse to the party who seeks the said permission.¹³ The discretion of the Court has to be exercised judicially and in such a manner that injustice may not result. There is nothing in Section 165 to show that cross-examination of the witness by parties on answers elicited by Court is absolutely barred.¹⁴

7. Witness called by Court. But the case dealt with by the section must be distinguished from that where the witness is called by the Court. When a party to the suit, or a witness, is summoned by the Court, such witness is liable to be cross-examined by the parties.¹⁵ The provisions of this

9. *G. R. Sawant v. B. A. Kakade*, I.L.R. 1975 Bom. 829 : (1975) 77 Bom. L.R. 214.
10. *Bhappu v. Parasmal Namaji Bhurmani*, (1976) 78 Bom. L.R. 500.
11. *Bal Kishan Deen Dayal v. State*, (1975) 77 Bom. L.R. 295.
12. *R. v. Sakhatam Mukundji*, (1874) 11 Bom. H.C.R. 166.
13. *In re Mukhesh Ramchandra Reddy*, 1958 Andh. Pra. 165 : I.L.R. 1957 Andh. Pra. 742.
14. *Dwarka Das v. State*, 1979 Cr. L.J. 550.
15. *Tarini Charan v. Saroda Sundari*, (1869) 3 B.L.R. (A.C.) 145, 158;

R. v. Girish Chunder, (1879) 5 C. 614 : and see *Gopal Lall v. Manick Lall*, (1897) 24 C. 288, in which both the abovementioned cases were followed ; see also, *Chintamon Singh v. Emperor*, I.L.R. 35 Cal. 243 : 7 C.L.J. 177 : 12 C.W.N. 299 ; *Pita v. King-Emperor*, 1925 All 285 : I.L.R. 47 All 147 : 85 I.C. 719 ; but see *Makund Singh v. Mst. Ghafurunnisa*, 74 I.C. 108 : 1924 Oudh 18. (The expression "any witness" in the section includes a Court witness, and cross-examination of the witness is not a matter of right but requires the permission of the Court.)

section only forbid the cross-examination without the leave of the Court of any witness upon any answer given in reply to a question asked by the Judge. They apply rather to particular questions put to a witness, already before the Court, than to the whole examination of a witness called by the Court. His examination is not to be confined to such questions as the Court sees fit to put to him, but his knowledge as to the facts he states may be tested, as in the case of any other witness, by questions put by the parties.¹⁶ There is nothing in this section which debars or disqualifies a party to a proceeding from cross-examining any witness called by the Court. All that the section says is that a party to a proceeding shall not be allowed to cross-examine a witness upon an answer given by him to a question put by the Court without the permission of such Court.¹⁷ There is no restriction on the Court examining any witness who in its opinion can give any evidence helpful to the Court, and, when one party cites a witness and does not examine him, it is perfectly open to the trial Court to put him in the witness-box, as a Court witness, and see if he is possessed of knowledge, which after being tested by cross-examination by both sides would be materially helpful to decide any issue.¹⁸ Where a witness had been summoned, but was not called, by the defence, and was thereupon called by the Court, it was held that the witness was not a witness for the defence and that the accused should have been given opportunity to cross-examine him.¹⁹ A Court should not examine a witness without notice to the parties or their pleaders, and without affording them an opportunity to cross-examine him or to rebut his statements. This section does not justify such procedure.²⁰ It has been held that a Court witness is a witness caused to be produced by the Judge acting on his own initiative, and that a witness examined by the Court, at the request of a party is not a Court witness who can be examined freely by both the parties.²¹

Under Sec. 540, Criminal Procedure Code (now Section 311 of 1973 Code), a court has unrestricted powers of summoning a witness. The only restriction is that this power should not be exercised, to save the parties from trouble and expense.²² Subject to this, it is not only the prerogative but also the plain duty of a Court to examine such of those witnesses, as it considers absolutely necessary, for doing justice between the State and the subject. It would not be an improper exercise of the powers of the Court under Sec. 540, Criminal Procedure Code (now Section 311 of 1973 Code), merely because the evidence

In England it has been held that at the trial of an action the Judge has power to call and examine a witness who has not been called by either of the parties and when he does so neither party has a right to cross-examine the witness without the Judge's leave which should be given to either of the parties against whom the evidence should prove adverse; *Coulson v. Disborough*, (1894) 2 Q. B. 316. It has been also held that where, after the examination of witnesses to facts on behalf of a prisoner, the Judge (there being no Counsel for the prosecution) calls back and examines a witness for the prosecution, the prisoner's Counsel has a right to cross-examine him again if he thinks it material; *R. v. Watson*,

- (1834) 6 C. & P. 653.
 16. *Tarini Charan v. Saroda Sundari*, (1869) 3 B.L.R. (A.C.) 145, 158; for the English rule see *Coulson v. Disborough*, (1894) 2 Q.B. 316.
 17. *Gopal Lall v. Manick Lall*, (1897) 24 C. 288.
 18. *Sheikh Dada Sahib v. Jammu Lachanna*, 1954 Mad. 80 : (1952) 2 M.L.J. 290 : 1952 M.W.N. 604 (1).
 19. *Mohendra Nath v. R.*, (1902) 29 G. 387 : 6 C.W.N. 550.
 20. *Peary Lal v. Peary Lal*, 1914 Cal. 575 : 22 I.C. 407 : 18 C.L.J. 646.
 21. *Emperor v. Sayendra Kumar Dutt*, 1923 Cal. 463 : 71 I.C. 657.
 22. *In re K. V. R. S. Mani*, A.I.R. 1951 Mad. 707 : (1951) 1 M.L.J. 184.

taken supports the case of the prosecution and not that of the accused.²³ A just decision under Sec. 540, Criminal Procedure Code (now Section 311 of 1973 Code), does not mean a decision in favour of the defence.²⁴

It is always open to a court to examine a particular witness as court witness.²⁵

The only rules which the Court must bear in mind when examining court witnesses are : (1) that the prosecution and the accused are both equally entitled to cross-examine a court witness, and (2) that if the evidence of a court witness is prejudicial to the accused, opportunity to rebut the evidence so given must be given to the accused.¹

Subject to these twin rules dictated by fairplay and justice, there seems to be no other restriction, which can be usefully placed; and certainly there can be no restriction to the examination of a court witness.

In this connection we can usefully remember an extract from Burke in the Trial of Warren Hastings :

"A Judge is not placed in the high situation merely as a passive instrument of the parties. He has a duty of his own, independent of them and that duty is to investigate the truth."

Lumpkin, J., in *Epps v. State*,² observed : "Counsel only seek for their clients' success but the Judge must watch that justice triumphs."³

8. Proviso (1). The proviso declares that the judgment must be based upon facts declared by this Act to be relevant (v. ante, Secs. 5-55) and duly proved (v. ante, Secs. 56-100). The consent of parties cannot take the place of the statutory direction in Sec. 165 that judgments must be based on facts declared by the Act to be relevant or duly proved.⁴ The Court is not entitled to base its judgment upon matters which are not properly admissible in evidence.⁵ Evidence which is not relevant under the provisions of the Act cannot be made relevant because it has been led without objection. If a document is inadmissible on account of a defect which could be cured by the person relying on it, provided an objection had been taken at the proper time, it is obvious that no objection as to its admissibility should be allowed at a later stage. The omission to object to the admission of irrelevant evidence cannot possibly make it relevant.⁶ This proviso, as already observed, indicates the construction which should be placed on the first portion of the section. The answer to an irrelevant question may lead to the discovery of important relevant matter, which may be the basis of a decree, though an answer to an irrelevant question could not be so. The Judge will

23. In re K. K. Narayana Nambiar, A. I.R. 1942 Mad. 223 : I.L.R. 1942 Mad. 494.

24. Kesava Pillai v. Emperor, A.I.R. 1929 Mad. 837 : 30 L.W. 642 : 57 M.L.J. 681.

25. R. P. Sastri v. Keshori Devi, (1973) 39 Cut. L.T. 885.

1. Rangaswami v. Muruga, A.I.R. 1954 Mad. 169 *infra*.

2. (U.S.A.) 19 Ga 118 (Am.).

3. Rangaswami v. Muruga, A.I.R.

1954 Mad. 169 : (1952) 2 M.L.J. 497 : 1952 M.W.N. 750.

4. Ponnusami Pillai v. Singaram Pillai, 1919 Mad. 848 (2) : I.L.R. 41 Mad. 731 : 46 I.C. 849.

5. Baldeo Singh v. Sheoraj Kueri, 1920 Pat. 116 : 56 I.C. 807.

6. Nanak Chand v. Mian Mohammad Shahbaz Khan, 1936 Lah. 114 ; Jagdish Chandra De v. Harihar De, 1924 Cal. 1042 : 78 I.C. 219 : 40 C.L.J. 89.

not be permitted to found his judgment upon the class of statement to which he may resort as indicative evidence for the reason that it would tempt Judges to be satisfied with second-hand reports, would open a wide door to fraud, and would waste an incalculable amount of time.⁷ It may also be added that it would modify, if not entirely do away with, the admitted and declared rules of evidence to a very considerable extent.⁸ And it is intolerable that the Court should decide rights upon suspicions unsupported by testimony.⁹ In a trial held by a Sessions Judge, he is exactly in the same position as the jury in dealing with the evidence properly given before him, and he is bound to confine his attention solely to such evidence.¹⁰ It is improper for a Court to receive any information of any kind in reference to a case, whether it be relevant or not, other than such as comes before it in the way which the law recognises in the form of legal evidence.¹¹ "It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a Judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them."¹² On the other hand, it has been laid down, by their Lordships of the Privy Council in *Hurpurshad v. Sheo Dyal*,¹³ that the Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. Their Lordships appear to draw the distinction between the conclusion drawn from the knowledge of a Judge about the general character and position of the parties and their witnesses and his knowledge regarding any particular facts connected with the facts in issue in the case.¹⁴

The functions of a Judge, with regard to evidence, have been declared¹⁵ to be of a threefold nature: (a) to exclude everything that is not legitimately evidence¹⁶ and then when judgment is to be given, (b) to ascertain clearly

- 7 Steph., Introd., 162, 163.
8. If inadmissible evidence has been received (whether with or without objection) it is the duty of the Judge to reject it when giving judgment and if he has not done so, it will be rejected on appeal as it is the duty of Courts to arrive at their decisions upon legal evidence only; *Jacker v. I.C. Co.*, 5 Times L.R. 13.
9. *Sm. Mohun v. Sarat Chand*, 2 C.W. N. 27.
10. *R. v. Jadub Das*, I.L.R. 27 Cal. 295 : 4 C.W.N. 129.
11. *Mahalal v. Sankla*, (1904) 6 Bom. L.R. 789.
12. *Bamundoss Mookerjee v. Mst. Tarinee*, 7 M.L.A. 169 (P.C.) at p. 203.
13. (1877) 26 W.R. 55 : 3 I.A. 259 (P.C.).
14. See *San Hla Baw v. Mi Khorow Nissa*, 1918 L.B. 66 : 45 I.C. 734 : 9 L.B.R. 160.
15. Norton, Ev., 65 ; see Taylor, Ev., ss. 23-27. As to the duty of a Sessions Judge in criminal cases, see Cr. P.C., S. 298.
16. As is laid down in criminal trials by S. 298 of the Cr. P.C. As to the

existence of a similar duty in civil cases, v. ante, notes to S. 5 and cases there cited ; as to want of objection to admissibility, see the case of *Miller v. Modho Das*, 23 I.A. 106 : 19 A. 76 where it was held that an erroneous omission to object to irrelevant evidence does not make it admissible ; and see *Sri Rajah Prakasrayanin Guru v. Venkata Rao*, (1916) 38 M. 150, consent or want of objection to manner in which relevant evidence is brought on the record precludes objection or appeal. "Under the old law, and almost as it were from the necessity of the thing, it was indicated on more than one occasion [see Circular No. 31 (Civil Side), 13th October 1863] that the Courts had an active duty to perform in respect of the admission and rejection of evidence and this wholly irrespective of objections emanating, or rather failing to emanate, from the parties or their pleaders" ; where it is also observed that when the manner in which case are prepared for trial in the majority of Courts of original jurisdiction in the mofussil is considered, an

what the evidence is which he has before him, and (c) to estimate correctly the probative force of that evidence.¹⁷

However, even if the evidence on the record is in itself insufficient the Judge may properly decide the case upon the evidence such as it is, if the defendant has waived his objection to its insufficiency and consented to its being taken as sufficient.¹⁸

9. **Proviso (2).** This proviso subjects the Judge, in the exercise of the powers hereby given, to the provisions contained in Secs. 121-131, 148 and 149, ante. Thus, a Judge can no more compel a witness to disclose a confidential professional communication,¹⁹ or question him to his credit without reasonable grounds,²⁰ or compel a third party to produce his title-deeds²¹ than the parties or their agents can do. Of course, it is the duty of the Judge to otherwise properly question and to coerce the witness in any manner. So, where in cross-examination before the Court of Session, a witness stated, when she was before the committing Magistrate that officer addressing her, said: "Recollect, or I will send you into custody," it was held that if the statements were correct, the conduct of that officer was not only most improper, but absolutely illegal and that a repetition of it would involve very serious consequences.

Under this section, a Judge has the power of asking irrelevant question of a witness, if he does so in order to obtain proof of relevant facts; but, if he asks questions with a view to criminal proceedings being taken against the witness, the witness is not bound to answer them, and cannot be punished for not answering them under Sec. 179 of the Penal Code.²² Therefore, although the power given to a Judge is very wide under Sec. 165, he must as far as possible be in a detached position, and then only will he have a proper and favourable opportunity to observe the demeanour of a witness, and to correctly appreciate the weight of evidence. Lord Bacon in his Essay on Judicature has well said :

"Patience and gravity of hearing is an essential part of justice, and an over-speaking Judge is no well-tuned cymbal. It is no grace to a Judge first to find that which he might have heard in due time from the bar : or to show quickness of conceit in cutting evidence or counsel too short or to prevent information by questions though pertinent. The parts of a Judge in hearing are four : To direct the evidence; to moderate length, repetition or impertinency of speech; to recapitulate, select and collect the material points of that which hath been said; and to give the rule or sentence; whatsoever is above here is too much. It is a strange thing to see that the boldness of advocates should prevail with Judges; whereas they should imitate God in whose seat they sit who represseth the presumptuous and giveth grace to the modest; but it is more strange that Judges should have noted favourites which cannot but cause multiplication of fees and suspicion of by-ways. There is due from the Judge to the advocate some commendation and gracing where causes are well handled and fair pleaded especially towards the side which obtaineth

when it is reflected that many of the practitioners in the lower Courts have little idea of what is or what is not relevant, it will be apparent that if the Court be themselves passive, the utility of the code of evidence will seriously be impaired.

17. *v. ante*, Introduction to Part II and

cases there cited.

18. *Sheetul Pershad v. Junmeioy Mullick*, (1869) 12 W.R. 244-45.

19. *v. ante*, Ss. 126-129.

20. *v. ante*, S. 149.

21. *v. ante*, S. 130.

22. *R. v. Hari Lakshman*, (1885) 10 B. 186.

not (is not successful); for that upholds in the client the reputation of his counsel and makes him feel less confident of the goodness of his cause. There is likewise due to the public a civil apprehension of advocates, where there appeareth cunning counsel, gross neglect, slight information, indiscreet pressing or an overbold defence; and let not the counsel altercate or bandy words with the Judge, nor wind himself into the handling of the cause anew after the Judge had declared his sentence; but on the other side let not the Judge meet the case half-way, nor give occasion to a party to say his counsel or evidence were not heard."

166. *Power of jury or assessors to put questions.* In cases tried by jury or with assessors, the jury or assessor may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

COMMENT

The system of trial of criminal cases by jury or with assessors has now been abolished by the Code of Criminal Procedure, 1973. However some enquiries or cases under special Acts are still conducted with assessors.

CHAPTER XI

Of Improper Admission and Rejection of Evidence

In his Introduction²³ to this Act, Sir James Fitzjames Stephen observes with reference to the sections concerning relevancy that "important as these sections are for purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts, they are not likely to give rise to litigation or to nice distinctions. The reason is that Sec. 167 of the Evidence Act, which was formerly Sec. 57 of Act II of 1855, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on the subject is principally due to the fact that under the earlier practice the improper admission or rejection of a single question and answer would give a right to a new trial in a civil case, and would upon a criminal trial be sufficient ground for the quashing of a conviction before the Court for Crown Cases Reserved.²⁴ The improper admission or rejection of evidence in India has no effect at all, unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge, moreover, if he doubts as to the relevancy of a fact suggested can, if he thinks, it will lead to anything relevant, ask about it himself under Sec. 165."²⁵

Errors committed by the Court, either in matters of law or in admitting or rejecting evidence, and occasionally in matters of practice, are corrected by application to a superior tribunal. Formerly in England, where evidence had been improperly admitted or rejected a new trial was granted unless it was clear that the result would not have been affected; but this rule is reversed by the present rules of the Supreme Court, which prescribe that a new trial shall not be granted on the ground of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.¹ But the Court of Appeal may, if the circumstances require it, hear evidence.²

23. At p. 73 : see p. 60, ante.

24. This Court is now supplemented (and in practice replaced) by the Court of Criminal Appeal.

25. Sir William Markby (Ev., p. 117) observes : "I think these words must have been written under some misconception. As the law stands, an error in the reception or rejection of evidence may have the gravest consequences." The language is perhaps, misleading, but doubtless Sir J. F. Stephen meant that it was practically a matter of little moment whether an error was made in the reception or rejection of some particular item of evidence which does not really affect the decision on the merits, but which item might under the earlier practice of the English Courts have been ground for a new trial or the quashing of a conviction. In other

words, the section by curing the ill-result of slight and really immaterial errors makes their commission of no great importance and the raising of technical objections by reason of such commission ineffectual.

1. Order XXXIX, R. 6 of the Rules of the Supreme Court : see also C.C.R., Order XXXVII and Best, Ev., s. 82, v. post : and see also *ib.*, as to the misconduct of a jury so as to defeat justice : see Phipson, Ev., 11th Ed., 699 : see also *Holford Stewart v. George Alfred Francis Hancock*, 1940 P.C. 128 : 189 L.C. 321.

2. See *Braddock v. Tillotson's Newspapers*, (1930) 1 K.B. 47 : *Gillan v. Landless*, (1948) 2 All E.R. 721n; *Tucker v. Tucker*, (1910) P. 105 : *Percell v. Railway Executive*, (1951) 1 All E.R. 536

Section 167 applies to both criminal as well as civil proceedings,³ and is but one of the many applications of that principle which is at the root of modern legislation respecting judicial procedure, namely, that if legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impeding the course of judicial proceedings, and the attainment of that substantial justice which should be their only aim.⁴ Another application of the same principle is that contained in Sec. 99 of the Code of Civil Procedure which enacts that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action, or of any error, defect or irregularity in any proceedings in the suit nor affecting the merits of the case, or the jurisdiction of the Court. Similar provisions are contained in Sec. 537 of the Code of Criminal Procedure [now Section 465(1) of 1973 Code]. But the disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by this section.⁵

167. *No new trial for improper admission or rejection of evidence.* The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision.

s. 5 ("Evidence.")

s. 5 ("Court.")

Steph. Dig. Art. 148; Taylor, Ev., ss. 1881-1882B; Best, Ev., s. 82; Chitty's Archbold, 730; Roscoe, N. P. Ev., 273, 274; Powell, Ev., 9th Ed., 703-704; Markby Ev., 116, 117; Roscoe, Cr. Ev., 16th Ed., 115; Steph., Introd., 73; Mulla's Civ. P. C., loc. cit.; Henderson's Cr. P. C., loc. cit.; Annual Practice 1906. Notes and cases therein given and cited under Order XXXIX, Rule: 1-8.

SYNOPSIS

1. Principle.
2. Improper admission or rejection of evidence :
—Tendering.

3. Objection to admissibility of evidence.
4. Civil cases.
5. Appeals.

3. v. post.

4. See Goshain Tota v. Ruckminee Bulub, 13 Moo I.A. 77, 83; s.c. 12 W. R. (P.C.) 32. (The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of this Tribunal to do substantial justice between the parties and to see if there is sufficient evidence on the whole record to justify the conclusion to which the Court below arrived); and as to substantial justice, see also Baboo Bodhnarain v. Omrao Singh, 13 Moo

I.A. 519 : s.c. (1870) 15 W.R. (P.C.) 1; Dal Singh v. R., 191 P.C. 25 : 44 I.A. 137 : I.L.R. 4 Cal. 876 : 39 I.C. 311; Vaithintha Pillai v. R., 40 I.A. 15 (P.C.) : I.L.R. 86 M. 501 : I.C. 369; Clifford v. R., 40 I.A. 241 (P.C.).

5. Subrahmania Ayyar v. R., 28 I.A. 257 : I.L.R. 25 Mad. 61 : 3 Bon L.R. 540; see also Emperor Ermanali, 1930 Cal. 212 : I.L.R. 57 Cal. 1228 : 123 I.C. 664 (B.); Pulukuri Kottaya v. Emperor, 1947 P.C. 67 : 74 I.A. 65 : I.L.R. 1948 Mad. 1 : 230 I.C. 135.

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| 6. First appeals. | 13. To sum up the appreciation of evidence in appeals : Civil Appeals. |
| 7. Admission of evidence in appeal. | 14. Criminal appeals. |
| 8. Second appeals. | 15. Appeals against acquittals. |
| 9. Appeals to Privy Council and Supreme Court. | 16. Supreme Court Appeals. |
| 10. Criminal cases. | 17. To conclude the appreciation of evidence in appeals. |
| 11. Appeals to Supreme Court in criminal cases. | 18. Appeals by Special Leave. |
| 12. Letters Patent appeals. | |

I Principle. See Introduction, ante.

2. Improper admission or rejection of evidence. The principle of this section,⁶ is in accordance with that upon which the Courts in England now act and the section itself is a re-enactment of the provisions of Sec. 57 of the earlier Act, II of 1855. The grounds upon which it is based, have been already referred to in the Introduction to this Chapter, to which reference should be made.

The section applies to criminal cases as well as to civil cases, whether or not the trial has been held before a jury. A single Judge of the Patna High Court has held that this section applies to second appeals on the civil side or cases tried by a jury on the criminal side; and not to first appeals where the facts are a matter for decision of the appellate Court.⁸ The principle enacted by it has been applied in numerous cases, both prior and subsequent to the passing of this Act. In so far, however, as every case must depend upon its own peculiar facts, and can, therefore, generally afford no precedent to be followed in another, it would serve no practical purpose to analyse in detail the case decided under this section, or Sec. 57 of Act II of 1855, but reference may be made to the undermentioned cases,⁶ as illustrations of the manner in

6. Applied in *Kuruba Shankara Chenna Basappa v. Kili Manappa*, 1925 Mad. 245 (2) : 82 I.C. 283 : 21 L.W. 87.
7. *R. v. Hurribole Chunder*, (1876) 1 C. 207 ; *R. v. Navroji Dadabhai*, (1872) 9 Bom. H.C.R. 374 ; *R. v. Pitamber Jua*, (1877) 2 B. 61, 65 ; *R. v. Nand Ram*, (1887) 9 A. 609 ; *Subramania Ayyar v. R.*, 28 I.A. 257 : 1 L.R. 25 Mad. 61, 75 : 3 Bom. L.R. 540 ; *R. v. Rama Sattu*, (1902) 4 Bom. L.R. 434 ; *R. v. Alloomiya Husan*, (1902) 25 B. 129, 152 : 5 Bom. L.R. 805. The words of this section are identical with those of S. 57 of Act II of 1855 ; but the latter Act contained no express words making it applicable to all Courts whatever (see S. 1, ante), and it might have been doubted whether all its provisions were intended to be enforced in all proceedings, criminal as well as civil ; *R. v. Navroji Dadabhai*, (1872) 9 Bom. H.C.R. 374 ; it was however, held to be applicable in criminal case in *R. v. Ramaswami Mudaliar*, (1869)

- 6 Bom. H.C.R. (Cr. Ca) 47. As to the duty of the High Court in reserved or certified cases, see *Emperor, v. Panchu Das*, 1920 Cal. 500 : 1 L.R. 47 Cal. 671 : 58 I.C. 929 (F.B.).
8. *Bhabendra Chandra v. Ajodhiya Chatterji*, 1934 Pat. 605.
9. *R. v. Nujam Ali*, (1866) 6 W.R. (Cr.) 41 ; *Goshain Tota v. Ruckminee Bullub*, 13 Moo I.A. 77 : (1869) 12 W.R. (P.C.) 32 ; *Maharajah Jagadendra v. Bhabatarini Dasi*, (1870) 5 B.L.R. App. 54 : s.c. 14 W.R. 19 ; *Mohur Singh v. Ghuriba*, 6 B.L.R. 495, 498, 499 : (1870) 15 W.R. (P.C.) 8 ; *Mahomed Bux v. Abdool Kareem*, (1870) 20 W.R. 458 ; *Womma Kant v. Gunga Narain*, (1873) 20 W.R. 384 ; *R. v. Amrita Gobinda*, (1873) 10 Bom. H.C.R. 497, 502 ; *R. v. Purbhudas*, (1874) 11 Bom. H.C. R. 90, 97 ; *R. v. Jhubboo Mahton*, (1882) 8 C. 739 : s.c. 12 C.L.R. 233 ; *R. v. Nand Ram*, (1887) 9 A. 609, 610 ; *R. v. Maru*, (1888) 10 A. 207, 223 ; and see also *R. v.*

which these sections have been applied. In one of these cases¹⁰ in which evidence has been improperly admitted and objection taken thereto, the Privy Council observed as follows: "It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of law in this country—before which, on a motion for a new trial, it is shown that evidence improper to be admitted has been admitted before the jury. The courts in that case are not Judges of fact and are unable to say what weight the jury may have given to the evidence that ought not to have been admitted. But it is the duty of their Lordships, who are judges of the fact in such a case as this, to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decree. Their Lordships must nevertheless express their regret that the Court of first instance in the case before them should have been as lax as it has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal."¹¹

In *Shyam Singh v. Deputy Inspector-General of Police*,¹² the enquiry officer gave to the petitioner an opportunity of cross-examining a witness, but he declined to do so. The witness had placed documentary evidence before the enquiry officer and it also included one report which was to the effect that the petitioner (whose health was in question) and his wife were keeping good health and were running a hotel during the period the petitioner was away from his duty. It was true that the petitioner did not get an opportunity to cross-examine the officer who had made the report. The legal charge against the petitioner was that he had overstayed for a long period even after the expiry of his leave. The allegation of overstay without leave was not denied, and so it was for the petitioner to satisfy the authorities concerned that there were good reasons on account of which he could not possibly join his duty. He did not discharge that burden by producing any evidence. It was, therefore, found that he had not been prejudiced by the fact that he was not given

Huribole Chunder, (1876) 1 C. 207; R. v. Navroji Dadabhai, (1872) 2 Bom. H.C.R. 374; R. v. Puambar Jina, (1877) 2 B. 61, 65; R. v. Ramaswami Mudaliar, (1869) 6 Bom. H.C.R. (Ca. Ca.) 47, cited in preceding note; and Womesh Chunder v. Chund Churn, (1881) 7 C. 293; R. v. O'Hara, (1890) 17 C. 642; Wafadun Khan v. R., (1894) 21 C. 955; R. v. Ramchandra Gobind, (1895) 19 B. 749, 761, cited post; R. v. Alloomiya Husan, (1902) 28 B. 129, 152; 5 Bom. L.R. 805; R. v. Rama Sattu, (1902) 4 Bom. L.R. 434; K. Sankara Chenna Basappa v. K. Manappa, 1925 Mad. 245 (2); 82 I.C. 283; 21 L.W. 87.

10 Mohur Singh v. Ghuriba, (1870) 6 B.L.R. 495, 498, 499; s.c. (1870)

15 W.R. (P.C.) 8.

11. See also *Raja Bommarauze v. Rangasamy Mudaly*, (1855) 6 Moo I.A. 232; *Lala Bunseedhur v. Government of Bengal*, 9 B.L.R. 371; 14 Moo I.A. 86; 16 W.R. (P.C.) 11; *Goshain Tota v. Ruckminee Bullub*, 13 Moo I.A. 77; (1869) 12 W.R. (P.C.) 32. (The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of the tribunal to do substantial justice between the parties, and to see if there is sufficient evidence on the whole record to justify the conclusions to which the Court below arrived.

12. I.L.R. 1965 Raj. 44; A.I.R. 1965 Raj. 140.

an opportunity to cross-examine the officer in question who gave the report. Besides, there was no application to show that the petitioner had requested the enquiry officer to call the officer who had given the report for the purpose of cross-examination. Under the circumstances it was held that the case did not fall under this section, for even if the petitioner had been allowed an opportunity for cross-examination, it would not have varied the decision. The section lays down that the improper admission or rejection of evidence can be no ground of itself for the reversal of any decision, in any case, if it appears that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision.

The mere fact that some evidence, which may not be strictly admissible, has been admitted is no ground for setting aside the decision of an inferior Court. The section provides for such contingencies. It is true that, in appraising evidence, different Judges may, at times, entertain different opinions, but, even on an appeal, the superior Court is bound to respect the findings of the trial Court on questions of fact, and hence the mere admission of inadmissible evidence on an insignificant fact is not sufficient to warrant the conclusion that the trial Court was in error in taking the view that it did.¹³ A finding will not be disturbed if, apart from the evidence impugned as inadmissible, there is other evidence sufficient to support the finding.¹⁴ Where in land acquisition proceedings the valuation of a garden made by the Land Acquisition Officer has been substantially increased by the High Court relying on inadmissible evidence and the Government has not appealed against the decision of the High Court, the claimant cannot complain that the valuation rests upon inadmissible evidence.¹⁵ If independently of the evidence objected to and admitted, there is overwhelming direct and positive evidence which is admissible the improper admission of the evidence objected to is under this section not a ground for a new trial or for the reversal of the decision of the Court below.¹⁶ But it is clear, from the language of this section, that it is not in every case that the admission of inadmissible evidence will be disregarded on the ground that it appears to the appellate Court that, independently of the evidence improperly admitted, there was sufficient evidence to justify the decision. Where by reason of the admission of a large body of inadmissible evidence, the trial has taken a course substantially different from that con-

13. *Dandapani Das v. Mohan Nayak*, 1954 Orissa 67 : 1.L.R. 1953 Cut. 682.

14. *Kali Das v. Emperor*, 1948 Cal 16 : 229 I.C. 276 ; *Jamna Prasad v. Emperor*, 1938 Nag 325 : 174 I.C. 523 ; *Pharbo v. Emperor*, 1932 Sind 201 : 141 I.C. 392 : 26 S.L.R. 302; see also *Achhaibat Singh v. Emperor*, 1921 Pat 331 : 61 I.C. 230 : 2 P.L.T. 223 ; *Emperor v. Mahabali Rama Sani*, 1924 Bom. 480 : 87 I.C. 520 : 26 Bom. L.R. 706 ; *K. Sankara Chenna Basappa v. K. Manappa*, 1925 Mad. 245 (2) : 82 I.C. 283 : 21 L.W. 87 ; *Mirza Akbar v. King-Emperor*, 1940 P.C. 176 : 67 I.A. 336 : 1.L.R. 1940 Kar. (P.C.) 302 : 1.L.R. 1940 Lah. 612 : 190 I.C. 233 ; *Bhagwan Baksh Singh*

v. Mahesh Baksh Singh, 1935 P.C. 199 : 159 I.C. 325 ; *Sukhrum v. Ram Swarup*, 1969 A.W.R. (H.C.) 12 : 1969 A.L.J. 129 at 130.

15. *Chaturbaj Pande v. Collector of Rajgarh*, (1969) 1 S.C.R. 412 : (1969) 1 S.C.J. 344 : (1969) 1 S.C.W.R. 320 : (1968) 2 Um N.P. 203 : 1969 A.L.J. 159 : 1969 B.L.J.R. 196 : 1969 K.L.J. 212 : 1969 J.L.J. 495 : 1969 M.P.L.J. 346 : 1969 M.P.W.R. 188 : 1969 Mah. L.J. 367 : A.I.R. 1969 S.C. 255, 257.

16. *Ramyaad v. King-Emperor*, 1926 Pat. 211 : 95 I.C. 273 : 7 P.L.T. 673 ; *Madan Lal v. Principal, H.B.T. Institute, Kanpur*, A.I.R. 1962 All 166 ; *Babu Nandan v. Board of Revenue*, A.I.R. 1972 All. 406.

templated by the law, the case is outside the purview of this section.¹⁷ So also, where the evidence excluded is not a piece of evidence, but the main evidence in support of a party's case, it is impossible to state what the finding of the Court below would have been, had this evidence been considered. And the finding is liable to be set aside.¹⁸ Again, the section does not excuse the admission of inadmissible evidence. It is more important that justice should be administered strictly by Courts of criminal jurisdiction than that persons involved in an offence, such as one under Sec. 323, Indian Penal Code, should be punished. It is the duty of the trial Magistrate or Judge to refuse to admit evidence which is not admissible according to law.¹⁹ The fact that a document was admitted without any objection from a party does not entitle the Court to admit in evidence what is in law inadmissible.²⁰ It may be noted that the reception of inadmissible evidence would be less injurious than the rejection of admissible evidence, because, in the former case, in arriving at a decision the evidence wrongly admitted can well be excluded from consideration whereas, in the latter case, the evidence wrongly excluded can only be brought upon record by having recourse to further proceeding necessitating thereby the prolongation of the trial and possible harassment to the persons concerned.²¹

As regards the rejected evidence, the question under this section is not so much, whether the evidence rejected would not have been accepted against the other testimony on the record as whether the evidence ought not to have varied the decision. In *Ramachandran v. Registrar of Co-operative Societies*,²² a co-operative credit society filed an arbitration reference for recovery of loan taken by a member. The latter contended that he had repaid the loan and relied on the entries made in the pass book issued by the Society. This pass book was rejected on the ground that it did not constitute proper evidence. The decision was considerably influenced by the view that the entries in the pass book did not afford any cogent evidence in support of the plea of payment of the debt. It was held that the rejection of the pass book amounted to an error of law which vitiated the award. It is true that the acceptance or rejection of a piece of evidence is entirely within the competence of the Court. It has full discretion in the matter, but the said discretion is to be exercised properly. And if the Court rejects evidence, after proper exercise of discretion and holds the evidence of the record sufficient for the disposal of the case, the improper rejection of evidence is no ground, of itself, for a new trial or reversal of the decision of the case.²³

Tendering. Where it is clear from the record that the prosecution, though it had cited a certain person as a witness, was not very keen to examine him and that when that person objected to give evidence the prosecution dropped him, it is not a case in which evidence can be said to have been rejected within the meaning of this section. In such cases, the prosecution does not, in fact, tender a person as a witness.

17. *G. G. Lloyd v. Emperor*, 1933 Cal. 136 : 142 I.C. 274.
18. *Channoo Mahto v. Jang Bahadur Singh*, 1957 Pat. 293 : 1956 B.L.J. R. 197.
19. *Phukan Singh v. Emperor*, 1931 Pat. 345 : 133 I.C. 449 : 32 Cr. L.J. 1025 : 12 P.L.T. 471.
20. *Smt. Krishna Subala Bose v. Dhama-pati Dutta*, 1957 Cal. 59.

21. *State of Mysore v. Sampangiahiah*, 1953 Mys. 80 : I.L.R. 1953 Mys. 171.
22. A.I.R. 1963 M. 105 : 75 L.W. 406.
23. *Bibhuri Bhushan Bank v. Sadhan Chandra*, A.I.R. 1965 C. 199 : 68 C.W.N. 1043 ; *Habibul Rahman v. Mt. Tetri*, A.I.R. 1972 Pat. 43.

The test, whether a witness is material for the present purpose is not, whether he would have given evidence in support of the defence. The test is, whether he is a witness essential to the unfolding of the narrative on which the prosecution is based. Whether a witness is so essential or not would depend on whether he could speak to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied.²⁴ It is not that the prosecution is bound to call on witnesses who may have seen the occurrence and so duplicate the evidence. But, apart from this, the prosecution should call all material witnesses, and if a material witness has been deliberately or unfairly kept back, then a serious reflection is cast on the propriety of the trial itself, and the validity of the conviction, resulting from it, may be open to challenge.²⁵

When a court of fact acts on a material partly relevant and partly irrelevant and it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at the finding and such a finding is vitiated because of the use of such inadmissible material, the case should be remanded for rehearing without the inadmissible material.¹ The effect of improper omission or rejection of evidence has been considered by the Supreme Court in *Ramkishan Mitanal Sharma v. State of Bombay*,² *Narain v. State of Punjab*,³ and *Nagendra Bala Mitra v. Chunilal Chandra Roy*.⁴ The section prohibits the quashing of proceedings, simply because the prosecution, without trying to establish a fact by its own evidence, examines the accused in spite of his unwillingness and protest.⁵ If the Court refuses to summon a defence witness, the important question to consider is whether accused has been prejudiced and not whether the order refusing to summon witness was wrong.⁶ Failure of Magistrate to place inspection note on record does not vitiate the trial unless it is shown that prejudice was caused thereby to a party.⁷

3. Objection to admissibility of evidence. The proper time to object to the admissibility of evidence is at the trial, when the evidence is tendered, and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence. When the objection is taken at the proper time, the party wishing to produce the evidence may be able to take steps to make the evidence admissible.⁸ As their Lordships observed in a case: "Where

24. *Stephen Seneviratne v. The King*, A. I.R. 1936 P.C. 289 relied on in *Narain v. State of Punjab*, *infra*.

25. *Narain v. State of Punjab*, A.I.R. 1959 S.C. 484 : 1959 S.C.J. 447 : 1959 (Supp.) 1 S.C.R. 724 : 1959 A.W.R. (H.C.) 292 : 1959 Cr. L.J. 537 : 1959 M.L.J. (Cr.) 289. *Kalappa v. Bhima*, A.I.R. 1961 Mys. 160 : *Pacha Khan v. H.D. Gopalakrishna Rao*, (1975) 1 Kant. L.J. 105 : I.L.R. 1925 Kant. 25 : A.I.R. 1975 Kant. 179.

2. A.I.R. 1965 S.C. 104 : (1955) 1 S.C.R. 903.

3. A.I.R. 1959 S.C. 484 : 1959 S.C.J. 447 : 1959 Supp. (1) S.C.R. 724 : 1959 A.W.R. (S.C.) 292 : 1959 Cr. L.J. 537 : 1959 M.L.J. (Cr.)

289.

4. A.I.R. 1960 S.C. 706 : (1960) 3 S.C.R. 1.

5. *John v. Shertally Municipality*, I.L.R. 1959 Kerala 150 : A.I.R. 1959 Ker. 323.

6. I.L.R. 1971 Him. Pra 796

7. *Shoo Singh v. B. Mahton*, 1972 B.L.J.R. 278

8. *Jahangir v. Shoo Raj Singh*, 1915 All 334 : I.L.R. 37 All. 600 : 30 I.C. 505 : 13 A.L.J. 817 : *Shahzadi Begam v. Secretary of State*, I.L.R. 34 Cal. 1059 : 31 I.A. 194 : 9 Bom. L.R. 1192 : *Anup Singh v. Harbanj Kaur*, 1958 Punj. 116 : 59 P.L.R. 650 : I.L.R. 1958 Punj. 335.

the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof.⁹

An erroneous omission to object to inadmissible evidence does not make it admissible. If the evidence is *per se* inadmissible, and cannot possibly be admitted under any provision of the Act, the failure to object to its admission in the trial Court would not make it admissible, and would not bar the party objecting to admission from raising the point in the appellate Court. It is only with respect to evidence, which is admissible under some provision of the Act, and there is some defect in connection with its admission, but no objection was taken to the admission on account of the defect, that the party objecting may not be allowed to object to the improper admission at the appellate stage.¹⁰ It is not correct to say that a Court allowing evidence to go on the record is incompetent to decide subsequently that it was inadmissible.¹¹ But its conclusion should not be overruled except in very clear cases of miscarriage of justice.¹² Evidence cannot be said to have been improperly admitted merely because it was admitted at an improper stage of the case, unless indeed the other party has been prejudiced by this course.¹³ But when a Court acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding, and such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises.¹⁴

4. Civil Cases. The words "reversal of any decision" indicate the applicability of the section to appeals, inasmuch as Courts of Appeal have power to reverse the decisions in respect of which appeals are preferred. The Code of Civil Procedure does not provide for a new trial in civil cases. But Order XLI, Rule 23 of the Code provides for a remand, and where a suit is remanded under this rule, the whole suit is reopened and questions, on which the trial Court may have recorded its findings, may be re-agitated.¹⁵ Order XLVII¹⁶ of the Code provides for a review of judgment; and Order XLVII, Rule 8,¹⁷ enacts that when an application for a review of judgment is granted, the Court may at once rehear the case or make such order in regard to the

9. *Gopal Das v. Sri Thakurji*, 1943 P. C. 83 at 87 : I.L.R. 1943 Kar. 69 (P.C.) : 207 I.C. 553 : 1943 A.L.J. 292 endorsed in *M. Ramappa v. M. Bajappa*, (1964) 2 S.C.W.R. 673 : (1964) 1 Andh. L.T. 1 : A.I.R. 1963 S.C. 1633; *Kamal Lochan v. Mitrabhanu Biswal*, 32 Cut. L.T. 343 (350) ; see also *Mst. Gurdevi v. Mangal Ram*, 1951 Simla 223 : 52 P.L.R. 14.
10. *Mulli v. Babu Madho Das*, 23 I.A. 106 : I.L.R. 19 All 76 (P.C.) ; *Kishan Lal v. Sohan Lal*, 1955 Raj. 45 : I.L.R. 1955 Raj. 191.
11. *Robert Cameron Chamarettee v. Mrs Phyllis Ethel Chamarettee*, 1937 Lah. 176 : 172 I.C. 619.
12. *Rup Singh v. Chiranjil Lal*, 1952 M. B. 95 : 6 D.L.R.M.B. 6.

13. *Doc v. Bower*, (1851) 16 C.B. 805; *Taylor, Ev.*, S. 387 : *Goshain Tota v. Ruckminee Bullub*, 13 Moo I.A. 77, 83.
14. *Dhirajlal v. J. T. Commissioner*, A.I.R. 1955 S.C. 271 : *Kallappa v. Bhima*, A.I.R. 1961 Mys 160 : *Pacha Khan v. H. P. Gopalkrishna Rao*, (1975) 1 Kant. L.J. 105 : I.L.R. 1975 Kant. 25 : A.I.R. 1975 Kant. 179.
15. *Bhadai Sahu v. Sh. Manowar Ali*, 1920 Pat. 735 : 52 I.C. 125 : 4 Pat. L.J. 645 : *Bachecha Lal v. Lachman*, 1938 All 388 : 176 I.C. 393 : 1938 A.L.J. 511 : *Sashi Kumar Banerjee v. D. J. Hill*, 1951 All 316 : 54 C.W.N. 926.
16. See Civil Procedure Code
17. *Ib.*

rehearing as it thinks fit. By such rehearing is meant, according to the practice of the Courts, a re-arguing and reconsideration of the case after receiving the additional evidence, the discovery of which, since the former trial, was the ground of admitting the review. A review is distinct from an appeal in that the primary intention of granting a review is a reconsideration of the same question by the same Judge, as distinguished from an appeal which is a hearing before another tribunal.¹⁸ Strict proof is required in review under Order XLVII, Rule 4 of the Civil Procedure Code, and it has been held by the Calcutta High Court that 'strict' here refers to the formality of the evidence in accordance with the provisions of this Act and not to its sufficiency, since the question of sufficiency of evidence is for the Court admitting the review. In the undermentioned case,¹⁹ Farran, C. J., said, with reference to the powers of revision, "I am myself strongly inclined to the view that when Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence, having exercised their judgment upon the question of its admissibility or inadmissibility we have no jurisdiction to interfere in the matter under Sec. 622.²⁰ What the Court do, in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law is not, I think, an illegality or a material irregularity within the meaning of Sec. 622 of the Code." Section 37 of Act XV of 1882²¹ provides for the general finality of decrees and orders of Presidency Small Cause Courts. Under the provisions of Secs. 38 and 39 of the latter Act, a suit decided by the Small Cause Court, in which the amount or value of the subject-matter exceeds Rs. 1,000 can, in certain cases, be reheard by the High Court. Under the Provincial Small Cause Courts Act, IX of 1887, a review of judgment can be applied for, but not a new trial. As to retrials in criminal cases, *v. post*.

5. **Appeals.** Appeals in civil cases are of three kinds: (a) appeals from original decrees or first or "regular" appeals, as to which see Order XLI of the Civil Procedure Code; (b) appeals from appellate decrees or second or "special" appeals dealt with by Order XLII, Secs. 100-103, 107-108 of the same Code²²; and (c) appeals to the Supreme Court (formerly Privy Council) regulated by Secs. 109, 110 and Order XLV of the Code.²³ Appeals are also permitted from certain classes of orders (Order XLIII). In addition to the power of appeals conferred on suitors, the Courts themselves are possessed of certain discretionary powers by way of "revision" (Secs. 113-115) and "review" (Order XLVII) at their own instance or that of suitors.²⁴

18. See as to Review, Civil Procedure Code, Order XLVII.

19. *Madhavray v. Gulabbhai*, (1898) 23 B. 177; but see *Bhusan v. Profulla*, 1921 Cal. 251; I.L.R. 48 Cal. 119; 60 I.C. 801 (shutting out evidence).

20. Now S. 115.

21. Presidency Small Cause Courts Act.

22. The term "special appeal" is not used in the present Code, which speaks of "second appeals" and "appeals from appellate decree"; see S. 372 of the old and S. 99 of the

present Code. And as to the origin and history of second appeals, see Field's Bengal Regulations Introduction, 178, 181.

23. See also Arts. 133 and 136 of the Constitution.

24. For above references, see Mulla's Civil Procedure Code, Order XLI; Order XLII, Ss. 100, 103; Ss. 107, 108; Order XLV, S. 113; Order XLIII. As to the Civil Appellate Courts other than High Courts in Bengal (Act XII of 1887, Ss. 20, 21).

6. **First appeals.** In the words of their Lordships of the Privy Council, in the case of *Mohur Singh v. Ghuriba*,²⁵ cited ante, it is indicated very clearly what is the duty of a Court sitting in first appeal, or under the old Code, 'regular appeal' and therefore competent to deal with both facts and law when evidence has been improperly admitted by the Court of the first instance. It should throw aside the evidence which ought not to have been admitted, and then consider whether there still remains sufficient evidence to support the decree. Where the evidence which is to be thrown aside is wholly irrelevant, the case is sufficiently clear. The decree can be supported upon relevant evidence only; and if after all that is irrelevant has been thrown aside, there does not remain enough that is relevant to support it, the decision must be reversed. The party who is thus defeated may say that, if he had known that the evidence given would have been insufficient for the purpose, he could have produced other evidence that would have been sufficient. The answer to this objection is to be found in the following observations of their Lordships of the Privy Council in the case of *Maharaja Koowur v. Nund Lal Singh*¹: "The learned Counsel for the appellant have not strongly contended that the proper order to be made on this appeal is one remitting the case for retrial. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favour by the principal Sudder Ameen affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sudder Court was right in treating the cause as ripe for final decision. The appellant had had at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on these issues, if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular, it is not for him to complain of an irregularity committed at his instance or with his consent. And the suspicion, however probable, of the Judge, that a party, who has failed to prove his case may be more successful on a second and fuller investigation is not sufficient ground for directing a new trial."² But there is another class of cases, namely, those in which a fact relevant in itself has been erroneously allowed to be proved in a manner not permitted by law, as for example, where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for. The rule in England is that, unless the opposite party objected to this evidence at the time that it was offered, he cannot object afterwards; and in accordance with this it has been held more than once by the Calcutta High Court, that it is not competent to an Appellate Court sitting in regular appeal to reject the copy of a document, to the admission of which by the lower Court no objection was made by any of the parties, although the original was not produced or its non-production not accounted for.

Madras (Act III of 1873, S. 13) and Bombay (Act XIV of 1869, Ss. 8, 15, 17, 26) Presidencies, see the Acts and sections noted in the preceding brackets.

25. (1870) 6 B.L.R. 495, 498, 499 v. ante, p. 2976.
1. 8 Moo I.A. (199) 219 : 1 W.R. (P.C.) 51.
2. See also R. v. Madhub Chander, (1874) 21 W.R. (Cr.) 15 where the High Court declined on appeal, to

receive evidence which was available at the trial below, when the prisoner deliberately elected not to give evidence in reply to the case made against him; and as to the admission of additional evidence in the Appellate Court, see Civil Procedure Code, Order XLI, R. 27; Ram Das v. The Official Liquidator, (1887) 9 A. 366; Morgan v. Morgan, (1882) 4 A. 306; Upendra Mohun v. Gopal Chander, (1894) 21 C. 484, v. p. 11.

7. **Admission of evidence in appeal.** If the Appellate Court is of opinion that the rejected evidence, if received, ought to have varied the decision, it does not follow that such Court should, in every case, proceed at once to reverse the decision of the lower Court. It is competent for the superior Court, and in most cases it would be proper, to proceed in the manner provided for by Order XLI, Rule 27 of the Civil Procedure Code relating to the production of additional evidence in the Appellate Court.³ Even if admissible evidence has been wrongly rejected by the first Court, the appellate Court will not interfere if the finding is soundly based on other evidence on record.⁴ The Privy Council have held that an Appellate Court should not allow additional evidence which impeaches testimony without calling the impeached witness and giving him an opportunity to contradict it.⁵ An Appellate Court should only require additional evidence, if, after examining the evidence on record, it perceives some defect in it.⁶ The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in Order XLI, Rule 27, C. P. C. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. It is no doubt true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the evidence itself which raise serious doubts about its genuineness, cannot be accepted as a finding that is conclusive in second appeal.⁷ But the decision of the lower appellate Court should not be set aside unless the second appellate Court is satisfied that the decision on the merits is wrong and that the improper admission might have resulted in such a wrong decision.⁸ Where the additional evidence wrongly admitted was used only for the purpose of doubting other evidence and not for any finding, it was held that the decision of the lower appellate Court could not be interfered with.⁹ Where the prosecution negligently fails to produce evidence, additional evidence cannot be considered necessary within the meaning of the Criminal Procedure Code, Sec. 428 (now Section 391 of 1973 Code) and there should be an acquittal.¹⁰

8. **Second appeals.** The wrongful reception or rejection of evidence is an error of law, and as such may be made the ground of second appeal,¹¹

3. *Daji Abaji v. Sakharam Krishna*, 1914 Bom. 253 : I.L.R. 38 Bom. 665 : 27 I.C. 33 : 16 Bom. L.R. 641.

4. *Habibur Rahman v. Mt. Tetri. A.* I.R. 1972 Patna 43.

5. *Jagrani Koer v. Kuar Durga Prasad*, 41 I.A. 76.

6. *Garden Reach Spinning Co. v. Secretary of State*, 1915 Cal. 407 : I.L.R. 42 Cal. 675 : 28 I.C. 865 : 19 C.W.N. 401 : *Krishnamma Chatter v. Narasimha Chatter*, (1908) 31 M. 114 : 3 M.L.T. 308.

7. *Arjan Singh v. Kartar Singh*, (1951) 1 M.L.J. 506 : 1951 M.W.N. 546 : 87 C.L.J. 243 : 1951 S.C. 193 :

1951 S.C.J. 274 : 1951 S.C.R. 258 : 1951 A.L.J. (S.C.) 78 ; *Dhani Ram v. Mangtu*, 1953 Bilaspur 18 ; *Rajmal Mishrimal v. Rajmal Khan Chand*, 1955 M.B. 28 : I.L.R. 1955 M.B. 1 : 1954 M.B. L.J. 1052.

8. *P. Kameswaramma v. Bezwada Chelapathi*, 1915 Mad 762 (1) : 26 I.C. 50 : 1914 M.W.N. 864.

9. *Khuda Baksh v. Lahori Mai*, 1935 Lah. 560 : 156 I.C. 15.

10. *Jeremiah v. Vas*, (1911) 36 M. 457 : 12 I.C. 961 : 22 M.L.J. 73.

11. *Mohini Chandra Roy v. Kalitara Debia*, (1907) 11 C.W.N. 1028 ; and see *Trailokhya Mohini Dasi v.*

it is well established that when a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated, because of the use of inadmissible material and thereby an issue of law arises.¹² But it has been said,¹³ that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal. For, on second appeal, the Court has no power to deal with the sufficiency of the evidence; it has only a right to entertain questions of law. And its duty being thus confined, it seems that when evidence has been wrongly admitted by the Court below, the High Court has, generally speaking, no right to decide whether the remaining evidence in the case, other than what has been improperly admitted, is sufficient to warrant the finding of the Court below. It seems that the High Court cannot decide that question, without examining in detail the other evidence, and determining, as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding. But there can be no such difficulty now, as under Sec. 103 of the present Civil Procedure Code, in any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect, such as is referred to in sub-section (1) of Sec. 100. It has accordingly been held that where the evidence on the record is sufficient within the purview of Sec. 103 of the Code and this section, it will be open to the High Court in second appeal itself to determine an issue of fact, if it finds that it has been wrongly determined by reason of any illegality, and there would be no question of a remand for a new trial.¹⁴ It is within the power of the court of second appeal to come to a different conclusion on the evidence from that arrived at by the courts below, notwithstanding that appropriate issue had not been framed on the point.¹⁵

A document, which is admissible in evidence as against a particular individual, has necessarily to be referred to in the judgment, and it cannot be said that, merely because the judgment makes reference to a particular document which is admissible as against one of the defendants, the judgment

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- Kali Prosanna Ghose, (1907) 11 C.W.N. 380 (disregarding evidence without giving sufficient reason); Prabhū Dayal v. Ralla Ram, 1930 Lah. 672 : 125 I.C. 50 : 31 P.L.R. 198 ; Raoji v. Warlu, 77 P.C. 911; 1923 Nag. 107 ; Chooni Lal v. Nil Madhab, 1925 Cal. 1034 : 86 I.C. 734 : 41 C.L.J. 374 ; Ram v. Ghansham Das, 1923 Lah. 150 (1) : 71 I.C. 826 ; Tara Kumar Ghose v. Arun Chandra Singh, 1923 Cal. 261 : 74 I.C. 383 : 36 C.L.J. 389 ; Balwant Singh v. Baldeo Singh, 1921 Lah. 119 : 1 I.L.R. 2 Lah. 271 : 64 I.C. 929.
12. Dhirajlal Girdhari Lal v. Commissioner of Income-tax, 1955 S.C. 271 : 26 I.T.R. 736.
13. Per Garth, C.J. in Womesh Chunder v. Chundry Churn, (1881) 7 C. 293, 295, 296 (doubting) ; Watson v. Gopee Soonduree, (1892) 24 W.R. 392, referred to in Palakdhari Roy v. Manners, (1895) 23 Cal. 179, 185 ; Mauladad Khan v. Abdul Sattar, 1917 All 35 : I.L.R. 39 All 426 : 39 I.C. 666 : 15 A.L.J. 349 ; Brojendra Kishore v. Mohim Chandra, 1927 Cal. 1 : 99 I.C. 189 : 31 C.W.N. 32.
14. Abdul Shakur v. Kotwaleahwar Parsad, 1958 All 54. In view of the last portion of S. 103, C.P.C. as amended by Act 5 of 1926 the ruling in Jagdish Chandra De v. Harihar De, 1924 Cal. 1042 : 76 I.C. 219 : 40 C.L.J. 39 is no longer good law.
15. Damusa v. Abdul Samad, 1919 P.C. 29 : 46 I.A. 140 : 1 I.L.R. 47 Cal. 107 : 51 I.C. 177.

as against the other defendants is based on that document.¹⁶ Where, apart from the inadmissible evidence, there is other evidence in the case which entitles the Court to come to a particular finding of fact, the fact that reliance was placed on inadmissible evidence is no ground for interference in second appeal.¹⁷ But the Court of second appeal cannot accept the findings of the Courts below which might have been coloured by inferences from the inadmissible evidence.¹⁸ Nor can the findings be accepted where the inadmissible evidence was mainly relied on to arrive at them.¹⁹ Where an appellate Court has relied for its decision upon a document which is inadmissible in evidence, the Court of second appeal would be justified in remanding the case for decision to the appellate Court with a direction to exclude that document from its consideration.²⁰ Where on remand there is evidence to be considered, the decision of the Court of second appeal is final, even if on further consideration it appears unsatisfactory.²¹ The Court may, upon the hearing of a second appeal remand the case for reconsideration and a fresh decision by the lower Court.²²

9. Appeals to Privy Council and Supreme Court. The rule of the Judicial Committee of the Privy Council was never to disturb the concurrent decisions of the Courts below upon a mere question of fact unless it very clearly appeared that there had been some miscarriage of justice or that the conclusion drawn by the Courts below was plainly erroneous.²³ Where evidence, such as hearsay, was improperly admitted, it was held that the question for the Judicial Committee was whether, rejecting that evidence, enough remained to support the finding.²⁴

This rule, however, did not apply to concurrent findings on the question of an ancient custom, for this was a mixed question of fact and law,²⁵ or to a case of no evidence, for this was a question of law.¹

16. *K. Rosayya v. M. Rosayya*, 1947 Mad. 345 : (1947) 1 M.L.J. 60 : 1947 M.W.N. 345.
17. *Pradip Singh v. Ambika Singh*, 1948 Pat. 185 ; *Paran Munda v. Santosh Mahto*, 1942 Pat. 372 : 199 I.C. 144 ; *Soney Lall Jha v. Darbdeo Narayan Singh*, 1935 Pat. 167 : I. L.R. 14 Pat. 461 : 155 I.C. 470 : 16 P.L.T. 199 (F.B.) ; *Hari Ahir v. Sat Sanghat Chacha*, 1934 Pat. 617 (2) : 152 I.C. 829 ; *Mohammad Ali v. Labh Singh*, 1937 Lah. 26 : 169 I.C. 940 : 39 P.L.R. 1841 ; *Saktoo Mal v. Gopal Chand*, 1922 All 439 : 66 I.C. 313.
18. *A. Narasimham v. A. Babu Rao*, 1939 Mad. 40 : I.L.R. 1939 Mad. 333 : 183 I.C. 751.
19. *Harihar Prasad v. Mst. Janak Dulari*, 1941 Pat. 118 : 191 I.C. 275 : 21 P.L.T. 873.
20. *Sumitra Kuer v. Ram Kuer*, 57 I. C. 561 : 5 Pat. L.J. 410 : 1 P.L. T. 702 followed in *Hem Raj v. Nihal Singh*, 1925 Lah. 506 : 90 I.C. 678 : 7 L.L.J. 352 : 26 P.L. R. 632.
21. *East India Railway Co. v. Changai Khan*, 1916 Cal. 554 : I.L.R. 42 Cal. 888 : 28 I.C. 245.
22. *Nawab Khan v. Raghonath Doss*, (1873) 20 W.R. 474 ; see further as to second appeals, cases cited in *Mulla's Civ. P.C.*, notes to Ss. 100-103.
23. *Goshain Tota v. Ruckminee Bullub*, (1869) 13 Moo I.A. 77, where also the rule of the Privy Council as to the improper admission of evidence is laid down ; see *Ravi Veeraraghavulu v. Bomma Devara Venkata*, 1914 P.C. 87 : 41 I.A. 258 : I.L.R. 37 Mad. 443 : 25 I.C. 305.
24. *Mohur Singh v. Ghuriba*, (1870) 6 B.L.R. (P.C.) 495.
25. *Palaniappa Chetty v. Sreenath Devasikamony Pandara Sannadhi*, 1917 P.C. 33 : 44 I.A. 147 : I.L.R. 40 Mad. 709 : 39 I.C. 722.
1. *Harendra Lal v. Haridasi Devi*, 1914 P.C. 67 : 41 I.A. 110 : I.L.R. 41 Cal. 972 : 23 I.C. 637 ; see *Paul v. Robson*, 1914 P.C. 42 : 41 I.A. 180 : I.L.R. 42 Cal. 46 : 24 I.C. 300.

By the constitution of the High Courts in India, the Judges for the purpose of the trial of an action, sit as a jury as well as Judges, and the same weight is to be given to a decision of the Judges in such circumstances as to the verdict of a jury in England in which the Judge who tries the cause makes no objection. The Privy Council therefore, did not disturb a judgment of an Indian Court upon a question of the credibility of witnesses unless it was manifestly clear from the probabilities attached to certain circumstances in the case that the Court below was wrong in the conclusion drawn from such evidence.² And in the undermentioned case,³ the Privy Council observed as follows: "This Board never heard of an appeal being instituted on the ground that witnesses had been discredited; the Courts below were aware of the character of those witnesses, and besides the knowledge of their character, had the advantage of seeing their demeanour and behaviour, of which we, on written evidence, have no power of judging. We feel it our duty, therefore, to decide this case on the general principle that no appeal will lie from the judgment of a Court below on the ground that the Court discredited the witnesses produced to them by either party."

When the lower Courts convicted an accused on the basis of evidence including a confession which was inadmissible, the Supreme Court did not interfere because even excluding the confession other evidence was sufficient to sustain the conviction.⁴

10. Criminal cases. As already observed, it has been held that this section applies to criminal as well as civil cases. The words "in any case" used in this section are wide and have all along been interpreted as including criminal trial.⁵ The section is imperative and applies to any decision in any case and therefore necessarily to the decision of the High Court when exercising its powers under clause 26, Letters Patent.⁶ In criminal cases, an Appellate Court may, if it sees fit, order the appellant to be retried (Criminal Procedure Code, Sec. 423) (now Secs. 385 and 386 of 1973 Code); and the High Court in the exercise of its powers of revision may exercise any of the powers conferred on a Court of appeal, including the power of ordering a new trial [ib., Sec. 43 (9)]. With reference to appeals in criminal cases see the Criminal Procedure Code, Secs. 404, 418, 430, 407, 408, 410, 414, 417, 427, 419, 431 (now see Sections 372, . . . , 393, . . . , 374 (3), 374—376, 378, 390, 382, 394 (1), (2) of 1973 Code) and as to reference and revision, Chapter XXXII of the same Code (now Chapter XXX of 1973 Code). Section 527 (now Section 465 of 1973 Code) contains an important provision, based on the same principle which underlies Sec. 167 of this Act, that no finding, sentence or order is reversible or alterable unless the error, omission, irregularity, want of sanction or misdirection has occasioned a failure of justice. For erroneous rejection of evidence by the Court below, to furnish a ground for ordering a new trial or reversing a conviction, it must be shown that the rejection of the evidence was likely to affect the decision of the case.⁷ The improper ad-

2. *Musadee Mahommed v. Mahommed Khan*, (1854) 6 Moo I.A. 27.

3. *Santacana v. Ardevol*, 1 Knapp. 269.

4. *Nika Ram v. State of H.P.*, 1972 Cr. L.J. 1317 : A.I.R. 1972 S.C. 2077.

5. *Queen-Empress v. Ramchandra Govind*, 1895 I.L.R. 19 Bom. 749 ; *Savlimiya Miyabhai v. Emperor*, 1944 Bom. 338 : 46 Bom. L.R. 589 : 326

also *Subramania Ayyar v. King-Emperor*, I.L.R. 25 Mad 61 : 28 I.A. 257 : 3 Bom. L.R. 540 (P.C.) ; *R. v. Panchudas*, 1920 Cal. 500 : I.L.R. 47 Cal. 671 : 58 I.C. 929 (F.B.).

6. *Padam Prasad v. Emperor*, 1929 Cal. 617 : 119 I.C. 193 : 33 C.W. N. 1121 (S.B.), per Jack, J. *Vakhan Khan v. Emperor*, 1948 Cal 122 : 49 Cr. L.J. 558.

mission of evidence is no ground for the reversal of the decision, if, independently of the evidence objected to, there is evidence to justify the decision,⁸ specially when the accused is not prejudiced thereby.⁹ In the case noted, however, the case was sent back to the trial Magistrate, the Court observing: "In my opinion although we can under Sec. 167, Evidence Act, determine the matter ourselves on the evidence which is on the record eliminating the evidence of the complainant, yet for the ends of justice, I think, we should send the matter back to the learned Magistrate to determine the guilt or otherwise of the appellant after eliminating the evidence of the complainant which he had wrongly admitted. The trying Magistrate had the advantage of seeing the demeanour of the witnesses who had given evidence before him and we are informed that the said learned Magistrate is still available for the purpose of determining the case."¹⁰ The decision has to be set aside and new trial ordered, where it is impossible to separate, as against each accused, the legal evidence against him from what has been improperly used as such.¹¹

Improper advice given by the Judge to the jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in exercise of a sound judicial discretion, ought to give the jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court on appeal or revision, in setting aside a verdict of guilty. The power of setting aside convictions of and ordering new trials for any error or defect in the summing up will be exercised by the High Court, only when the Court is satisfied that the accused has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby.¹² Where inadmissible evidence had been admitted in a criminal case tried with a jury, the High Court on appeal may, in view of this section, after excluding such inadmissible evidence, maintain a conviction, provided that the admissible evidence remaining was, in the opinion of the Court, sufficient clearly to establish the guilt of the accused. "Misdirection is not in itself a sufficient ground to justify interference with the verdict. The High Court must, under the provisions of Sec. 423 [now Sections 385 (2), 386 of 1973 Code], sub-section (2), and Sec. 537 of the Criminal Procedure Code [now Section 465 (1) of 1973 Code] proceed respectively to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. If the Court so finds, then its duty is to interfere. In deciding, whether there has been in fact a failure of justice in consequence of a misdirection, the High Court is entitled to take the whole case into consideration and

8. *Mirza Akbar v. King-Emperor*, 1940 P. C. 176, Pakala Narayana Swami v. *Emperor*, 1939 P.C. 47 : 66 I.A. 66 : I.L.R. 18 Pat. 234 : I.L.R. 139 Kar. 123 : 180 I.C. 1 ; *Sumil Chandra v. State*, 1954 Cal. 305 : 57 C.W.N. 962 ; *Kali Das v. Emperor*, 1948 Cal. 16 : 229 I.C. 276 ; *Jamna Prasad v. Emperor*, 1938 Nag. 325 : 174 I.C. 523 ; *Emperor v. Ramanuja Iyengar*, 1935 Mad. 528 : I.L.R. 58 Mad. 642 : 158 I.C. 764 (F B) ; *Sankara Chenna Bassappa v. Kalli Manappa*, 1925 Mad. 245 (2) : 82 I.C. 203 : 21 L.W. 87 ; *Mazar Ali Inayat Ali v. Emperor*, 1933, Bom. 226 : I.L.R.

57 Bom. 400 : 144 I.C. 985 ; *Nika Ram v. State of H.P.*, 1972 Cr. L. J. 1317 : A.I.R. 1972 S.C. 2077 ; *Babu Nandan v. Board of Revenue*, A.I.R. 1972 All 406.

9. *Ran Yad Dusadh v. King-Emperor*, 1926 Pat. 211 : 95 I.C. 273 : 7 P. L.T. 673 ; *Kandan Narayanan v. State*, 1952 T.C. 459 : 1952 K.L.T. 704.

10. *Sudhindra Nath v. The State*, 1953 Cal. 339 at 341 : 56 C.W.N. 835.

11. *Sheo Karan v. Emperor*, 1928 Lah. 923 : 110 I.C. 590.

12. *In re Elahce Buksh*, (1866) 5 W.R. (Cr.) 89.

determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted."¹³ Reception of evidence inadmissible owing to the provisions of Sec. 162, Criminal Procedure Code (same section in 1973 Code) is not necessarily fatal and, in an appeal, the Court has to see whether the reception influenced the mind of the jury so seriously as to lead them to a conclusion which might have been different but for its reception.¹⁴ It must always be a question, whether prejudice has been caused in such cases, and, if not, whether the materials left are sufficient within the meaning of this section.¹⁵ In *Mushtaq Husain v. State of Bombay*,¹⁶ their Lordships of the Supreme Court held, that where a jury has been misdirected and has based its verdict on assumptions and conjectures, the Supreme Court may order a re-trial or remit the case to the High Court with a direction that it should consider the merits of the case in the light of the decision of the Supreme Court and say whether there has been a failure of justice as a result of misdirections, or it may examine the merits of the case and decide for itself whether there has been a failure of justice in the case, and that, in deciding whether there has been in fact a failure of justice in consequence of a misdirection, the Court would be entitled to take the whole case into consideration. The Court discussed the statute law in India which in certain circumstances, permitted an appeal against a jury verdict and authorised the appellate Court to substitute its own verdict on its own consideration of the evidence and came to the conclusion that unless it was established in a case that there has been a serious misdirection by the Judge in charging the jury which had occasioned a failure of justice and had misled the jury in its verdict, the verdict of the jury could not be set aside. What has therefore got to be done, in cases where inadmissible evidence has been admitted and has been incorporated in the learned Judge's charge to the jury, is to exclude the inadmissible evidence from the record and consider whether the balance of evidence remaining thereafter is sufficient to maintain the conviction.¹⁷ There had long existed a controversy as to whether the appellate Court, in deciding whether there is sufficient ground for interfering with the verdict of a jury, particularly where there has been a misdirection by the judge, has the right and duty to go into the merits of the case for itself and on its own consideration of the evidence to make up its mind whether the verdict was justified or not. On the one hand, it had been said that

13. *Abdul Rahim v. Emperor*, 1946 P. C. 82 : 73 I.A. 77 : I.L.R. 1946 Lah. 119 : 224 I.C. 426 affirming *Abdul Rahim v. Emperor*, 1945 Lah. 105 : I.L.R. 1945 Lah. 290 : 220 I.C. 467 (F.B.) ; see also *Emperor v. Panchu Das*, 1920 Cal. 500 : I.L.R. 47 Cal. 671 : 58 I.C. 929 (F.B.) ; *Savlimiya Miyabhai v. Emperor*, 1944 Bom. 338 : 46 Bom. L.R. 589 ; *Gokul Chandra Chatterji v. The State*, 1950 Cal. 306 : 51 Cr. L.J. 1201 ; *Amalash Chandra v. The State*, 1952 Cal. 481 : I.L.R. (1949) 1 Cal. 302. *The State v. Ram Prasad Singh*, 1953 Pat. 354 : 1 B.L.J. 333 ; *In re Moorthy*, 1956 Mad. 536 : (1956) 2 M.L.J. 43 : 69 L.W. 799 ; *Smt. Jasoda Haldar v. Sailendra Nath*, 1957 Cal. 372 : 61 C.W.N. 483.

14. *Surendra Dinda v. Emperor*, 1949 Cal. 514 : I.L.R. (1945) 2 Cal. 513 : see also the cases cited therein.

15. *Surendra Dinda v. Emperor*, 1949 Cal. 514 : I.L.R. (1945) 2 Cal. 513.

16. 1953 S.C. 282 : 1953 S.C.A. 36 : 1953 S.C.R. 809 : 1953 Cr. L.J. 1127 : 55 B.L.R. 529 : 1954 M.W.N. 247.

17. *Ram Kishen v. State of Bombay*, 155 S.C. 104 : 1955 S.C.A. 410 : 1955 S.C.J. 129 : (1955) 1 S.C.R. 903 : 1955 S.C.A. 410 : 1955 A.W.R. (Supp.) 41 : 57 B.L.R. 600 : 1955 Cr. L.J. 196 : (1955) 1 M.L.J. (S.C.) 66 : 1955 M.W.N. 146 ; *Pulukuri Kattaya v. Emperor*, 1947 P.C. 67 : 74 I.A. 65 : I.L.R. 1948 Mad. 1 : 290 I.C. 135.

the accused is entitled to have his guilt or innocence decided by the verdict of a jury and that the appellate Court has no right to substitute its own judgment in place of a verdict by a jury. On the other hand, it was argued that it is impossible for the Court to perform the duty laid on it by the Code without applying its own mind to the soundness of the verdict. Their Lordships of the Privy Council examined the cases in *Abdul Rahim's* case¹⁸ and came to the conclusion that the ratio of cases beginning with *Elahee Buksh, In re*,¹⁹ and ending with *A. M. Mathews v. Emperor*,²⁰ was correct, and held that the Court was entitled to examine the evidence for itself and see whether it justified the verdict pronounced or whether there had in fact been a failure of justice. The Court of Appeal is thus entitled to substitute its own verdict for the verdict of the jury, if on examining the record for itself it comes to the conclusion that the verdict of the jury was erroneous or that there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.²¹ Where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witness, a new trial may be ordered.²² In the case of wrongful exclusion of the evidence of a witness, it is difficult to apply this section, as the appellate Court can have no idea as to what the witness would say. If there is a document, it is possible for the appellate Court to judge what effect, if any, the admission or rejection of that document would have on the result of the case; but one cannot often estimate the effect of the admission of oral evidence.²³

11. Appeals to Supreme Court in criminal cases. (1) In criminal cases there was no right of appeal to the Privy Council, but now, Art. 134 of the Constitution enacts that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India, if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) certifies that the case is a fit one for appeal to the Supreme Court :

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Art. 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

18. 1946 P.C. 82.

19. (1866) 5 Suth. W.R. 80 : Beng. L.R.,
Sup. Vol. 459 (P.C.).

20. 1940 Lah. 87 : 187 I.C. 456.

21. *Ram Kishen v. State of Bombay*,
1955 S.C. 104 *supra*.

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22. *Ram Chandra v. Emperor*, 1935
Bom. 153 : 35 Bom. L.R. 174.

23. *Crown Prosecutor v. Ramanujulu
Naidu*, 1944 Mad. 169 : I.L.R.,
1944 Mad. 759 : 211 I.C. 471.

12. Letters Patent appeals. The nature and extent of the powers of the High Court under Sec. 26 of the Letters Patent has proved to be a question of considerable difficulty. It has been held, that this section applies to criminal trials by jury in the High Court,²⁴ and that the High Court on a point of law as to the admissibility of evidence has power to review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial, and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial, and that the same rule applies where evidence has been improperly admitted.²⁵

It is not open to the Court hearing a reference under clauses 25 and 26 of the Letters Patent (Calcutta) to direct a new trial. After rejecting the evidence improperly admitted, the Court should dispose of the case finally.¹ Where, however, there was a misjoinder of charges making the whole trial initially bad, and the objection to the conviction was not limited to improper reception of evidence, it was held by the Privy Council that the course pursued, which was illegal, could not be amended by the High Court arranging afterwards what might or might not have been properly submitted to the jury. Upon the assumption that the trial was illegally conducted, it could not be suggested that there was enough left upon the indictment upon which the conviction might have been supported if the accused has been properly tried. The mischief sought to be avoided had been done. The effect of the misjoinder of charges, which was not curable under Sec. 537, could not be averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the charge as ought to have been submitted to the jury. To do so would be to leave to the Court the functions of the jury, and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.²

24. *Padam Prashad v. Emperor*, 50 C.L.J. 106 : 33 C.W.N. 1121 : 119 I.C. 193 : 1929 Cal. 617 (S.B.) ; *R. v. Navroji Dadabhai*, (1872) 9 Bom. H.C.R. 358 ; *R. v. Hurribole Chunder*, (1876) 1 C. 207 ; *R. v. Pitambar Jina*, (1877) 2 B. 61, 65.
25. *Ramanuja Ayyangar v. Emperor*, 1935 Mad. 793 : 159 I.C. 240 : 42 L.W. 140 ; *R. v. Pitamber Jina*, (1877) 2 B. 61, 65 following *R. v. Navroji Dadabhai*, (1872) 9 Bom. H.C.R. 358 ; *R. v. Hurribole Chunder*, (1876) 1 C. 207 : 25 W. R. (Cr.) 36 (apart from S. 167 of the Evidence Act, the Court has power in a case under clause 26 of the Letters Patent to review the whole case on the merits and affirm or quash the conviction) ; *R. v. O'Hara*, (1890) 17 C. 642. In these cases it was argued for the Crown that for the full Court to go into the merits of the case would be practically the same as sitting as Judge and Jury, but it was held that the Court had power to deal with the case on the merits as it appeared

from the notes of the trial Judge, and in the last case quashed, and in the others upheld, the conviction. In the later case of *R. v. McGuire*, (1900) 4 C.W.N. 433, it was held that this section applied to cases, heard by the High Court when exercising its powers under clause 26 of the Letters Patent ; see also *Subramania Ayyar v. R.*, 28 I.A. 257 : I.L.R. 25 Mad. (61) 77 : 3 Bom. L.R. 540 (P.C.) ; *Hrishikesh Mandal v. Abadhaut Mandal*, 1917 Cal. 159 : I.L.R. 44 Cal. 703 : 38 I.C. 421.

1. *R. v. Panchu Das*, I.L.R. 47 Cal. 671 : 58 I.C. 929 : 1920 Cal. 500 (F.B.) ; *Padam Prashad v. Emperor*, 50 C.L.J. 106 : 33 C.W.N. 1121 : 119 I.C. 193 : 1929 Cal. 617 (S.B.) ; see also *Fateh Chand v. Emperor*, 1917 Cal. 123 : I.L.R. 44 Cal. 477 : 38 I.C. 945.
2. *Subramania Ayyar v. R.*, 28 I.A. 257 : I.L.R. 25 Mad. 61, 96, 97 followed in *Asgar Ali Biswas v. R.*, I.L.R. 40 Cal. 846 : 20 I.C. 609 : 17 C.W.N. 827.

13. To sum up the appreciation of evidence in appeals: Civil Appeals.

As regards appreciation of evidence, the appellate Court has under Sec. 107 of the Civil Procedure Code, the same powers and duties as the trial Court. On appeal, the whole case, including the facts, is within the jurisdiction of the appellate Court. But generally speaking, it is undesirable to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends upon the credit which attached to one or other of conflicting witnesses.³ "The burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded."⁴ In practice, two conflicting viewpoints have to be reconciled, namely, on the one hand, the undoubted duty of the Court of Appeal to review the recorded evidence to draw its own inferences and conclusions, and, on the other hand, the unquestionability which must be attached to the opinion of the Judge of the primary court who has the advantage of seeing the witnesses and noticing their look and demeanour.⁵ "If the evidence, as a whole, can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refrained from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."⁶ Where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, verdict of the judge trying the case should not be lightly disregarded.⁷ Where the question of credibility does not depend on the light thrown upon it by the demeanour of the witness in the box and the manner in which the witness answers and how he is affected by the questions put to him but the views and credibility are founded upon the argumentative inferences from facts not disputed, the Court of Appeal is really in as good a situation as the trial Judge.⁸ But there may obviously be other circumstances, apart from the manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Jury even on questions of fact turning on the credibility of witnesses whom

3. *Bombay Cotton Manufacturing Co. v. Motilal Shivlal*, 1915 P.C. 1, 2: 42 I.A. 110 : I.L.R. 39 B. 386 : 29 I.C. 229.
4. *Naba Kishore v. Upendra Kishore*, 1922 P.C. 39, 40 : 65 I.C. 305 : 20 A.L.J. 22.
5. *Prasannamayidebi v. Baikuntha Nath*, 1922 Cal. 260 : I.L.R. 49 Cal. 132 : 66 I.C. 702.
6. *Per Viscount Simon in Watt v. Thomas*, 1947 A.C. 484 at p. 486 referred to in *Sara Veeraswami v.*

- Talluri Narayya*, 1949 P.C. 32 : 75 I.A. 252 : I.L.R. 1949 Mad. 487.
7. *Bombay Cotton Manufacturing Co. v. Motilal Shivlal*, 1915 P.C. 1, 2: 42 I.A. 110 : I.L.R. 39 Bom. 386: 29 I.C. 229.
8. *Palchur Sankara Reddy v. Palchur Mahalakshamma*, 70 I.C. 949 : 1922 P.C. 315 : 27 C.W.N. 414 ; *Nagendramma v. Rama Kotaya*, 1954 Mad. 713 : (1955) 1 M.L.J. 25.

the Court has not seen.⁹ But it has been laid down in a decision of the Privy Council that it is always difficult for Judges who have not seen or heard the witnesses to refuse to adopt the conclusions of those who have done so, and that the difficulty is all the greater when the latter have formed an opinion adverse to the witnesses in question.¹⁰ In a later case in the Allahabad High Court, it was said that as a general rule a trial Judge in India has not as much opportunity of attaching importance to the demeanour of witnesses as a Judge in England because in this country many trials are not heard continuously and judgments are often written sometime after the evidence is heard.¹¹

14. Criminal appeals. In an appeal from conviction it is for the prosecution to establish that the judgment of the trial Court is right. The presumption of innocence of the accused still persists and the appellate Court has to satisfy itself that the judgment of the trial Court is right.¹² It is for the appellate Court, as it is for the trial Court, to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellant has been established beyond all reasonable doubt. To hold that, unless reasonable ground is given to the appellate Court for differing from the lower Court, the appellate Court must accept its findings of fact, is to approach the case from a wrong standpoint.¹³ The sound rule to apply in trying a criminal appeal where questions of fact are in issue is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one. In the latter case the Court must be convinced, before reversing a finding of fact by a lower Court, that the finding is wrong.¹⁴ The case of *Pratap v. R.*,¹⁵ was followed in *Milan v. Sagai*,¹⁶ and *Lalji v. Guzdar*.¹⁷ The Court is bound in forming its conclusions as to the credibility of the witnesses to attach great weight to the opinion which the Judge who heard them has expressed upon that matter.¹⁸

15. Appeals against acquittals. Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the Sessions Judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.¹⁹ It cannot be disputed that the High Court in hearing an appeal against an order of acquittal has full powers to review and reassess the evidence on the record and reach its

9. *Per Barnes, J.*, in *Coghlan v. Cumberland*, (1898) 1 Ch. 704; *Bombay Cotton Manufacturing Co. v. Motilal Shivalal*, 1915 P.C. 1, 2 : 42 I.A. 110.
10. *Shanmugaraya v. Manikka*, (1909) 32 Mad. 400 (P.C.) and *Imdad v. Pareshri*, (1909) 32 A. 241 (P.C.).
11. *Mouladad v. Abdul*, I.L.R. 39 All 426 : 39 I.C. 666 : A.I.R. 1917 A. 35.
12. *Per Sen, J.*, in *Abdul Ghani v. Emperor*, 1943 Cal. 463 : I.L.R. (1943) 1 Cal. 423 : 209 I.C. 105.
13. *Kanchan Malik v. Emperor*, 1915 Cal. 187 : I.L.R. 42 Cal. 374 : 6 I.C. 134; *Mohamed Husain v. Em-*

peror, 1945 Nag. 116 : I.L.R. 1945 Nag. 441.

14. *Pratap v. R.*, (1882) 11 C.L.R. 25, *per White, J.*, referred to in *Rohimuddi v. R.*, (1892) 20 C. 353, 357; but see *R. v. Ramlochan*, (1872) 18 W.R. (Cr.) 15.
15. (1882) 11 C.L.R. 25.
16. (1885) 23 C. 347, 349.
17. 43 C. 833 : 34 I.C. 807 : A.I.R. 1916 C. 964.
18. *R. v. Modhab*, (1874) 21 W.R. (Cr.) 13.
19. *Wilayat Khan v. The State of U.P.*, 1953 S.C. 122 : I.L.R. (1953) 1 All 189.

own conclusions upon the estimate of the evidence. But in exercising these powers the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Court as to the credibility of witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of the appellate Court in disturbing the findings of fact arrived at by a Judge who had the advantage of seeing the witnesses.²⁰ It is well settled that it is not enough for the High Court to take a different view of the evidence; there must also be substantial and compelling reasons for holding that the trial Court was wrong²¹ and if the trial Court takes a reasonable view of the facts of the case, interference under Sec. 417 is not justifiable unless there are really strong reasons for reversing that view.²² The appellate Court must start with the realisation that an experienced Judicial Officer (with four assessors) had concluded that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before the Court. It, therefore, requires good and sufficiently cogent reasons to overcome such reasonable doubt before the appeal Court comes to a different conclusion.²³ The presumption of innocence of the accused is further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.²⁴ Where the case turns on oral evidence of witnesses the estimate of such evidence by the trial Court is not to be lightly set aside. General suspicions are not by themselves enough to dispute the credibility of witnesses whom a trial Magistrate was inclined to accept.²⁵ An appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically.¹ In *Sanwat Singh v. The State of Rajasthan*,² the Supreme Court has construed the phrase "strong and compelling reasons" as follows :

"In recent years the words 'compelling reasons' have become words of magic incantation in every appeal against acquittal. The words are so elastic that they are not capable of easy definition, with the result, their interpretation varied between two extreme views—one holding that if a trial court acquitted an accused, an appellate court shall not take a different view unless the finding is such that no reasonable person will come to that conclusion, and the other accepting only the conscience of the appellate court as the yardstick to ascertain whether there are reasons to compel its interference. In the circumstances we think it necessary to clarify the point.

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20. *Madan Mohan Singh v. State of U. P.*, 1954 S.C. 637 : 1954 Cr. L.J. 1656 ; see also *Sheo Swarup v. Emperor*, 1934 P.C. 227 (2) : 61 I.A. 398 : I.L.R. 56 A. 645 : 151 I.C. 322 ; *Narayan Itivari v. State of Travancore-Cochin*, 1953 S.C. 478 : 1953 K.L.T. 173 ; *Prandas v. State*, 1954 S.C. 36 : 1954 Cr. L.J. 331.
21. *Ajmer Singh v. State of Punjab*, 1953 S.C. 76 at 77, 78 : 1953 S.C. R. 418.
22. *Suraj Pal Singh v. State*, 1952 S.C. 52 at 54 : 1952 S.C.R. 193 ; *Aher Raja Khima v. State of Saurashtra*,

- 1956 S.C. 217 at 220 : 1956 S.C.A. 440.
23. *Tulsi Ram v. State*, 1954 S.C. 1 : 1953 S.C.J. 612 : 1954 Cr. L.J. 225 (226).
24. *Suraj Pal Singh v. State*, 1952 S.C. 52 at 54 : 1952 S.C.R. 193.
25. *S. A. A. Biyabani v. State of Madras*, 1954 S.C. 645 : 1954 Cr. L.J. 1665.
1. *In re Goomance*, (1872) 17 W.R. (Cr.) 59.
2. A.I.R. 1961 S.C. 715 : (1961) 2 S.C.J. 179 : (1961) 2 S.C.A. 342.

"The scope of the powers of an appellate court in an appeal against acquittal has been elucidated by the Privy Council in *Sheo Swarup v. Emperor*.³ There Lord Russell observed at p. 404 thus :

.....the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.....'

"Adverting to the facts of the case, the Privy Council proceeded to state,—

..... They have no reason to think that the High Court failed to take all proper matters into consideration in arriving at their conclusions of fact.'

"These two passages indicate the principles to be followed by an appellate court in disposing of an appeal against acquittal and also the proper care it should take in re-evaluating the evidence. The Privy Council examined its earlier observations in *Nur Mohammad v. Emperor*⁴ :

'Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon the evidence the order of acquittal should be reversed.'

"These two decisions establish that the power of an appellate court in an appeal against acquittal is not different from that it has in an appeal against conviction; the difference lies more in the manner of approach and perspective rather than in the content of the power. These decisions defining the scope of the power of an appellate court had been followed by all the courts in India till the year 1951 when, it is said, this Court in *Surajpal Singh v. The State*⁵ laid down a different principle. But a perusal of that judgment does not bear out the construction which is very often placed thereon. The passage relied upon reads thus :

'It is well established that in an appeal under Sec. 417 (now Sec. 378) of the Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.'

"On the facts of that case the Supreme Court held, 'we are inclined to hold that the Sessions Judge had taken a reasonable view of the facts of the

3. 61 Ind. App. 398 : A.I.R. 1934 P.C. 227 (2).

4. A.I.R. 1945 P.C. 151 at p. 152 :

(1945) 2 M.L.J. 362 : 47 Cr. L.J. 1.
5. 1952 S.C.R. 193 at p. 201 : A.I.R. 1952 S.C. 52 at p. 54.

case, and in our opinion there were no good reasons for reversing that view.' We think these observations are nothing more than a restatement of the law laid down by the Privy Council and the application of the same to the facts of the case before the Court. Though in one paragraph the learned Judges used the words "substantial and compelling reasons" and in the next paragraph the words "good reasons," these observations were not intended to record any disagreement with the observations of Lord Russell in *Sheo Swarup's* case⁶ as to matters a High Court would keep in view when exercising its power under Sec. 417 of the Criminal Procedure Code (now Sec. 378 of Cr. P. C., 1973). If it had been so intended, this Court would have at least referred to *Sheo Swarup's* case⁷ which it did not. The same words were again repeated by this Court in *Ajmer Singh v. State of Punjab*.⁸ In that case the appellate court set aside an order of acquittal on the ground that the accused had failed to explain the circumstances appearing against him. This Court held that as the presumption of innocence of an accused is reinforced by the order of acquittal the appellate court could have interfered only for substantial and compelling reasons. The observations made in respect of the earlier decisions applied to this case also. Mahajan, J., as he then was, delivering the judgment of the Court in *Puran v. State of Punjab*⁹ again used the words "very substantial and compelling reasons," but immediately thereafter the learned Judge referred to the decision of *Sheo Swarup's* case¹⁰ and narrated the circumstances which an appellate court should bear in mind in interfering with an order of acquittal. This juxtaposition of the so-called formula and the circumstances narrated in *Sheo Swarup's* case,¹¹ indicate that the learned Judge used those words only to comprehend the statement of law made by the Privy Council. Mukherjea, J., as he then was, in *Narayan Ittivar v. State of Travancore-Cochin*,¹² again referred to the Privy Council decision and affirmed the wide power of an appellate court and also the proper approach in an appeal against acquittal. The learned Judge did not introduce any further limitation on the power of the appellate court. But it was observed that the High Court had not clearly kept before it the well settled principles and reversed the decision of the trial court 'without noticing or giving due weight and consideration to important matters relied upon by that court.' In *Tulsiram Kanu v. The State*,¹³ this Court used a different phraseology to describe the approach of an appellate court against an order of acquittal. There the Sessions Court expressed that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before it. Kania, C. J., observed that it required good and sufficiently cogent reasons to overcome such reasonable doubt before the appellate court came to a different conclusion. This observation was made in connection with a High Court's judgment which had not taken into consideration the different detailed reasons given by the Sessions Judge. In *Madan Mohan Singh v. State of Uttar Pradesh*¹⁴ on appeal by special leave, this Court said that the High Court 'had not kept the rules and principles of administration of criminal justice clearly before it and that therefore, the judgment was vitiated by non-advertence to and misappreciation of various material facts transpiring in evidence and the

6. 61 Ind. App. 398 : A.I.R. 1934 P.C. 227 (2).

7. *Ibid.*

8. 1953 S.C.R. 418 : A.I.R. 1953 S.C. 78.

9. A.I.R. 1953 S.C. 459 : 55 P.L.R. 158.

10. 61 Ind. App. 398: A.I.R. 1934 P.C. 227 (2).

11. *Ibid.*

12. A.I.R. 1953 S.C. 478.

13. A.I.R. 1954 S.C. 1.

14. A.I.R. 1954 S.C. 637.

consequent failure to give true weight and consideration to the findings upon which the trial court based its decision.' In *Zwinglee Ariel v. State of M. P.*,¹⁵ this Court again cited the passage from the decision of the Privy Council extracted above and applied it to the facts of that case. In *Shiv Bahadur Singh v. State of Vindhya Pradesh*,¹⁶ Bhagwati, J., speaking for the Court, after referring to an earlier decision of this Court, accepted the principle laid down by the Privy Council and, indeed, restated the observations of the Privy Council in four propositions. It may be noticed that the learned Judge did not use the words "substantial and compelling reasons." In *S. A. A. Biyabani v. State of Madras*,¹⁷ Jaganadhadas, J., after referring to the earlier decisions, observed at p. 647 thus :

'While no doubt on such an appeal the High Court was entitled to go into the facts and arrive at its own estimate of the evidence, it is also settled law that where the case turns on oral evidence of witnesses, the estimate of such evidence by the trial court is not to be lightly set aside.'

"The learned Judge did not repeat the so-called formula but in effect accepted the approach of the Privy Council. The question was again raised prominently in the Supreme Court in *Aher Raja Khima v. State of Saurashtra*,¹⁸ Bose, J., expressing the majority view, stated at p. 1287 thus :

'It is, in our opinion, well settled that it is not enough for the High Court to take a different view of the evidence; there must also be substantial and compelling reasons for holding that the trial court was wrong and if the trial court takes a reasonable view of the facts of the case, interference under Sec. 417 is not justifiable unless there are really strong reasons for reversing that view.'

"It may be noted that the learned Judge equated "substantial and compelling reasons" with "strong reasons." Kapur, J., in *Bhagwan Das v. State of Rajasthan*,¹⁹ referred to the earlier decisions and observed that the High Court should not set aside an acquittal unless there are "substantial and compelling reasons" for doing so. In *Balbir Singh v. State of Punjab*,²⁰ this Court observed much to the same effect thus at p. 222 :

'It is now well settled that though the High Court has full power to review the evidence upon which an order of acquittal is founded, it is equally well settled that the presumption of innocence of the accused person is further reinforced by his acquittal by the trial court and the views of the trial Judge as to the credibility of the witnesses must be given proper weight and consideration, and slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses must also be kept in mind, and there must be substantial and compelling reasons for the appellate court to come to a conclusion different from that of the trial Judge.'

"These observations only restate the principles laid down by the Court in earlier decisions. There are other decisions of the Court where, without dis-

15. A.I.R. 1954 S.C. 15.

16. A.I.R. 1954 S.C. 322.

17. A.I.R. 1954 S.C. 645.

18. (1955) 2 S.C.R. 1285 ; A.I.R. 1956 S.C. 217.

19. A.I.R. 1957 S.C. 589 : 1957 S.C. A. 886.

20. A.I.R. 1957 S.C. 216 : 1957 Cr. L.J. 481.

cussion, this Court affirmed the judgments of the High Courts where they interfered with an order of acquittal without violating the principles laid down by the Privy Council.

There is no difficulty in applying the principles laid down by the Privy Council, and accepted by this Court, to the facts of each case. But appellate courts are finding considerable difficulty in understanding the scope of the words "substantial and compelling reasons" used by this Court in the decisions cited above. This Court obviously did not and could not add a condition to Sec. 417 of the Criminal Procedure Code. The words were intended to convey the idea that an appellate court not only shall bear in mind the principles laid down by the Privy Council but also must give its clear reasons for coming to the conclusion that the order of acquittal was wrong.

The foregoing discussion yields the following results : An appellate court has full power to review the evidence upon which the order of acquittal is founded; the principles laid down in *Sheo Swarup's* case,²¹ afford a correct guide for the appellate Court's approach to a case in disposing of such an appeal; and the different phraseology used in the judgment of the Supreme Court, such as (1) 'substantial and compelling reasons', (2) 'good and sufficiently cogent reasons' and (3) 'strong reasons' are not intended to curtail the undoubted power of an appellate Court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the question of fact and the reasons given by the Court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified.

To conclude, the power of an appellate Court in an appeal against acquittal is thus not different from what it has in an appeal against conviction; the difference lies more in the manner of approach and the perspective rather than in the content of the power.²²

This is also the effect of the later decisions in *Harbans Singh and others v. State of Punjab*,²³ and *Agarwal v. State of Maharashtra*.²⁴

16. Supreme Court appeal. The assumption that once an appeal has been admitted by special leave under Art. 136 of the Constitution, the entire case is at large and the appellant is free to contest all the findings of fact and raise every point which could be raised in the High Court or the trial Court is entirely unwarranted. The exercise of its extraordinary jurisdiction by the Supreme Court is not justifiable in criminal cases unless exceptional or special circumstances are shown to exist or substantial and grave injustice has been done.²⁵ In the case of an order of acquittal where the presumption of innocence of an accused person is reinforced by that order,

21. 1934 M.W.N. 1017 : A.I.R. 1934 P.C. 227 (2).

22. *Sanwat Singh v. State of Rajasthan*, A.I.R. 1961 S.C. 715 at p. 717.

23. A.I.R. 1962 S.C. 439 : (1962) 2.

S.C.J. 662.

24. Notes of recent cases, (1962) 11 M. L.J. 39.

25. *Pritam Singh v. State* 1950 S.C. 169 1950 S.C.R. 453.

the exercise of the jurisdiction would not be justified for merely correcting errors of fact or law of the High Court. An occasion for interference with an order of acquittal may arise, however, where a High Court acts perversely or otherwise improperly or has been deceived by fraud.¹

17. To conclude the appreciation of evidence in appeals. In hearing appeals there are two temptations to be resisted. First is to agree with whatever is said by the lower Court on the principle that the men on the spot know best. As David Alec Wilson, I. C. S., in his *East and West*, has well said: "To see through the eyes of the men on the spot is a good thing; but it is not enough. It is only the first step to sympathetic knowledge: for the men on the spot seldom see very much, and may not understand what they see." As the Arabian proverb runs: "The ass may go often to Mecca but never knows more than an ass." Humanity everywhere is too abstruse to be deciphered at sight. Secondly, the temptation to differ is from a desire to show off. As Plowden in his 'Grain or Chaff,' p. 19, remarks:

"Moreover there are temptations which may well prove on occasion too strong for minds not rigidly disciplined. There is the temptation to think that the appeal would not be made without good cause and the purely human temptation to prove if he can that another is wrong. To agree with another mind seems often tame and unsatisfactory. To overrule gives a conscious sense of superiority. There must always be danger lest considerations like these press too hardly on such indisciplined minds and dispose them without any conscious bias to indulge in the greater luxury of reversing or modifying a decision rather than confirming it; and lastly there is the temptation to acquire cheap popularity with the Bar by ill-considered and wholly unmerited reductions of sentences. Therefore appeals should be decided by minds rigidly disciplined and as little open as possible to such extraneous considerations."

18. Appeals by Special Leave. Though there was a prerogative right in the Crown to entertain an appeal in criminal cases, there was no absolute right of appeal to the Privy Council inherent in the person convicted and the Council only entertained such an appeal upon the certificate of the High Court or in very exceptional cases.² "Her Majesty will not review, or interfere with, the course of criminal proceedings, unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."³

1. *The State Government, Madhya Pradesh v. Ramkrishna Ganpatrao Limsey*, 1954 S.C. 20: 55 Cr. L.J. 244; *Aher Raja Khima v. State of Saurashtra*, 1956 S.C. 217 as to the Practice of the Privy Council before the abolition of Privy Council Jurisdiction Act, V of 1949, see *Dal Singh v. King-Emperor*, 1957 P.C. 25: 44 I.A. 137: I.L.R. 44 Cal. 876; *Smt. Bibhabati Devi v. K. Ramendra Narayan Roy*, I.L.R. 1947 Kar. (P.C.) 85: 1947 P.C. 19: 73 I.A. 246: I.L.R. (1947) 1 Cal. 52: 227 I.C. 177 (Ayer: Art of Cross-examination, Law Book Company, Allahabad).

2. *In re Joykissen Mookerjee*, 1 W.R. (P.C.) 13: 9 Moo I.A. 179; *R. v. Eduljee Byramjee*, (1846) 3 Moo I.A. 468; and see *Phillip Esnouf v. Attorney-General for Jersey*, (1883) L.R. 8 App. Cas. 304; *R. v. Bertrand*, (1867) L.R. 1 P.C. 526.

3. *Ex parte Carew*, 1897 App. Cas. 719, 721; *Re Dillett*, (1887) 12 App. Cas. 459, 467; cited in *Bal Gangadhar v. R.*, 25 I.A. 1: I.L.R. 22 Bom. 521 in which leave to appeal was refused in the case of *Subramania Ayya v. R.*, (1900) 4 C.W.N. ccxii (1901) 25 M. 61 leave to appeal was granted and the conviction set aside.

The Privy Council had said that the prerogative right would not be exercised merely because the Privy Council would have taken a different view of the evidence, but that an error in procedure may be of a character so grave as to warrant interference, even where the accused person appeared to be guilty.⁴ Now, under Art. 136 of the Constitution, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal, other than a court or tribunal constituted by or under any law relating to the Armed Forces, in the territory of India. Though the Supreme Court is not bound to follow the decisions of the Privy Council too rigidly, yet some of the principles laid down by the Privy Council for granting special leave in criminal cases are useful as furnishing in many cases a sound basis for invoking the discretion of the Supreme Court in granting special leave. Generally speaking, the Supreme Court will not grant special leave, unless it is shown that exceptional circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.⁵ The Supreme Court cannot grant special leave in cases not covered by Art. 134, 135 or 136. An omission to provide for such a relief in the Constitution cannot be remedied by the Supreme Court, and assumption of jurisdiction which is not warranted by the clear words of Art. 134, 135 or 136 will be tantamount to making legislation by the Supreme Court, which it is never its function to do.⁶ There is no provision in the Constitution corresponding to Sec. 417, Criminal Procedure Code and such an order is final, subject, however, to the overriding powers vested in the Supreme Court by Art. 136 of the Constitution.⁷

THE SCHEDULE. [Enactments Repealed] Repealed by the Repealing Act, 1938 (1 of 1938), Sec. 2 and Schedule.

APPENDIX I

SUMMARY

To summarise the foregoing

Summary of Part I of the Indian Evidence Act

The Indian Evidence Act has been divided into three principal parts :

PART (i) contains two chapters, namely, I and II.

Chapter I deals with preliminary definitions. (Sections 1 to 4)

- Act X of 1897 repeals so much of the Indian Evidence Act as relates to Act I of 1868 ; Vaithinatha Pillai v. R., 40 I.A. 501 : I.L.R. 36 Mad. 501 : 21 I.C. 369 ; Johnson v. R., 1904 A.C. 817.
4. Dal Singh v. R., 1901 P.C. 25 : 44 I.A. 137 : I.L.R. 44 Cal. 876 : 39 I.C. 311. Inayat Khan v. Emperor, 1936 P.C. 199 : I.L.R. 17 Lah. 488 : 163 I.C. 7.
 5. Pritam Singh v. The State, A.I.R. 1950 S.C. 169 : 1950 M.W.N. 605 : 68 L.W. 875 : 1950 S.C.R. 453.
 6. Janaradhan Reddy v. The State, A.I.R. 1951 S.C. 124 : 1951 S.C.J. 98 : 64 L.W. 378.
 7. State Government (Madhya Pradesh) v. Ramkrishna Ganpatrao Limsey, 1954 S.C. 20 : 55 Cr. L.J. 244.
 8. The revising Authors are greatly indebted to the ancient classics on Evidence like Stephen's Digest, Cunningham the Indian Evidence Act (1899 Edition), in the preparation of this summary and they gratefully acknowledge their debt.

Chapter II deals with relevancy of facts and shows in what way various relevant facts are connected with each other. (Sections 5 to 55)

PART (ii) contains four chapters, namely, III, IV, V and VI.

Chapter III deals with certain facts which need not be proved. (Sections 56 to 58)

Chapter IV deals with oral evidence. (Sections 59 to 60)

Chapter V deals with documentary evidence. (Sections 61 to 90)

Chapter VI lays down rules regarding the exclusion of oral by documentary evidence. (Sections 91 to 100)

PART (iii) contains five chapters, viz., VII, VIII, IX, X and XI.

Chapter VII deals with burden of proof and presumption. (Sections 101 to 114)

Chapter VIII deals with the subject of estoppels. (Sections 115 to 117)

Chapter IX speaks of witnesses who are competent to testify. (Sections 118 to 134)

Chapter X deals with the examination of witnesses. (Sections 135 to 166)

Chapter XI deals with the effect of improper admission and rejection of evidence. (Section 167)

The object of legal proceedings is the determination of rights which depends upon evidence (Section 3). Evidence is thus defined in Section 3: "It means and includes (i) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry;

(ii) all documents produced for the inspection of the courts; such documents are called **documentary evidence**."

With the above definition may be compared two other well-known definitions, viz., by Blackstone and Taylor. Blackstone in his commentaries on the Laws of England says "that evidence signifies that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue, either on the one side or the other." Taylor defines evidence "as including all the legal means exclusive of mere arguments which tend to prove or disprove any matter or fact, the truth of which is submitted to judicial investigation. On the adduction of this evidence courts determine rights which are the object of legal proceedings."

Therefore the Evidence Act is based upon two principal divisions, viz., firstly the adduction of the permissible material of belief, on which the court has to act, and secondly the manner in which each of these facts constituting the material has to be proved and brought on record.

The first division is covered by Part (i), Chapters I and II, relating to the relevancy of facts. The second division covers Parts II and III of the Act; Part (ii) in turn comprising Chapters III to VI, deals with the general principles governing proof, such as rules relating to oral and documentary evidence and the cases in which one is excluded by the other; and Part (iii) dealing with (1) the persons who are bound to supply this evidence, on whom,

in other words, the burden of proof lies and (2) the procedure according to which they must supply it, in other words the rules governing examination of witnesses.

To put it in another way, the law of evidence determines (a) what sort of facts may be proved in order to establish the existence of that which is the subject of determination; (b) what sort of proof is to be given of those facts; (c) who is to give them; and (d) how is it to be given.

In short the law of evidence consists of two sets of rules: (1) the rules determining what facts are relevant to the issue and (2) rules determining how these facts are to be proved.

The permissible material of belief on the adduction of which the court determines the rights, etc. consists of facts in issue (Section 5) and relevant facts (Secs. 6 to 55).

Facts in issue. Section 5 itself comprehensively defines facts in issue as meaning and including any fact from which either by itself or in connection with other facts, the existence or non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows. Where the issue is whether a thing happened, the most obvious and direct way of producing belief or its occurrence is for someone who is able to assert of his own knowledge from having seen it, that it did happen and to come to court and say so. The only question which the Judge has then to decide is whether that account can be trusted. The illustration appended to Section 3 runs as follows:

A is accused with the murder of B. At his trial the following facts will be in issue, viz.,

That A caused B's death.

That A intended to cause B's death.

That A had received sudden and grave provocation from B.

That A at the time of doing the act which caused B's death was by reason of unsoundness of mind incapable of knowing its nature.

Relevant facts. There are surrounding every fact a number of other facts which bear upon it or connected with it more or less intimately and in a higher or lower degree affect its probability. Now as has been repeatedly laid down in several judicial decisions under Section 11, almost every fact may in the concatenation of human affairs be shown to be in some way or other connected with another; but the attempt to follow it in every instance however remotely connected, would not only render judicial inquiry impossible from its interminable length, but would even if practicable be of doubtful help towards the discovery of the truth, because the mind would be diverted from the immediate subject of inquiry. West, J. in *R. v. Parbhudas*,⁹ neatly put it "the connections of human affairs are so infinitely various and so far-reaching that thus to take the Section 11 in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and means of the parties. One of the objects of the law of evidence is to restrict investigations made by courts within the bounds

9. (1874) 11 Bom. H.C.R., 90 at 91.

prescribed by general convenience, and this object would be completely frustrated by the admission on all occasions of every circumstance on either side having some remote and conjectural probative force, that precise account of which might itself be ascertainable only by a long trial, and a determination of fresh collateral issues growing up in endless succession, as the inquiry proceeded." Therefore Sections 6 to 55 (relevancy of facts to one another) depend either (a) on their connection with one another as cause and effect, or (b) generally on the existence of the one rendering the existence of the other highly probable or improbable. These relevant facts constitute what English text-books call circumstantial evidence as opposed to evidence on the actual fact in issue which is termed 'direct'.

These relevant facts stand grouped under five headings. In forming opinion about a fact one has to consider, first anything which has happened or been done in connection with it (Sections 6 to 16); secondly, anything which has been said about it (Sections 17 to 39); thirdly, anything that has been decreed in courts of justice about it (Sections 40 to 44); fourthly, anything that has been or is thought about it (Sections 45 to 50); and fifthly, the character and reputation of the parties concerned (Sections 52 to 55). Under these five headings all relevant facts have been arranged in the Act. Under someone of them every fact which claims to be relevant must be shown to fall, though many relevant facts will fall under more than one of them. The headings are all inclusive and not exclusive of one another.

Anything which has happened or been done in connection with it. Sections 6 to 16 enumerate the particular forms of connections which law regards as constituting relevancy. These relevant facts fall under two further groups, viz., first facts which are connected with the fact in issue as to form part of the same transaction (Section 6); the occasion, cause or effect of the fact in issue or relevant fact constituting the state of things under which fact in issue or relevant fact happened affording an opportunity for the occurrence or transaction of the fact in issue or relevant fact (Section 7); or show or constitute motive or preparation for fact in issue or relevant fact (Section 8); or necessary to explain or introduce fact in issue or relevant fact, support or rebut the inference suggested by the fact in issue or relevant fact or establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened; or show relation of parties by whom any fact in issue or relevant fact is transacted (Section 9); or are inconsistent with anything regarding the fact in issue or relevant fact or it by themselves or in connection with other facts make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable (Section 11).

Secondly, the allied group of facts relevant in particular cases fall under Secs. 10, 12, 13, 14, 15 and 16. Section 10 relates to conspiracy, and question arises as to the existence of a conspiracy and whether any person was a party to it. Section 12 relates to suits in which damages are claimed. Section 13 when there is a question as to the existence of any right or custom; Section 14, when the existence of any state of mind or bodily feeling is relevant; Section 15, when there is a question whether an act was accidental or intentional or done with a particular knowledge or intention; Section 16, when there is a question whether a particular act was done the existence of any course of business is relevant.

Statements when relevant facts (Secs. 17 to 39), anything which has been said about it. The next class of relevant facts are statements (Sections 17 to

39). The general rule is that the mere fact that someone had previously said something about the fact to be proved is irrelevant. There are however, certain previous statements which under certain conditions assume a most important bearing on the probabilities of the case. They constitute the best available evidence. Out of this group of Sections 17 to 39, Sections 17 to 20 relate to admissions, namely, statements which suggest an inference as to the fact in issue or relevant fact and made by a category of persons set out in Sections 18 to 20.

Section 21 makes it clear that admissions are relevant against the person who made it and not in his behalf. Because if such statements are admissible it would simply be manufacturing evidence on one's own behalf. An admission is relevant only against the person who makes it or his representative, and its effect as against him is set out in Section 31, if it is not merely as an admission conclusive. The person who made it may show that he was mistaken or he was not telling the truth; he may diminish the importance to be attached to it in any way he can; he is not precluded from contradicting it; but many admissions become estoppels, and then as laid down in Section 115 the person who made them cannot deny them. Till admissions ripen into estoppels, they remain merely as admissions. Section 21 makes relevant certain admissions on behalf of the person who made them. Those admissions may be proved in his own behalf. They fall under three groups, namely, (1) statements which are made relevant in Section 32, (2) an admission as to the relevant state of mind or body may be proved by the person making it, (3) admissions are also made relevant otherwise than as admissions on a question of an accused receiving stolen goods knowing them to be stolen. He may prove them as his own by refusal to sell them below the value, because that refusal would be relevant under Section 8 as explaining conduct influenced by the fact in issue. Similarly a man might prove his own statements if they form part of the same transaction as a relevant fact under Section 6, or where the occasion of a relevant fact under Section 7 are necessary to explain it under Section 9.

Section 22 deals with oral admissions of contents of documents.

Section 23 restricts the use of admissions as evidence in civil cases in regard to admissions made on the expressed condition that they should not be used as instances from which such a condition can be inferred.

Sections 24 to 29 deal with confessions of accused persons; Section 30 deals with the confession of a co-accused, in regard to which, the guarded language used, is, that such a confession may be taken into consideration against such other person as well as against the person making it. (For a further discussion see appropriate sections below).

Next follow (Section 32) statements which from their nature are declared to be relevant facts when the person who made them is dead, or for good reasons cannot be produced or cannot be produced without a degree of expense and trouble, which the court considers unreasonable. Eight categories of statements are set out.

In the next place (Section 33) a statement made by a witness in a former judicial proceeding is a relevant fact under certain conditions making them *prima facie* worthy of being scrutinised with reference to the matter on hand.

Sections 34 to 38 deal with statements made in special circumstances like entries in books of account regularly kept in the course of business (Sec. 34)

or entries in public records or registers by a public servant or other person, in performance of duty (Sec. 35), statements in public maps, etc. (Sec. 36), statements of facts of a public nature made in the recital of an Act by Parliament of the United Kingdom or by Indian Legislatures or in a Gazette notification (Sec. 37) and statements of law in any country contained in a book published under the authority of the Government of that country and published rulings of courts (Sec. 38). How evidence is to be given when statement forms part of a conversation, document, book or series of letters or papers is set out in Sec. 39.

Sections 40 to 44 fall under the third heading of anything that has been decreed in courts of justice about it. (See discussion under the appropriate sections below).

The character and reputation of parties concerned. Sections 45 to 50. The next class of relevant facts are opinions. There are some cases in which in ascertaining the truth of a thing, it becomes important to know what people think about it. This obviously, as Justice Cunningham points out, requires a somewhat substantial sort of proof, and it will be seen that it is only in very special cases and under very strict conditions that opinions are admissible.

Section 45 covers expert testimony. The opinions of the experts are generally admissible whenever the subject is one, a knowledge of which can only be acquired by special training and experience. Such specially skilled persons are called experts. Section 45 does not deal with matters of which any one is an expert but only with points of foreign law or science or art or handwriting or finger prints. Other evidence of witnesses who may be experts: their evidence in other matters will not be expert testimony, but as men who had observed relevant facts and whose evidence derives an enhanced value from the circumstance that they had favourable opportunities, peculiar facility and obvious incentives for accurate observation and that their training would fit them to appreciate and describe what they observed.

Under Section 46, facts not otherwise relevant are made relevant, if they support or are inconsistent with the opinions of experts if such opinions are relevant.

Section 47: In the next place there are some opinions which, though not given by experts, are yet relevant as being the opinion of persons possessing such means of information. In regard to the question whether some particular document was written or signed by some particular person, the opinion of any person who is acquainted with the handwriting of that person is relevant; and a person is said to be acquainted with the handwriting of another, if he has (a) seen him write, (b) received letters purporting to be signed by him in reply to letters addressed by him, or (c) been in the habit in the course of business of seeing documents purporting to be signed by him.

Two allied matters complete this fourth group, viz. opinion evidence is made relevant in regard to general custom or right and relationship under Sections 48 to 50. The sections provide suitable safeguards for making that opinion *prima facie* receivable. To test opinion evidence effectively Sec. 51 makes grounds of opinion of living deponents relevant.

Sections 52 to 55: We now come to the last class of relevant facts, namely, the cases in which character is relevant. In civil cases, the fact that the character of a common man is such as to render probable or improbable any conduct imputed to him is made relevant, except, in so far as such

character appears from facts otherwise relevant. In criminal inquiries, the good character of the accused is relevant, whereas the bad character is made irrelevant. It is right that an accused should have the benefit of a previous character and of any favourable inferences that are to be drawn from it, and it is equally right that a person who is on his trial should be treated with all possible fairness and even indulgence by excluding evidence of previous bad character. There are two exceptions. The section does not apply to cases in which the bad character of any person is itself a fact in issue. In the second place, if an accused person chooses to bring forward evidence of his previous character he thereby challenges an inquiry, and it is but right that evidence to contradict evidence of his alleged good character should be admissible. Explanation 2 is merely declaratory for the fact if a man had previously been convicted of an offence that is a tangible unmistakable piece of evidence about him. In civil cases, character is made relevant wherever it affects the amount of damages to be recovered.

This completes the list of relevant facts. There are certain other facts provided for in Sections 146, 148, 155, 156 and 157 which may in certain circumstances be proved for the purpose of discrediting a witness either by showing previous inconsistent statements or in some other manner proving him to be untrustworthy, for corroborating a witness by showing corroborative circumstances or by proving the previous statements consistent with the present evidence. This will be more fully considered when we come to examination of witnesses.

This concludes the first part of the Act as to the material of belief. Then we have to proceed to consider the sections of the two main divisions of the subject, namely, the mode in which the material is brought to the Judge's mind. This second part in other words deals how facts which are relevant under the preceding sections are to be proved. This second part falls under two sub-divisions corresponding to Parts (ii) and (iii) of the Indian Evidence Act. The second part, Sections 56 to 100 of the Indian Evidence Act deals with proof after having in Section 155 declared the law on the point of ascertaining what facts can be proved. The second part deals with the law as to how such facts are to be proved. A fact may be relevant, but it must be duly proved, that is, by evidence which is admissible under the Evidence Act. Section 157: facts are relevant or irrelevant, evidence may be admissible or inadmissible. Relevancy is a quality of fact, admissibility is a quality of the evidence tendered to prove a relevant fact. Admissibility is the term used to describe one aspect of proffered evidence, viz., that it must be received by the tribunal. The question whether proffered evidence is admissible or inadmissible involves four questions. First, are the facts sought to be proved admissible as being facts in issue or relevant to the facts in issue or relevant on any other ground? Secondly, if so, are they outside any rule of exclusion of facts such as that of privilege or that of estoppel? Thirdly, if so, does the evidence offend against any other rule of exclusion such as that against the admission of hearsay, and fourthly in any event, is the appropriate mode of proof adopted? Thus before the confession of an accused person is admitted, it must be made to appear that it was made voluntarily. Again, Section 21 says that admissions are relevant or may be proved as against the person who makes them; but they cannot be proved by the person who makes them. Therefore although admissions are relevant, if tendered by the person who makes them, they will not be admissible. A client's communication with his pleader may be relevant under Section 11 or Section 21, but is not admissible as evi-

dence under Section 126. Thus to reiterate, relevancy is a quality of fact, and admissibility is a quality of the evidence tendered to prove a relevant fact.

Summary of Part II

The facts in issue and the relevant facts falling under the second par (Sections 56 to 100) fall under three groups, namely, (a) matters of which proof is not required or judicial notice, (b) materials on which proof is not allowed, and (c) oral and documentary evidence.

The matters of which proof is not required fall under Sections 56 to 57 of the Indian Evidence Act. The facts which require no proof and of which judicial notice ought to be taken by the court are set forth in Section 57. In addition to facts enumerated in Section 57, it is provided by Section 58 that admissions need not be proved though the court has the discretion of calling for proof of them otherwise than by such admissions. Turning to matters of which proof is not allowed, this branch of the law of evidence is known as estoppel, which is a rule of evidence, whereby a person is precluded or estopped from denying the existence of a state of things which has been previously asserted to exist by him or which by words or by conduct he has induced another to believe in and act upon such belief. An estoppel, says Blackstone in his Commentaries happens where a man hath done some act or executed some deed which estops or precludes from averring anything to the contrary. Estoppels are generally divided into three classes: (1) by record, (2) by deed (3) by conduct. (Sections 115 to 117 contain provisions relating to estoppel and they can only come into application in civil cases). But it may be noted that judgments of criminal courts operate as estoppel by record as regard matters which the court has jurisdiction to decide directly between the parties.

Proof is furnished of facts in issue or relevant facts by the examination of witnesses on the production of documents of all facts excepting the contents of documents which may be proved by oral evidence (Section 59); which must in all cases be direct, that is to say, if the fact to be proved is one that can be seen, the evidence must be that of a witness who saw it; if the fact is one that could be heard, the evidence must be that of a witness who heard it, if it be one which is perceptible by any other sense the evidence must be that of a witness who perceived by that sense; if the fact to be established is the existence of an opinion in a person's mind, the evidence must as a general rule be that of the person who says that he holds that opinion (Section 60). Hearsay evidence, that is to say, evidence of a witness of a fact which he did not himself perceive but which he proves was stated by another person is not admissible except in a few special cases which have been referred to above.

The contents of documents may be proved either by primary or secondary evidence (Section 61). Primary evidence means the document itself produced for the inspection of the court (Section 62); but secondary evidence of the kind referred to in Section 63 is also admissible as provided for in section 64, in cases contemplated by Sections 65 and 66 of the Act, which lays down certain prerequisites for its admissibility.

Secondary evidence means and includes (a) certified copies given under the provisions of the Act, (b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy; copies compared with such copies and copies made from or compared from the original; (c) counterparts of documents as against the parties who did not execute the counterparts being permanent evidence as against those who did execute them.

(d) oral accounts of the contents of a document given by some person who has himself seen it (Section 63).

Documents are divided into two classes, public and private. No definition is given in the Act of these words but Section 3 defines in general the meaning of a document, and Section 74 declares what are public documents, and by a process of eliminating Section 76 indicates that all other documents are private. Proof is not generally needed of public documents, there being a presumption in favour of their genuineness (Sections 79 to 84 and 86); but the mere production alone is not sufficient in the case of private documents, and evidence is required to prove execution before they can be received in evidence. Such proof is furnished by complying with the requirements of Sections 67 to 73. If a document is alleged to be signed or to have been written wholly or in part by a person it is necessary to prove such signature or handwriting (Section 67). If a document is required by law to be attested, then if any attesting witness is alive and subject to the process of the court and capable of giving evidence he may be called to prove its execution (Section 68); if no such witness can be found or the document purports to have been executed in the United Kingdom then it is necessary to prove the attestation of at least one witness and also the signature of the person who executed the document; if the document be attested and admission by a party of its execution by himself is sufficient against him (Section 70); if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence (Section 71); attested documents not required by law to be attested may be proved as if it was unattested (Section 72); proof can also be afforded of the execution of documents by comparison of signature, writing or seal with others admitted or proved (Section 73), such comparison being also applicable under the Act to finger impressions.

In this connection certain presumptions recognised by Sections 85 to 88 and 90 should be adverted to. Section 85 requires the genuineness of a power-of-attorney purporting to have been executed before an authenticated Notary Public or any court or Judge or Magistrate, etc. to be presumed. Section 86 deals with presumptions as to certified copies of foreign judicial records; Section 87 with presumptions as to books, maps and charts; Section 88 with presumption as to telegraphic messages; Section 89 with presumption as to decree executed, etc., documents called for and not produced after notice to be produced, namely, that every such document so attested, stamped and executed in the manner required by law; and Section 90 with documents thirty years old and coming from proper custody; presumption under Section 90 is of great importance in obviating the effects of the lapse of time as to proof of document. As years go on, the witnesses who can personally speak to the attestation to execution of a document or to the handwriting of those who executed or attested gradually die out. If strict proof of execution of handwriting were necessary it would after a generation become impossible to prove any document. On the other hand, as has been pointed out in several judicial decisions, there is some reason to suppose that documents of which people take care to preserve for a long series of years should be authenticated, and the law acts on its probability and provides that in the case of a document of such a nature the court may presume that the signature and every other part is in the handwriting of the person by whom it purports to be written and that it was duly executed and attested by the persons by whom it purports to be executed and attested.

This concludes the provisions of the law for the proof of documents. But there is an important limit thereto, to which we must now refer, namely, the

cases in which the existence of a document operates to exclude any other evidence as to the matter to which the document refers. It is a general rule of the law of evidence to exclude oral by documentary evidence whenever the latter is available, and this principle is enunciated in Secs. 91 and 92 of the Act. By Sec. 91 it is enacted that when the terms of a contract, agreement or other disposition of property are reduced to the form of a document, only primary evidence or secondary evidence of the document itself is admissible. Oral evidence of its contents is therefore excluded. Section 92 further excludes evidence as between the parties to any such document or their representative-in-interest of any oral agreement for the purposes of contradicting, varying, adding or subtracting to its terms except in certain cases to which the provisos of the section apply. The exceptions so engrafted on the rule provide for cases (a) where the validity of document is attacked on the ground of fraud, intimidation, illegality, etc.; (b) when it is sought to prove matters on which the document is silent; (c) where a condition precedent or subsequent agreement in modification is sought to be proved, as also any usage or custom is incidental; (d) when it is attempted to explain the language used in relation to existing facts. But persons who are not parties to a document or their representatives-in-interest may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the agreement (Sec. 99).

The employment of oral evidence in the interpretation of documents is dealt with in Secs. 93 to 100, and guides us in resolving difficult questions to the extent to which extraneous evidence may be given to aid in the interpretation of the document. These rules are as follows, in the language of Justice Cunningham: A patent ambiguity cannot be explained (Sec. 93); whereas a latent ambiguity can be. A patent ambiguity arises when the language used in a document is on its face ambiguous or defective, and a latent ambiguity is plain in itself but unmeaning in reference to existing facts; then, where the language would apply equally well to several persons or things but could not have been intended to apply to more than one of them, evidence may be given to show to which of such persons or things it was intended to apply (Sec. 96); where the language applies partly to one set of facts and partly to another but the whole of it does not apply accurately to either, evidence may be given to show to which it was intended to apply; where the document contains illegible or unintelligible characters, foreign, obsolete, technical or provincial terms or abbreviations of words used in a peculiar sense evidence may be given to explain them (Sec. 98). The above rules of interpretation do not apply to documents which are governed by the Indian Succession Act as to the construction of wills (Sec. 100).

Summary of Part III

Thus far we have analysed Part (I), the material of belief, and Part (II) the mode in which that material should be brought to the Judge's mind by oral or documentary evidence. This does not exhaust the subject of proof. There remains the all-important question as to which of the parties before the court is bound to tender the evidence constituting the material of the Judge's belief in regard to the question in dispute, and to what extent. In other words, on which of the parties the burden of proof will lie?

In regard to this material of belief, whenever a tribunal is called upon to decide any question of fact it must do so either by obtaining actual evidence or by the easier yet less precise method by employing instead some *a priori* presumption which falls under the two heads, of irrebuttable and re-

buttable presumptions. In fact upon an analysis it will be found that the difference between reaching a conclusion upon evidence and reaching a conclusion on presumption is only one of degree. In the former case the mind is easily led to the conclusion by habitual experience and by a long accustomed process of thought; and in the latter over the years the courts have found by experience that there are certain factual situations from which it is safe to make a wider leap to a conclusion than a cautious person might unguided be disposed to take. It is in such cases that the Evidence Act directs employment of presumptions. Therefore the real difference between reaching of a conclusion upon evidence and reaching of a conclusion on presumption is only one of degree; and in the case of presumptions, the only difference really is that there is a wider gap between the last fact deposited to any evidence and the conclusion which might be reached. The result of presumptions is that there is shifting of burden of proof.

In addition to these irrebuttable and rebuttable presumptions we have a class of cases, which persons may by their previous conduct have disqualified themselves from making particular assertions in giving evidence. This principle is known as Estoppel.

In regard to the burden of proof, viz., as to which of the parties before the court is bound to supply evidence which is to be the material of the Judge's belief on the question in dispute, we have three general rules. The first and obvious principle is that the burden of proving the existence or non-existence of any fact lies on the party who wants the court to believe such existence or non-existence (Sec. 101). The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all is given on either side. The apt illustration given is: A sues B for money due on a bond. The execution of the bond is admitted. But B says, it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed as the bond is not disputed and fraud is not proved, and therefore, the burden of proof is on B (Section 102). When, however, a person asserts a particular fact by way of defence, e.g., when he sets up a plea of *alibi* on his being charged with theft on a particular date the burden of proof rests on him (Section 103).

In addition to these general rules in the following instances special provision is made as to the party on whom the burden of proof shall lie. When it is necessary in order to render particular evidence admissible that some fact should be proved, the burden of proving the fact lies on the person who wants to use the evidence, e.g., if A wants to prove the dying declaration of B, he must prove that B is dead. If he wants to use secondary evidence of a document he must prove that the original is destroyed or lost (Section 104). When any person is accused of an offence the burden of proving that the case falls within any general or special exceptions or proviso in the Indian Penal Code or other law, lies on the accused (Sec. 105). When any fact which is especially within the knowledge of any person, the burden of proving that fact is on him, e.g., A charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him (Section 106). If a man is shown to be alive within 30 years, the burden of proving him to be dead lies on the person affirming it (Section 107). If a man is not to be heard of for seven years, the burden of proving him to be alive lies on the person asserting it (Section 109). When a person is in possession of anything, the burden of proving him not to be the owner lies on the person asserting that he is not the owner (Section 110). When a person stands in the position of active confidence such as a trustee towards another, the burden of

proving good faith in any transaction between them lies on the person in the position of active confidence (Section 111).

Certain presumptions which the law allows to be made and to which reference has been made above, materially affect the burden of proof, for where they arise, the burden of proof is shifted when it is sought to rebut them. These presumptions are of two varieties, irrebuttable and rebuttable. We have in Sections 112 and 113 two obligatory presumptions. The fact of a person being born during a valid marriage between his mother and any man within 260 days after its dissolution, the mother remaining unmarried is a conclusive proof (vide definition, Section 4) of his legitimacy unless non-access is proved (Section 112). Section 113 deals with secession of territory. Other instances of conclusive proof are afforded by those judgments of probate, matrimonial, admiralty or insolvency courts, which are conclusive proof of any legal character or of any absolute right conferred or declared by them to exist. In all the above cases no option is given to the judge. In all such cases further proof is of course superfluous and all contradictory evidence inadmissible.

In contradistinction to these obligatory presumptions we have facts which may be presumed (vide definition, Sec. 4) under Sec. 114. Section 114 provides that a court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the case; in other words, wherever the ordinary course of human events and the general tendency of human character render probable under the circumstances of the case that a thing is true, the court is at liberty to presume it is true, to exempt the party asserting it from the necessity of proof in the first instance and to throw upon the party who denies it the burden of showing that it is not true. Whether in any particular case it is safe to do so, is a question which the judge must decide for himself according to his judgment.

The next group of sections we have to consider (Sections 115 to 117) relate to a class of cases in which persons may by their previous conduct have disqualified themselves from making particular assertions in giving evidence. The law has a right to require certain degree of consistency in those who seek its aid. It is based upon the principle that it is for the common good that there should be an end to litigation and that none should be vexed twice on the same ground. The practical consequence is that generally speaking no suitor will be allowed to put forward a claim or a ground of defence or to make an assertion which is contrary to something which he has on some former occasion said or done. The following are the estoppels known to Indian law : (1) Estoppel by declaration or conduct (Section 115); (2) Estoppel by tenant (Section 116); (3) Estoppel of acceptor of bills of exchange of bailee and licensee (Section 117). These are the only cases in which man is precluded by law from setting up what facts he pleases.

This concludes our analysis of the sections, how proof should be produced by the party on whom the burden of proof rest (Chapter VII, Sections 101 to 114) unless he is estopped (Chapter VIII, Sections 115 to 117).

We have now to consider the examination of witnesses :

Adduction of proof by examination of witnesses : The examination of witnesses and placing on record their oral testimony are covered by Sections 118 to 156 of the Act. Taking first the capacity of witnesses, all persons are competent to testify unless the court considers that they are prevented from

understanding the questions put to them or from giving rational answers to those questions by reason of (1) tender years, (2) extreme old age, (3) disease, whether of body or mind, or (4) any other cause of the same kind (Section 118). The exception to the section says that a lunatic is not competent to testify unless he is prevented by acts of lunacy from understanding the questions put to him and giving rational answers to them. Dumb witnesses may testify by writing or signs made in open court (Section 119); though in civil proceedings the parties to the suit are competent witnesses (Section 120). There are certain limitations in regard to an accused person in a criminal case. Formerly an accused person could not be examined as a witness on oath on his own behalf, though he could and can be examined by the Court under Section 342 of the Criminal Procedure Code, 1898 (now Section 313 of 1973 Code) without oath being administered to explain any circumstance appearing in the evidence against him. To this Section (342), another Section 342-A (now Section 315 of 1973 Code) has been added by Section 61 of Act XXVI of 1955. Now any person accused of an offence before a criminal court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him, or any person charged together with him at the same trial, provided that (a) he shall not be called as a witness except on his own request in writing; or (b) his failure to give evidence shall not be made the subject of any comment by any of the parties or court or give rise to any presumption against himself or any person charged together with him at the same trial.

The Indian Evidence Act also recognises different kinds of privileges claimable by witnesses from disclosing matters within their knowledge. Section 121 confers on judges and magistrates the privilege of not being compelled except under the special order of some court to which they are subordinate to answer questions as to their own conduct in court as such judges or magistrates on anything which came to their knowledge in court in that capacity. They may be examined, however, as to other matters which occurred in court while they were sitting. Witnesses are also privileged from disclosing: communications during marriage (Section 122) except in suits between married persons, or prosecutions in which one married person is accused of an offence against another (Section 122); affairs of State (Section 123); official communications (Sec. 124); information as to communication to a magistrate or police officer or revenue officer in regard to offences in the case of the former, and offences against public revenue in the case of the latter (Section 125); professional communications (Section 126); Section 127 extends Section 126 to interpreters, etc. Though legal practitioners are privileged by Section 126 from disclosing without the consent of their clients communications made to them by their clients in the course of and for the purpose of their employment as such, this protection does not extend to communications made in furtherance of any criminal purpose, nor to any fact observed by the legal advisers in the course of their employment showing that a crime or fraud had been committed since the commencement of their employment. This obligation continues after the employment has also ceased. A client does not waive his privilege by giving evidence.

On the same principle no one can be obliged to disclose confidential communications between himself and his professional adviser unless he offers himself as a witness; in that case he can be compelled to disclose any such communications as the court thinks necessary to explain the evidence but no others. It is provided in Section 128 that a party to a suit who gives evidence at his own instance is not deemed thereby to have consented to a disclosure by his legal adviser of professional communication; and if he calls his legal

adviser as a witness he does not consent to disclosing professional communications unless he questions him on matters, but for such questions he would not be at liberty to disclose. Nor again, can any witness who is not a party to the suit be compelled to produce his title-deeds or any document, the production of which might tend to criminate him, unless he has agreed in writing to produce them; nor can he be compelled to produce deeds in his possession belonging to another person, which that person, if they were in his possession might refuse to produce, unless of course that other person consents to their being so produced. A witness is not, however, excused from answering any question relating to the matter in issue on the ground that the answer to it will criminate or tend to criminate him or would expose him to penalty or forfeiture of any kind (Section 132); but at the same time it is provided that any answer which such a witness shall be compelled to give, shall not be subject-matter to arrest or prosecution or be proved against him in any criminal proceedings except a prosecution for giving false evidence.

Section 133 lays down that conviction is not illegal merely because it is grounded on the uncorroborated evidence of an accomplice. This has to be read along with the illustration to Section 114 (d) that an accomplice is unworthy of credit unless he is corroborated in material particulars (*see discussion*). Section 134 lays down that no particular number of witnesses shall in any case be required for the proof of any fact.

We come next to the mode in which witnesses have to be examined. Sections 135 and 136 lay down the general rule that the order of production or examination of witnesses shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law, by the discretion of the court (Section 135). The Judge has to allow only evidence to be given as is in his opinion relevant; when the relevancy of a fact depends on proof of some other fact, the Judge may insist first that other fact being proved first, or may accept the party's undertaking that it will be proved at a subsequent stage. Thus if it is proposed to prove a statement which would be relevant only if the person who made it is dead, the court may either insist on having that person's death proved before admitting that statement, or may admit the statement first on an undertaking that the death would be subsequently proved (Section 136).

In examining a witness he is first examined by the party who calls him (Section 137), then cross-examined by the adverse party, and next re-examined by the party who called him.

The object of an examination-in-chief is to obtain testimony in support of the facts in issue for the party calling the witness.

The object of cross-examination is twofold: first to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose belief the cross-examination is conducted, and secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party. Re-examination is a further examination by the advocate who called the witness, to give the latter an opportunity to explain matters left in doubt.

The examination and re-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which witness testified in examination-in-chief. A person under cross-examination may also be asked questions to test the veracity, to discover his position in life or to shake his credit (Section 146). Thus cross-examination consists of cross-examination of the issue and cross-examination of credit (Section 137). The re-

examination must, except with the permission of the court, be directed to the explanation of matters referred to in cross-examination, and if the court allows new matter to be introduced in re-examination, the opposite party has a right to cross-examine on the matter so introduced (Section 138). A person does not, however, become a witness by the mere fact of producing a document in obedience to a summons, and unless he is called as a witness, he cannot be cross-examined (Section 139). Witnesses to character may be cross-examined and re-examined in the same manner as any other witness (Section 140).

The important distinction between the examination and cross-examination is that, whereas in examination-in-chief and re-examination leading questions, that is to say, questions which either suggest the answer desired or assumes the existence of disputed facts cannot be asked. In cross-examination, leading questions may be asked (Section 143). But the court can always permit leading questions in examination-in-chief or re-examination as to matters which are introductory or undisputed, or which have, in the opinion of the court, been already sufficiently proved (Section 142).

We next have the rule for the purpose of carrying out provisions of Section 91, as to the exclusion of oral by documentary evidence. A witness who is about to give evidence regarding a contract, grant or other disposition of property may be asked whether it is not in writing, and if he says it was so, he may be stopped and the production of the document enforced, unless the right to give secondary evidence of it is made out. The explanation makes it clear that a witness may give oral evidence on the other hand of statements made by other persons about the contents of the documents, if such statements are in themselves relevant facts, e.g., motive (Section 144).

A witness can also be asked in cross-examination about previous statements made by him in writing or reduced into writing on relevant matters without such writing being shown to him or being proved. But if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him (Section 145).

This brings us to a class of questions which may be asked as to credit and which may not be asked under the pretext of impugning credit (Sections 146 to 155). The questions which might be asked of a witness to gauge his credit, set out in Section 146, have already been referred to. If any such question relates to a matter relating to a suit or proceedings, the provisions of Section 132, that is to say, witness not excused from answering on ground that answer will criminate, will apply (Section 144). It is necessary, however, to make careful provision against so powerful an engine as cross-examination being perversely or wantonly employed. It would be a grievous hardship if every person who came forward to give evidence was liable at the caprice of an unscrupulous cross-examiner to have every detail of his life dragged into light and be forced to reply to interrogations which suggest what the interrogator dares not assert and thus merely slanders in disguise. To the judge accordingly is confided the delicate and responsible task of admitting or excluding questions asked with a view of testing or injuring a witness's character.¹⁰

10. Cunningham, *Ev.*, introd.

Section 148 lays down that in exercising discretions the court shall have regard to the following considerations:

(1) Such questions are proper, if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to credibility of the witness on the importance to which it testifies; (2) such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect in a slight degree the opinion of the court as to the credibility of the witness on the matter to which he testifies; (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence; (4) the court may, if it sees fit, draw from the witness's refusal to answer the inference that the answer, if given, would be unfavourable. In no case, such a question be asked unless the person asking it has some reasonable grounds for thinking that the imputation which it conveys is well founded (Section 149); the offending lawyers are liable to be reported to the High Court or other authority to whom they are subordinate (Section 150): the court has also the power of forbidding questions which it regards as indecent or scandalous unless they relate to facts in issue or are indispensable to the proof or disproof of facts in issue. The court is peremptorily enjoined to forbid any question which appears to it to be intended to insult or annoy or which though proper in itself appears to it needlessly offensive in form.

The credit of a witness, besides being asked questions to discredit him in terms of Section 146, may also be impugned in the following ways by the adverse party or in the case of a hostile witness with the consent of the court (Section 154) by the party who calls him. Besides being asked questions tending to discredit him, a witness may be discredited by the evidence of other persons to the effect that (a) they from their knowledge of the witness believe him to be unworthy of credit; (b) the witness has been bribed or has accepted the offer of a bribe or has received any other corrupt inducement to give his evidence; (c) he has on former occasions made statements inconsistent with this present evidence; (d) in prosecutions for rape or attempts to rape in which the prosecutrix is a witness, that she was generally of immoral character (Section 155). The Explanation to Section 155 sets out that a witness declaring another witness to be unworthy of credit may not upon his examination-in-chief give reasons for his belief, but may be asked his reasons in cross-examination and the answers which he gives cannot be contradicted, although, though if they are false, he may afterwards be charged with giving false evidence. This protection is enacted, because otherwise the courts would drift into irrelevant controversies, and if a pitched battle is going to be fought over the character of every witness, suits and proceedings would become simply interminable, and instead of trying cases, the judge will be trying witnesses.

Next come the provisions for corroborating witness by asking him about circumstances other than those to which he speaks and which he had observed about the same time or place (Section 156). Another mode of corroboration is by proving a former statement to the same effect as the witness's present evidence and made by him (a) either at or about the time when the facts to which he speaks, took place, or (b) before any authority legally competent to investigate the fact (Section 157). There are some cases in which under the provisions of the Evidence Act as we have already seen, a person's statement becomes relevant constituting an exception to the rule of hearsay. It is provided accordingly in Section 158 that in every case in which under Section 32,

or 33 of the Act a statement is made relevant, that statement may be corroborated or contradicted, or the credit of the person who made it, may be impugned or confirmed by any evidence which might have been proved if that person had been called as a witness in cross-examination. This is to ensure that these statements are tested in the same manner as oral testimony (Section 159).

It often happens not unoften that a witness needs to refresh his memory as to facts about which he speaks. This, he may do, referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards, that the court considers it likely that the transaction was at the time fresh in his memory. A witness may also for the purpose of refreshing his memory refer to a copy of any document, provided that good cause for the non-production of the original be shown. An expert may refresh his memory by reference to professional treatises (Section 159). A witness may also testify to facts stated in any documents to which he might refer to refresh his memory, though he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded (Section 160). Any paper used to refresh memory must be produced and shown to the opposite party, who may, if he pleases, cross-examine upon it (Section 161).

Sections 162 to 164 deal with the production of documents, translation of documents and documents called for and produced on notice and documents sought to be made use of by a party after refusing to produce on notice by the other party. A witness summoned to produce document must bring it to court (Section 162). Documents called for and inspected must be given in evidence if required (Section 163). A person refusing to produce the document cannot afterwards put it in as evidence without the consent of the other party or order of the court (Section 164).

Section 165 deals with the Judge's power to ask questions. It frequently happens, as says Justice Cunningham that the parties generally in their questions do not elicit all the facts necessary to a sound view of the merits of the case. A plaintiff may have some weak points in his case, which he is afraid of betraying, and so dexterously avoids, or the defendant may fail to perceive the import of some answer given and allow it to pass uncriticised; in any such case it is highly important that the judge should be armed with full power enabling him to get at the facts. Therefore Section 165 ~~gives~~ the judge with the following powers, namely, that in order to discover or to obtain proper proof of relevant facts, ask any question he pleases in any form, at any time, of any witness or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order; nor without leave of the court to cross-examine any witness upon any answer given in reply to any such question. But at the same time suitable safeguards are provided against the judge's interrogation verging on the inquisitorial. Therefore it is provided that the judgment must be based upon facts declared by the Evidence Act to be relevant and duly proved, and consequently this provision could not be converted into an authorisation of any judge to compel any witness to answer any question or to produce any document, which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the questions were asked or the document were called for by the adverse party; nor shall the judge ask any question which it will be improper for any other person to ask under Sections 148 and 149; nor shall he dispense with primary evidence of any document except in cases excepted by the Act (Section 165).

"Thus restricted," says Justice Cunningham, "the power of asking questions is of obvious utility in a country like India where in the vast majority of cases no advocate is employed, but the judge has to make out the truth as best as he could from the confused, inaccurate and often intentional false accounts of ignorant, excited and mendacious witnesses."¹¹

The Act concludes that the improper admission or rejection of evidence is not a ground for reversal of judgment or for a new trial of the case, if the court considers that independently of the evidence improperly admitted there was evidence enough to justify the decision, or if the rejected evidence had been admitted it ought not to have varied the decision. When therefore an appeal is granted on the improper admission or exclusion of evidence the appellant must be prepared to show not only that there has been an improper admission or exclusion but that of a miscarriage of justice is being thereby occasioned (Section 167).

This analysis can be concluded with rules of evidence peculiar to criminal law. A distinction is sometimes observed between evidence in civil and evidence in criminal proceedings. In fact there are some treatises dealing separately with these subjects; but this distinction is one of practical convenience rather than of principle, and it has involved authors in a discussion of the major part of the law of evidence. There are some common points between both types of legal proceedings. Thus the principle of relevance applies to all legal proceedings; the general rules for the examination of witnesses and proof of documents are the same and they are on all fours. The principle determining the means of proof is applied equally to civil and criminal cases. But as all rules of procedure are not the same in civil and criminal proceedings, even so, there are variations in the general rules of evidence. There are some rules of evidence which are peculiar to civil cases and some others peculiar to criminal cases.¹²

The salient special rules peculiar to criminal proceedings can be listed under six heads, (a) proof, (b) witnesses, (c) documents, (d) hearsay, (e) admissions and (f) character.

(a) *Proof*. In trials for crime the standard of proof required from prosecution is (i) higher than that clearly required by a party in civil action; (ii) higher than that required of the accused. In civil actions it is sufficient that there is preponderance of evidence in favour of the successful party. In criminal cases the burden rests on the prosecution to prove that the accused is guilty beyond reasonable doubt. The burden on the accused is lighter than that on the prosecution even in cases where the law throws the onus of proof on the defence. In *Sodeman v. R.*¹³ Lord Chancellor Hailsham says, "the burden of proof which rests upon the accused to establish his defence may fairly be stated as not being higher than the burden which rests on plaintiff or defendant in civil proceedings; and may be discharged by evidence satisfying the Jury of the probability of that which the prisoner is called to establish." This dictum was cited with approval by the court of criminal appeal in *R. v. Carr-Briant*.¹⁴

(b) *Witnesses*. There are certain limitations on the examination of the accused in his own defence, and certain privileges are claimable by witnesses in criminal cases.

11. Cunningham's Indian Evidence Act, published by Messrs. Higginbotham & Co., (1885).

12. See p. 195, ante.

13. (1936) 2 All E.R. 1138 at p. 1140.

14. 1943 K.B. 607 at p. 610.

(c) *Documents*. There are no provisions for discovering before trial, apart from the provisions made in the Criminal Procedure Code, and in criminal courts and there is no rule on the inadmissibility based on the stamp law.

(d) *Hearsay*. There are exceptions to the general rule in respect of complaints and dying declarations in addition to confessions. There are other exceptions in civil cases.

(e) *Admissions*. Notice to admit facts and order for interrogatories are unknown; admissions by the defence in court are not usually permissible; while confessions by the accused out of court are treated quite differently. There can be no waiver in criminal cases.

Subject to these, some special rules of evidence are applicable to civil cases, and other rules peculiar to criminal cases. There is no distinction between civil and criminal proceedings with regard to relevancy and manner of proof. What may be received in the one, may be received in the other, and what is rejected in the one will be rejected in the other. This is just and proper, because in both instances the sole object of adduction of evidence is ascertainment of truth.

(f) *Character*. The good character of the accused is irrelevant and his bad character may be inadmissible. In civil proceedings character is generally irrelevant.

APPENDIX II

FALLACY

Francis Chapman, an American writer has said: "The really sound lawyer is the one whose mind is stored with principles rather than with cases." This storing of mind with principles rather than to make it a lumber-room for ephemeral rubbishy case-law can only arise from correct thinking. In order to acquire a satisfactory knowledge of the rules of correct thinking, it is essential that we should become acquainted with the most common kinds of fallacy: that is to say, the modes in which, by neglecting the rules of logic, we often fall into erroneous reasoning. In previous lessons we have considered, as it were, how to find the right road; it is our task here to ascertain the turnings at which we are most liable to take the wrong road.

In describing the fallacies I shall follow the order and adopt the mode of classification which has been usual for the last 2,000 years and more, since in fact the great teacher Aristotle first explained the fallacies. According to this mode of arrangement fallacies are divided into two principal groups containing the logical and the material fallacies.

1. The logical fallacies are those which occur in the mere form of the statement; or as it is said in the old Latin expressions, *in dictione*, or *in voce*. It is supposed accordingly that fallacies of this kind can be discovered without a knowledge of the subject-matter with which the argument is concerned.

2. The material fallacies, on the contrary, arise, outside of the mere verbal statement, or as it is said, *extra dictionem*: they are concerned consequently with the subject of the argument, or *in re* (in the matter) and cannot be detected and set right but by those acquainted with the subject.

The first group of logical fallacies may be further divided into the purely logical and the semi-logical and we may include in the former class the distinct breaches of the syllogistic rules which have already been described. Thus we may enumerate as Purely Logical Fallacies :

1. Fallacy of four terms (*Quaternio Terminorum*)—Breach of Rule 1;
2. Fallacy of undistributed middle—Breach of Rule 3;
3. Fallacy of illicit process, of the major or minor term—Breach of Rule 4;
4. Fallacy of negative premises—Breach of Rule 5; as well as breaches of the 6th rule, to which no distinct name has been given. Breaches of the 7th and 8th rules may be resolved into the preceding (p. 151), but they may also be described as in p. 135.

The other part of the class of logical fallacies contains semi-logical fallacies, which are six in number, as follows :

1. Fallacy of Equivocation.
2. Fallacy of Amphibology.
3. Fallacy of Composition.
4. Fallacy of Division.
5. Fallacy of Accent.
6. Fallacy of Figure of Speech.

These I shall describe and illustrate in succession.

Equivocation consists in the same term being used in two distinct senses; any of the three terms of the synogism may be subject to this fallacy, but it is usually the middle term which is used in one sense in one premise and in another sense in the other. In this case it is often called THE FALLACY OF AMBIGUOUS MIDDLE and when we distinguish the two meanings by using other suitable modes of expression it becomes apparent that the supposed syllogism contains four terms. The fallacy of equivocation may accordingly be considered a disguised fallacy of four terms. Thus if a person were to argue that "all criminal actions ought to be punished by law; prosecutions for theft are criminal actions; therefore prosecutions for theft ought to be punished by law", it is quite apparent that the term "criminal action" means totally different things in the two premises, and that there is no true middle term at all. Often, however, the ambiguity is of a subtle and difficult character, so that different opinions may be held concerning it. Thus we might argue :

"He who harms another should be punished. He who communicates an infectious disease to another person harms him. Therefore he who communicates an infectious disease to another person should be punished."

This may or may not be held to be a correct argument according to the kinds of actions we should consider to come under the term 'harm' according as we regard negligence or malice requisite to constitute harm. Many difficult legal questions are of this nature, as for instance :

- Nuisance is punishable by law;
- To keep a noisy dog is nuisance;
- To keep a noisy dog is punished by law.

The question here would turn upon the degree of nuisance which the law would interfere to prevent. Or again :

Interference with another man's business is illegal;
 Underselling interferes with another man's business;
 Therefore underselling is illegal.

Here the question turns upon the kind of interference and it is obvious that underselling is not the kind of interference referred to in the major premise.

The fallacy of *Amphibology* consists in an ambiguous grammatical structure of a sentence, which produces misconception. A celebrated instance occurs in the prophecy of the spirit in Shakespeare's *Henry VI*: "The Duke yet lives that Henry shall depose," which leaves it wholly doubtful whether the Duke shall depose Henry, or Henry the Duke. This prophecy is doubtless an imitation of those which the ancient oracle of Delphi is reported to have uttered; and it seems that this fallacy was a great resource to the oracles who were not confident in their own powers of foresight. The Latin language gives great scope to misconstructions, because it does not require any fixed order for the words of a sentence, and when there are two accusative cases with an infinitive verb, it may be difficult to tell except from the context which comes in regard to sense before the verb. The double meaning which may be given to "twice two and three" arises from amphibology; it may be 7 or 10, according as we add the 3 after or before multiplying. In the careless construction of sentences it is often impossible to tell to what part any adverb or qualifying clause refers. Thus if a person says "I accomplished my business and returned the day after," it may be that the business was accomplished on the day after as well as the return; but it may equally have been finished on the previous day. Any ambiguity of this kind may generally be avoided by a simple change in the order of the words; as for instance, "I accomplished my business, and, on the day after, returned." Amphibology may sometimes arise from confusing the subjects and predicates in a compound sentence, as, if in "platinum and iron are very rare and useful metals", I were to apply the predicate useful to platinum and rare to iron, which is not intended. The word "respectively" is often used to shew that the reader is not at liberty to apply each predicate to each subject.

The fallacy of *Composition* is a special case of equivocation, arising from the confusion of an universal and a collective term. In the premises of a syllogism we may affirm something of a class of things distributively, that is of each and any separately, and then we may in the conclusion infer the same of the whole put together. Thus we may say that "all the angles of a triangle are less than two right angles," meaning that any of the angles is less than two right angles; but we must not infer that all the angles put together are less than two right angles. We must not argue that because every member of a jury is very likely to judge erroneously, the jury as a whole are also very likely to judge erroneously; nor that because each of the witnesses in law case is liable to give false or mistaken evidence, no confidence can be reposed in the concurrent testimony of a number of witnesses. It is by a fallacy of *Composition* that protective duties are still sometimes upheld. Because any one or any few trades which enjoy protective duties are benefited thereby, it is supposed that all trades at once might be benefited similarly; but this is impossible, because the protection of one trade by raising prices injures all others.

The fallacy of *Division* is the converse of the preceding, and consists in using the middle term collectively in the major premise but distributively in the minor, so that the whole is divided into its parts. Thus it might be argued, "All the angles of a triangle are (together) equal to two right angles; ABC is an angle of a triangle; therefore ABC is equal to two right angles." Or again, "The inhabitants of the town consist of men, women and children of all ages; those who met in the Guildhall were inhabitants of the town; therefore, they consisted of men, women and children of all ages," or, "The Judges of the Court of appeal cannot misinterpret the law; Lord A. B. is a Judge of the court of appeal; therefore, he cannot misinterpret the law."

The fallacy of *Accent* consists in any ambiguity arising from a misplaced accent or emphasis thrown upon some word of a sentence. A ludicrous instance is liable to occur in reading Chapter XIII of the First Book of Kings, verse 27, where it is said of the prophet: "And he spake to his sons, saying Saddle me the ass. And they saddled HIM." The capitals indicate that the word HIM was supplied by the translators of the authorised version, but it may suggest a very different meaning. The Commandment "Thou shalt not bear false witness against thy neighbour" may be made by a slight emphasis of the voice on the last word to imply that we are at liberty to bear false witnesses against other persons. Mr. deMorgan who remarks this also points out that the erroneous quoting of an author, by unfairly separating a word from its context or italicising words which were not intended to be italicised, gives rise to cases of this fallacy.

It is curious to observe how many and various may be the meanings attributable to the same sentence according as emphasis is thrown upon one word or another. Thus the sentence "The study of Logic is not supposed to communicate a knowledge of many useful facts," may be made to imply that the study of Logic DOES communicate such a knowledge although it is not supposed to; or that it communicates a knowledge of a FEW useful facts; or that it communicates a knowledge of many 'useless' facts. This ambiguity may be explained by considering that if you deny a thing to have the group of qualities A, B, C, D, the truth of your statement will be satisfied by any one quality being absent, and an accented pronunciation will often be used to indicate that which the speaker believes to be absent. If you deny that a particular fruit is ripe and sweet and well-flavoured it may be unripe and sweet and well-flavoured; or ripe and sour and well-flavoured; or ripe and sweet and ill-flavoured; or any two or even all three qualities may be absent. But if you deny it to be ripe and sweet and 'well-flavoured,' the denial would be understood to refer to the last quality. Jeremy Bentham was so much afraid of being misled by this fallacy of accent that he employed a person to read to him, as I have heard, who had a peculiarly monotonous manner of reading.

The fallacy of the *Figure of Speech* is the sixth and last of the semi-logical fallacies, and is of a very trifling character. It appears to consist in any grammatical mistake or confusion between one part of speech and another. Aristotle gravely gives the following instance: "Whatever a man walks he tramples on; a man walks the whole day; therefore he tramples on the day." Here an adverbial phrase is converted into a noun object.

MATERIAL FALLACIES

The material fallacies are next to be considered; and how their importance is very great although it is not easy to illustrate them by brief examples

There are altogether seven kinds of such fallacies enumerated by Aristotle and adopted by subsequent logicians, as follows :

1. The Fallacy of Accident.
2. The Converse Fallacy of Accident.
3. The Irrelevant Conclusion.
4. The *Petitio Principii*.
5. The Fallacy of the Consequent or *Non sequitur*.
6. The False Cause.
7. The Fallacy of Many Questions.

Of these the first two are conveniently described together. The fallacy of ACCIDENT consists in arguing erroneously FROM A GENERAL RULE TO A SPECIAL CASE, where a certain accidental circumstance renders the rule inapplicable. The converse fallacy consists in arguing FROM A SPECIAL CASE TO A GENERAL RULE. This latter fallacy is usually described by the Latin phrase A DICTO SECUNDUM QUID AD DICTUM SIMPLICITER, meaning "from a statement under a condition to a statement SIMPLY or without that condition." Mr. deMorgan has remarked in his very interesting Chapter on Fallacies¹⁵ that we ought to add a third fallacy, which would consist in arguing FROM ONE SPECIAL CASE TO ANOTHER CASE.

I will try by a few examples to illustrate these kinds of fallacy, but much difficulty is often encountered in saying to which of the three any particular example is best referred. A most ancient example repeated in almost every logical handbook is as follows : "What you bought yesterday you eat today; you bought raw meat yesterday; therefore you eat raw meat today." The assertion in the conclusion is made of meat with the accident quality of rawness added, where the first premise evidently speaks of the substance of the meat without regard to its accidental condition. This then is a case of the direct fallacy. If it is argued again that because wine acts as a poison when used in excess it is always a poison, we fall into the converse fallacy.

It would be a case of the direct fallacy of accident to infer that a magistrate is justified in using his power to forward his own religious views, because every man has a right to inculcate his own opinions. Evidently a magistrate as a man has the right of other men, but in his capacity of a magistrate he is distinguished from other men, and he must not infer of his special powers in this respect what is only true of his rights as a man. For another instance take the following : "He who thrusts a knife into another person should be punished; a surgeon in operating does so; therefore he should be punished." Though the fallacy of this is absurdly manifest, it is not so manifest how we are to classify the error. We may for instance say that as a general rule whoever stabs, or cuts another is to be punished unless it can be shewn to have been done under exceptional circumstance, as by a duly qualified

¹⁵ Formal Logic, Chapter XIII.

surgeon acting for the good of the person. In this case the example belongs to the direct fallacy of accident. In another view we might interpret the first premise to mean the special case of thrusting a knife **MALICIOUSLY**; to argue from that to the case of a surgeon would be to infer from one special case to another special case.

It is undoubtedly true that to give to beggars promotes mendicancy and causes evil; but if we interpret this to mean that assistance is never to be given to those who solicit it, we fall into the converse fallacy of accident, inferring of all who solicit alms what is only true of those who solicit alms as a profession. Similarly it is a very **good** rule to avoid law-suits and quarrels, but only as a general rule, since, there frequently arise circumstances in which resort to the law is a plain duty. Almost all the difficulties which we meet in matters of law and moral duty arise from the impossibility of always ascertaining exactly to what cases a legal or moral rule does or does not extend; hence the interminable differences of opinion, even among the judges of the land.

The third Material Fallacy is that of the **IRRELEVANT CONCLUSION** technically called the **IGNORATIO ELENCHI**, or literally ignorance of the Refutation. It consists in arguing to the wrong point, or proving one thing in such a manner that it is supposed to be something else that is proved. Here again it would be difficult to adduce concise examples because the fallacy usually occurs in the course of long harangues, where the multitude of words and figures leaves room for confusion of thought and forgetfulness. This fallacy is in fact the great resource of those who have to support a weak case. It is not unknown in the legal profession, and an attorney for the defendant in a law-suit, is said to have handed to the barrister his brief marked, "No case; abuse the plaintiff's attorney." Whoever thus uses what is known as **ARGUMENTUM AD HOMINEM**, that is an argument which rests, not upon the merit of the case, but the character or position of those engaged in it, commits this fallacy. If a man is accused of a crime it is no answer to say that the prosecutor is as bad. If a great change in the law is proposed in Parliament, it is an Irrelevant Conclusion to argue that the proposer is not the right man to bring it forward. Every one who gives advice lays himself open to the retort that he who preaches ought to practise, or that those who live in glass houses ought not to throw stones. Nevertheless there is no necessary connection between the character of the person giving advice and the goodness of the advice.

The **ARGUMENTUM AB POPULAM** is another form of Irrelevant Conclusion, and consists in addressing arguments to a body of people calculated to excite their feelings and prevent them from forming a dispassionate judgment upon the matter in hand. It is the great weapon of rhetoricians and demagogues.

Petitio Principii is a familiar name and the nature of the fallacy it denotes is precisely expressed in the phrase **BEGGING THE QUESTION**. Another apt name for the fallacy is **CIRCULUS IN PROBANDO** or "a circle in the proof." It consists in taking the conclusion itself as one of the premises of an argument. Of course the conclusion of a syllogism must always be contained or implied in the premises, but only when those premises are

combined, and are distinctly different assertions from the conclusion. Thus in the syllogism,

B is C,
A is B,
therefore A is C,

the conclusion is proved by being deduced from two propositions, neither of which is identical with it; but if the truth of one of these premises itself depends upon the following syllogism,

C is B,
A is C,
therefore A is B,

it is plain that we attempt to prove a proposition by itself, which is as reasonable as attempting to support a body upon itself. It is not easy to illustrate this kind of fallacy by examples, because it usually occurs in long arguments, and especially in wordy metaphysical writings. We are very likely to fall into it however when we employ a mixture of Saxon and Latin or Greek words, so as to appear to prove one proposition by another which is really the same expressed in different terms, as in the following: "Consciousness must be immediate cognition of an object, for I cannot be said really to know a thing unless my mind has been affected by the thing itself."

In the use of the disjunctive syllogism this fallacy is likely to happen; for by enumerating only those alternatives which favour one view and forgetting the others it is easy to prove anything. An instance of this occurs in the celebrated sophism by which some of the ancient Greek philosophers proved that motion was impossible. For, said they, moving body must move either in the place where it is or the place where it is not; now it is absurd that a body can be where it is not, and if it moves it cannot be in the place where it is; therefore it cannot move at all. The error arises, in the assumption of a premise which bets the question; the fact of course is that THE BODY MOVES BETWEEN THE PLACE WHERE IT IS AT ONE MOMENT AND THE PLACE WHERE IT IS AT THE NEXT MOMENT.

Jeremy Bentham however pointed out that the use even of a single name may imply a *Petio Principii*. Thus in a Church assembly or synod, where a discussion is taking place as to whether a certain doctrine should be condemned, it would be a *Petio Principii* to argue that the doctrine is HEARSAY, and therefore it ought to be condemned. To assert that it is hearsay is to beg the question, because every one understands by hearsay a doctrine which is to be condemned. Similarly in Parliament a bill is often opposed on the ground that it is unconstitutional and therefore ought to be rejected; but as no precise definition can be given of what is or is not constitution, it means little more than that the measure is distasteful to the opponent. Names which are used in this fallacious manner were aptly called by Bentham QUESTION BEGGING EPITHETS. In like manner we beg the question when we oppose any change by saying that it is UN-ENGLISH.

The FALLACY OF THE CONSEQUENT is better understood by the familiar phrase NON SEQUITUR. We may apply this name to any argument which is of so loose and inconsequent a character that no one can discover any cogency in it. It thus amounts to little more than the assertion of a conclusion which has no connection with the premises. Prof. deMorgan

gives as an example the following: "Episcopacy is of Scripture origin; the Church of England is the only episcopal Church in England; ergo, the Church established is the Church that should be supported."

By the Fallacy of the FALSE CAUSE I denote that which has generally been referred to by the Latin phrase *NON CAUSA PRO CAUSA*. In this fallacy we assume that one thing is the cause of another without any sufficient grounds. A change in the weather is even yet attributed to the new moon or full moon which had occurred shortly before, although it has been demonstrated over and over again that the moon can have no such effect. In former centuries any plague or other public calamity which followed the appearance of a comet or an eclipse was considered to be the result of it. The Latin phrase *POST HOC ERGO PROPTER HOC* (after this and therefore in consequence of this) exactly describes the character of these fallacious conclusions. Though we no longer dread signs and omens, yet we often enough commit the fallacy; as when we assume that all the prosperity of England is the result of the national character, forgetting that the plentiful coal in the country and its maritime position have contributed to our material wealth. It is no doubt equally fallacious to attribute no importance to national character, and to argue that because England has in past centuries misgoverned Ireland all the present evils of Ireland are due to that misgovernment.

Lastly there is somewhat trivial FALLACY OF MANY QUESTIONS, which is committed by those who so combine two or three questions into one that no true answer can be given to them. I cannot think of a better example than the vulgar pleasantry of asking, "Have you left off beating your mother?" Questions equally as unfair are constantly asked by barristers examining witnesses in a court of justice, and no one can properly be required to answer Yes or No to every question which may be addressed to him. As Aristotle says, "Several questions put as one should be at once decomposed into their several parts. Only a single question admits of a single answer: so that neither several predicates of one subject, nor one predicate of several subjects, but only one predicate of one subject, ought to be affirmed or denied in a single answer."

Read Prof. deMorgan's excellent and amusing Chapter on Fallacies, *FORMAL LOGIC*, Ch. XIII.

Whately's remarks on Fallacies, *ELEMENTS OF LOGIC*, Book III, are often very original and acute.

APPENDIX III

WIT AND HUMOUR IN COURTS IN TRIAL WORK

The work of our Courts in the adduction of evidence must be when all is said and done years of what Charles Lamb described with graceful alliteration as the "dry drudgery of the desk's wood". A sense of humour is the most welcome equipment which all concerned with working in our Courts should possess. It is undoubted that the murky atmosphere of the Court is illuminated by a flash thought, quick, happy and amusing. Wit properly used bridges over a difficulty, smooths away annoyance or perhaps turns aside anger and dissolves embarrassment in a second's laughter. How much lies in laughter!—the cipher key wherewith we decipher the whole man-wit and—courtesy need never be divorced. They are indeed complementary. Wit dis-

criminally used refreshes the weary Bench and the Bar. Wit and humour can be cultivated by judicious study. Here are a few extracts of wit and humour in Courts suggesting the lines on which wit and humour should be cultivated as an indispensable part of the Art of Advocacy and Trial Work in Courts.

In Georgia they tell of a prisoner who had been convicted a dozen times of stealing, who, when placed at the bar for his latest offence, displayed a singular curiosity.

"Your honour," said he, "I should like to have my case postponed for a week. My lawyer is sick."

"But, said the Magistrate, "you were caught with your hand in this gentleman's pocket. What can your counsel say in your defence?"

"Exactly so, your honour; that is what I am curious to know."¹⁶

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It was before Sir Henry—who was fond of holding criminal assizes—that a Hebrew barrister made this appeal for clemency for his client, convicted of perjury: "He is the best man in the kingdom for de trust. He always spoke de trut, and indeed he was so fond of it that he would tell more than de trut."¹⁷

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In a case tried before a New York court, the defendant's counsel, an amiable gentleman, allowed his client to persuade him to ask a number of irrelevant questions which the Court, of course, excluded. At last he asked another question so grossly out of place that the judge said, "That is certainly irrelevant."

"I know it, your honour," answered the lawyer, looking up at the ceiling, "but I asked it to gratify my client."

"Well, Sir," rejoined the judge, blandly, "during the rest of this trial the Court will endeavour to protect you from your client."

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"Well, son, now that you have graduated, what are you going to be?"

"I think I'd like to be a lawyer, Sir. There's a good deal of money passes through a lawyer's hands, isn't there?"

"He never lets it pass through if he knows his business, my son."¹⁸

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An attorney, on the marriage of his son, gave him £ 500, and handed him over a Chancery suit, with some common law actions. About two years afterwards the son asked his father more business. "Why, I gave you that capital Chancery suit," replied the father, "and then you have got a great many new clients; what more can you want?" "Yes, Sir" replied the son,

16. 25 M.L.J. 279 Jour. citing National Corporation Reporter 2 Cl. L. Rep. 60.

17. 7 Green Bag 449.

18. Boston Transcript, cited in 25 Green Bag 456.

"but I have wound up the Chancery suit; and given my client great satisfaction; and he is in possession of the estate." "What, you improvident fool," rejoined the father indignantly, "that suit was in my family for twenty-five years, and would have continued so as much longer if I had kept it. I shall not encourage such a fellow."¹⁹

A story is told of a certain newly-appointed judge who remonstrated with counsel as to the way in which he was arguing his case. "Your honor," said the lawyer, "you argued such case in a similar way when you were at the bar." "Yes, I admit that," quietly replied the judge. "But that was the fault of the judge who allowed it."²⁰

"Your honor said the Attorney, "this man's insanity takes the form of a belief that every one wants to rob him. He won't allow even me his counsel, to approach him."

"May be he's not so crazy, after all," murmured the court, in a judicial whisper.²¹

One of the best things ever said by a witness to a counsel was the reply given to Missing, the barrister who was at the time leader of his circuit.

He was defending a prisoner charged with stealing a donkey. The prosecutor had left the animal tied to a gate. When he returned it had vanished.

Missing was very severe in his examination.

"Do you mean to say, witness, that the donkey was stolen from that gate?"

"I mean to say, Sir," giving the judge and jury a sly look, "the ass was missing."

I shall never get over my longing to be a magistrate. Among the latest gems heard in court are the following (not all heard by myself, by the way, for I am not a regular habitue of police courts).

"He refused to give me any answer, and I was not satisfied with the reply." (This from a police official at Thames Police Court).

"He kicked my cat off his doorstep, and any one who kicks my cat kicks me." (This from a man at Yarmouth.)

"I want to ask this policeman a few cross-questions. (This from a man at Ealing.)

"Do you plead guilty?" Only a little! (This from Sunderland.)

"I tell you candidly," said the Judge, "I don't believe a word of your wife's story."

19. 35 Amc. Law Rev., pages 586-587.
20. 14 Amc. Law, 516.

21. Tit-Bits cited in 14 American Lawyer 132.

"Yer may do as yer like," was the reply, "but I've got to."

It is a story which Lincoln loved to tell against himself of the triumph of a yokel who killed a farmer's dog with a pitchfork and was sued for damages.

"What made you kill my client's dog?" asked Lincoln.

"What made him try to bite me?" retorted the defendant.

"But why didn't you go for him with the other end of your pitch-fork?" persisted Lincoln.

"Well, why didn't he come at me with his other end?" replied the witness, smartly.

Client (just acquitted on burglary charge): "Well, good-bye! I'll drop in on you some time."

Lawyer: "All right, but make it in the daytime, please."

Solicitor (to a woman witness): "Her language was shocking, wasn't it?"

Witness: "That depends on whether you usually visit a public house or a place of worship."

Before passing sentence on a prisoner found guilty of house-breaking, the judge put the usual question as to whether he had anything to say.

"Only this, your Lordship," said the prisoner with a glance of disgust at the chief witness for the prosecution, "what I want to know is how that bloke could tell it was me when he had the bedclothes over his head the whole time I was in the room."

"What made you steal those sheep?" demanded the magistrate.

"I can't make out at all, your worship," replied the prisoner. "I suppose I must have been wool-gathering."

"As you have been convicted on fifteen previous occasions," said the judge, gazing sternly at the prisoner, "I shall impose the maximum sentence of five years."

"Don't I get discount as a regular customer?" asked the prisoner sadly.

An unfortunate incident once occurred at an Assize Court. "Gentlemen," said the judge to the members of the jury, "kindly take your usual place in the court." Seven jury men walked into the dock.

Defendant : "I cannot imagine how he came to misunderstand me. My explanation was as plain as a, b, c."

Counsel : "Perhaps so, but was d, e, f, to him."

Counsel : "I suggest you are considerably straining a point in your version of what occurred."

Witness : "Perhaps I am, but one often has to strain things to make them clear."

A lawyer, more than usually given to circumlocution, was cross-examining a witness.

"Were you engaged in your normal occupation and in pursuance of your employer's orders, or instructions?" he asked.

"If you mean, 'was I doing my job'," replied the witness, "the answer is 'yes'."

He had been summoned for non-payment of rates and pleaded that he found it very difficult to make ends meet as he had seven unmarried daughters.

"You should husband your resources," the magistrate advised him.

"It would be easier for me if I could husband my daughters," retorted the man.

An old offender charged with assaulting a constable was asked if he would like a lawyer to undertake his defence.

"No, your honour," he replied, "I don't want any lawyer, but if you could get me a couple of good witnesses, I should take it very kindly."

A prisoner who was convicted at the Dublin Assizes for bigamy had married four wives. The judge, in passing sentence, expressed surprise that prisoner could be such a hardened villain as to delude so many women.

"Please, your Lordship," said the man, "I was trying to get a good wan."

A witness in a police court who had contradicted the evidence of a police man, was asked whether he was prepared to describe the constable as a liar. "I won't exactly say the constable is a liar," he answered, "but I din't mind saying he's handled the truth very carelessly."

A very successful barrister had secured the acquittal of a man charged with the theft of a pair of trousers. When told to leave the dock, the prisoner did not move. Again told he could go, he still made no effort to leave. H

counsel leaned over to him and asked why, as he had been found not guilty, he did not walk out of the dock. "I can't," he replied in a stage whisper, "the owner of the pants is over there, and I've got 'em on."

A man was on trial at Quarter Sessions for stealing ducks. His counsel addressed the jury for over an hour, urging three points: (1) The prosecutor had never lost any ducks; (2) The ducks found at prisoner's cottage were not the prosecutor's ducks; (3) The prisoner had established an *alibi* of the clearest character.

The Judge was about to sum up when the prisoner asked if he might be allowed to say something. The indulgence being granted, he blurted out, "All I have to say, gentlemen, is this: I wish I'd never seen the b----- ducks."

In the first Tichborne trial, Sir John Coleridge, during his speech, gave copious extracts from the Old Testament.

Sir George Honynman turned to Sir Henry Hawkins and whispered, "Why, he's giving us the first chapter of Genesis."

"Yes," was the reply; "but what we want is the last chapter of Revelations."

Most lawyers are reputed to take a keen delight in trying to confuse medical experts in the witness-box at murder trials. They often get paid back in their own coin, as the following example illustrates:

Counsel, after exercising all his ingenuity without effect, looked at the doctor giving evidence, and said, "You will admit that doctors make mistakes, won't you?"

"Yes, the same as lawyers," said the witness.

"But doctors' mistakes are buried underground," was counsel's triumphant reply.

"Yes," retorted the doctor; "but lawyers' mistakes often swing in the air."

Sir Edward Carson was once interrupted by a Judge with whom he had several passages of arms. The Judge had pointed out the discrepancies in the evidence of two of his witnesses, one a carpenter and the other a publican, when Sir Edward wittily and promptly retorted, "That is so, my Lord; yet another case of difference between Bench and Bar."

Many amusing stories are told of the Lawyer Volunteer Corps, but one of the best relates that when the word "Charge!" was given, every member of the corps produced a note-book and immediately wrote down six and eight pence.

A very good story is told of Lord Chief Justice Coleridge's habit of sleeping when on the Bench. Sporting readers will know what when a dog is exhibited, it is said to be "On the bench." At the trial of an action for damages concerning a sheep-dog, the defendant was anxious to prove that the dog had had its day and that the damages should be nominal. During the case, the judge went to sleep and the evidence was being wasted. Counsel's only hope was to cause such laughter in court as would awaken the judge; so, gradually raising his voice, he asked a witness. "Is it not your experience as an exhibitor, that when an old dog has regularly taken his place on the bench for many years, he gets sleepy and past his work?"

The roars of laughter which greeted this sally were loud enough to wake the judge.

Questioning a little girl as to her fitness to give evidence, Mr. Justice Maule asked her, "What will be done to you if you tell untruths?"

"I shall go to hell, sir," the child replied.

Whereupon the judge said, "Swear the girl; she knows more than I do."

Lord Justice Mathew had a money-lender before him who protested with vehemence against the allegation that he was interested in nothing but the getting of money. "For instance, I am much interested in birds!" he exclaimed.

"Pigeons?" gently inquired the judge.

A prisoner charged with bigamy raised the defence that he believed his first marriage to have been invalid. Mr. Justice Matthew, noted for his sarcasm, in summing up the case addressed the jury as follows:

"The prisoner, gentlemen, having made the acquaintance of a young woman of exceptionally pleasing appearance, was seized with conscientious scruples as to the validity of his first marriage."

After hearing the evidence in an assault case between a man and his wife, in which the wife had received considerable provocation, the judge turned to the husband and told him that he really could not do anything in the case.

"But she has cut a piece of my ear off, sir!" exclaimed the husband.

"Very well," said the judge, "I will bind her over to keep the peace."

"But you can't sir!" shouted the husband. "She's thrown the piece away!"

During a trial at the Old Bailey, a barrister, who was terribly verbose, discovered that one of the jurors was asleep. He soundly rated those who kept awake for taking so little interest in the case, when Commissioner Kerr said, "You remind me of a minister who was lecturing his congregation for not

coming to church and remarked, 'Those who do come are asleep except the village idiot,' when a voice, 'If I'd been an idiot, I would be asleep too.'

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Lord Chief Justice Coleridge was prone to sleep a great deal on the Bench during his later years. Someone asked Lord Justice Matthew, who was sitting with him, how the Chief justice was.

"He has quite got rid of his insomnia," replied Matthew.

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A man had attempted to serve a writ upon a defaulter but the latter stood over the process-server with a pistol and compelled him to swallow the documents. "I trust," said Judge Norbury, "that the writ was not returnable in this court."

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For better is that of the Irish counsel who was once asked by the Judge for whom he was "concerned". "My Lord", he replied. I am retained by the defendant and therefore, I am concerned for the plaintiff.

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When Baron Martin was at the bar and addressing the court of Exchequer in an insurance case he was interrupted by Baron Alderson who observed, "Mr. Martin, do you think any office would insure your life? Remember yours is a brief existence."

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It was in regard to Lord Chief Baron Pollock that Chief Justice Cockburn made his classic joke. It was after a Mansion House dinner and the hats had got mixed. "Here is my castor" exclaimed the Chief Justice; then "No hang it, it is Pollux!"

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Sergeant Merewether was a man of very ready wit. In a case argued by him before Lord Penrhyn the latter interposed and said, "This case presents great engineering difficulties. How do you propose to cross the rivers and how do you propose to get over these rocks."

Sergeant Merewether promptly replied, "Dam the rivers and blast the rocks."

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After Messrs. Strachan and Bates, the bankers had failed a king's counsel who had banked with them was coming down the steps of the banking house and nearly tumbled. A friend who happened to be passing expressed a hope that he was not hurt. "Oh! No," said he "I have only lost my balance."

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A low class attorney accidentally briefed for the prosecution thought it necessary to explain, "I am here for the Crown," said he. "The wonder is" said the opposite side barrister, "You are not here for half a Crown."

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The "bulls" in courts are many. A young advocate conducting his first case and pleading drunkenness as his client's defence began: "My Lord and Gentleman of the Jury! You all know what it is to be drunk." Another worthy began as follows: "The principle fault of the prisoner has been his unfortunate character of relying upon thieves and scoundrels of the worst description. The unhappy man in the dock therefore puts implicit faith on you, Gentleman of the Jury." A young advocate lacking in self-restraint hearing judgment against his client exclaimed that he was astonished at such decision. Ordered to reply to this contempt of court his senior apologising for him said "Had he (the Junior) been in this court half as long as I have been, he would not have been astonished at anything."

* * * * *

Justice Story wrote the following advice to those ambitious to succeed in the difficult art of advocacy:

You wish the court to hear and listen to?
Then speak with point; be brief, be close, be true,
Cite well your cases; let them be in point;
Not learned, rubbish dark, and out of joint,
And be your reasoning clear, and closely made
Free from false taste, verbiage and parade.

* * * * *

When to the close arrived make no delays
By petty flourishes or verbal plays,
But sum the whole in one deep solemn strain
Like a strong current hastening to the main.

* * * * *

Who is a great lawyer? He who aims to say
The least his cause requires, not all he may.

* * * * *

I wonder how many budding "leaders" have formed resolutions like the Lord Chancellor in W. S. Gilbert "IOLANTHE".

"When I went to the bar as a very young man
(Said I to myself said I)

I will work on a new and original plan,
(Said I to myself said I)

I'll never assume that a rogue or a thief
Is a gentleman worthy of implicit belief
Because his attorney has sent me a brief
(Said I to myself said I)

I'll never throw dust in a Juryman's eyes

(Said I to myself said I)

Or hoodwink a Judge who is not otherwise

(Said I to myself said I)

Or assume that the witnesses summoned in force

In Exchequer, Queen's Bench, Common Pleas or Divorce

Have perjured themselves as a matter of course

(Said I to myself said I)

Ere I go into Court, I will read my brief through

(Said I to myself said I)

I'll work on a new and original plan

(Said I to myself said I)

My learned profession I'll never disgrace

By taking a fee with a grin on my face

When I haven't been there to attend to the case

(Said I to myself said I)

* * * * *

It is often asked how can a righteous man accept a brief for a party whose cause is bad and for one apparently guilty of a crime which is charged against him. Dean Swift has pungently described lawyers as men who proved that white is black or black is white according as they are paid. And Lord Macaulay rhetorically enquires "Can it be right that a man should with a wig on his head and a band round his neck do for a guinea what without the appendages he would think it wicked and infamous to do for an empire?"

In law, what plea so tainted and corrupt

But, being seasoned with a gracious voice

Obscure the show of evil? (Shakespeare)

But this is not correct interpretation of the role of an advocate. Dr. Johnson has stated this role correctly in a well-known passage in "Boswell's life." "I asked him", said Boswell, "whether as a moralist he did not think that the practice of the Law in some degree hurt the nice feeling of honesty." Dr. Johnson replied, "Why, no sir, if you act properly." Later, Boswell said, "What do you think of supporting a cause which you know to be bad?" Dr. Johnson replied, "Sir, you do not know it to be good or bad until the Judge determines it." And the learned Doctor added, "An argument which does not convince yourself, may convince the Judge to whom you urge it, and if it does convince him, why then, Sir, you are wrong and he is right. it is his business to judge." This is a sound vindication of the rules and methods of the Bar.

* * * * *

A San Francisco lawyer tells of a Texan who being obliged to go to Denver before the termination of a suit brought against him by a neighbour left orders that his attorney should let him know the result by wire. In a couple of days the suit having been decided in his favour he had this telegram:—

"Right has triumphed."

Immediately the Texan wired back:

"Appeal at once."

• • • • •

We shall end this budget with a well-known passage from Sir Walter Scott's famous classic *Guy Mannering* depicting the scene of the rustic client Dinmont consulting his lawyer Pleydell about commencing a suit concerning a small piece of land, of little value and of which he held only a tenant's right with a neighbouring tenant of another landlord showing the extent to which the wrong-headedness of some simple clients would go in regard to the mania for litigation what the ideal lawyer could do in such circumstances.

'Dinmont began with a scrape with his foot and scratch of his head in unison. I am Dandie Dinmont, Sir, of the Charlieshope—the Liddesdale lad—Ye-illmind me—it was for me you won your grand plea.'

"What plea, you block-head, said the lawyer, 'd'ye think I can remember all the fools that come to plague me.'"

Lord Sir, it was the grand plea about the grazing on the Langato Head I said the farmer.

Well curse thee, never mind, give me the brief in the case and come to me on Monday at ten, replied the learned counsel.

'But Sir, I have not got any brief.'

'No brief man' said Pleydell.

No Sir no brief answered Dandie for your Honour said before, Mr. Pleydell, ye'll mind, that ye liked best to hear us hill folk tell our own tale by word of mouth.

'Beshrew my tongue, that said so, answered the counsellor, 'it will cost my ears a dinnint—well say, in two words what you have got to say—you see the gentleman waits.'

'Oh Sir, if the gentleman likes he may play his own spring first, it is all the same to Dandie.

'Now you boody' said the lawyer, 'cannot you conceive that your business can be nothing to Colonel Mannering but that he may not choose to have these great ears of thine regaled with his matters.'

'Well, Sir just as you and he like—so you see to my business' said Dandie, not a whit disconcerted by the roughness of this reception. We are at the old work of the marches again, Jock O'Dawston Clough and me. You see we march on the top of Touthop Rigg after we pass the Pomoragrains; for the Pomoragrains, and Slackenspool, they come in there, and they belong to the Peels; but after you pass Pomoragrains at a mukle great saucerheaded cutlugged stone, that they call Charlies Chuckie, there Dawston Clough and

Charlieshope they march. Now I say the march begins on the top of the hill where the wind and water shears; but Jock O'Dawston Clough again, he contravenes, that and says that hands down by the old drove road that goes away by the Knot of the Gate over to Keeldar-ward and that makes a great difference.

'And what difference does it make, friend' said Pleydell. How many sheep will it feed?

'Oh, not many,' said Dandie, scratching his head—'it is lying high and exposed—it may feed a hog or two in a good year.'

'And for this grazing, which may be worth about five shillings a year, you are willing to throw away a hundred pound or two?'

'No Sir, it is not for the value of the grass,' replied Dinmont, 'it is for justice.'

'My good friend,' said Pleydell 'justice like charity should begin at home. You do justice to your wife and family first, and think no more about the matter.'

Dinmont still lingered, twisting his hat in his hand 'It is not for that, Sir but I would like ill to be bragged with him—he boasts that he will bring a score of witnesses and more—and I am sure there are as many will swear for me as for him folk that lived all their days upon the Charlieshope, and would not like to see the land lose its right.

'Zounds, man, if it be a point of honour,' said the lawyer 'Why don't your landlords take it up?'

"I did not ken, Sir (scratching his head again) there has been no election just lately and the lords are very neighbourly, and Jock and me cannot get them to voke together about it, in spite of all that we can say—but if you think we might keep up the rent"

'Nor, no, that will never do,' said Pleydell—'confound you, why don't you take good cudgels and settle it.'

'Odd Sir' answered the farmer, 'we tried that three times already—that is twice on the land and once at Lockerby Fair—but I do not know—we are both qually good at single-stick and it could not well be judged.'

'Then take broadswords, and be d-d to you, as your fathers did before you,' said the counsel learned in the law.'

'Well Sir, if ye think it would not be against the law, it is all one to Dandie.'

'Hold! hold!' exclaimed Pleydell, 'we shall have another Lord Soullis mistake—Prytheeman comprehend me; I wish you to consider how very trifling and foolish a law-suit you wish to engage in.'

'Ay Sir' said Dandie, in a disappointed tone. 'So ye will not take the case from me, I am doubting.'

'Me! not I—go home, go home, take a pint and agree.'

APPENDIX IV

A VILLAGE PORTRAIT GALLERY

Extract from Sir Herbert Isley, K.C.I.E., C.S.I., I.C.S.—*The People of India*—a standard work of reference.

A village portrait gallery. No one indeed can fail to be struck by the intensely popular character of Indian proverbial philosophy and by its freedom from the note of pedantry which is so conspicuous in Indian literature. These quaint sayings have dropped fresh from the lips of the Indian rustic; they convey a vivid impression of the anxieties, the troubles, the annoyances, and the humours of his daily life; and any sympathetic observer who has felt the fascination of an oriental village would have little difficulty in constructing from these materials a fairly accurate picture of rural society in India. The *mise en scene* is not altogether a cheerful one. It shows us the average peasant dependent upon the vicissitudes of the season and the vagaries of the monsoon and watching from day to day to see what the year may bring forth. Should rain fall at the critical moment his wife will get golden earrings, but one short fortnight of drought may spell calamity when "God takes all at once". Then the forestalling Baniya flourishes by selling rotten grain, and the Jat cultivator is ruined. First die the improvident Musalman weavers (Jolaha), then the oil-pressers for whose wares there is no demand: the carts lie idle, for the bullocks are dead, and the bride goes to her husband without the accustomed rites.

The Brahman. But be the season good or bad, the pious Hindu's life is ever over-shadowed by the exactions of the Brahmin—"thing with a string round its neck" (a profane hit at the sacred thread) a priest by appearance, a butcher at heart, the chief of a trio of tormentors gibbeted in the rhyming proverb:

Is dunya men tin kasai,

Pisu, Khatmal, Brahman bhai.

Before the Brahman starves the King's larder will be empty; cakes must be given to him while the children of the house may lick the grindstone for a meal; his stomach is a bottomless pit; he eats so immoderately that he dies from wind. He will beg with his hand. In his greed for funeral fees he spies out corpses like a vulture, and rejoices in the misfortune of his clients. A village with a Brahman in it is like a tank full of crabs; to have him as a neighbour is worse than leprosy: if a snake has to be killed the Brahman should be set to do it, for no one will miss him. If circumstances compel you to perjure yourself, why swear on the head of your son, when there is a Brahman handy? Should he die (as is the popular belief) the world will be none the poorer. Like the devil in English proverbial philosophy, the Brahman can cite scripture for his purpose; he demands worship himself but does not scruple to kick his low-caste brethren; he washes his sacred thread but does not cleanse his inner man; and so great is his avarice that a man of another caste is supposed to pray "O God, let me not be reborn as a Brahman priest, who is always begging and is never satisfied." He defrauds even the gods: Vishnu gets the barren prayers while the Brahman devours the offerings. So Pan complains in one of Lucian's dialogues that he is done out of the good things which men offer at his shrine.

The Baniya. The next most prominent figure in our gallery of popular portraits is that of the Baniya, money-lender, grain dealer and monopolist, who dominates the material world as the Brahman does the spiritual. His heart, we are told, is no bigger than a coriander seed; he has the jaws of an alligator and a stomach of wax; he is less to be trusted than a tiger, a scorpion, or a snake; he goes in like a needle and comes out like a sword; as a neighbour he is as bad as a boil in the armpit. If a Baniya is on the other side of a river you should leave your bundle on this side, for fear he should steal it. When four Baniyas meet they rob the whole world. If a Baniya is drowning you should not give him a hand; he is sure to have some base motive for drifting downstream. He uses light weights and swears that the scales tip themselves; he keeps his accounts in a character that no one but God can read; if you borrow from him, your debt mounts up like a refuse heap or gallops like a horse; if he talks to a customer he "draws a line" and debits the conversation; when his own credit is shaky he writes up his transactions on the wall so that they can easily be rubbed out. He is so stingy that the dogs starve at his feast and he scolds his wife if she spends a farthing on betel-nut. A Jain Baniya drinks dirty water and shrinks from killing ants and flies, but will not stick at murder in pursuit of gain. As a druggist the Baniya is in league with the doctor; he buys weeds at a nominal price and sells them very dear. Finally, he is always a shocking coward; eighty-four Khattris will run away from four thieves.

The Kayasth. Nor does the clerical caste fare better at the hands of the popular epigrammatist. Where three Kayasths are gathered together a thunderbolt is sure to fall; when honest men fall out the Kayasth gets his chance. When a Kayasth takes to money-lending he is a merciless creditor. He is a versatile creature, and where there are no tigers he will become a shikari; but he is no more to be trusted than a crow or a snake without a tail. One of the failings sometimes imputed to the educated Indian is attacked in the saying "Drinking comes to a Kayasth with his mother's milk."

The Jat. Considering the enormous strength of the agricultural population of India, one would have expected to find more proverbs directed against the great cultivating castes. Possibly the reason may be that they made most of the proverbs, and people can hardly be expected to sharpen their wit on their own shortcomings. In two Provinces, however, the rural Pasquin has let out very freely at the morals and manners of the Jat, the typical peasant of the Eastern Punjab and the western districts of the United Provinces. You may as well, we are told, look for good in a Jat as for weevils in a stone. He is your friend only so long as you have a stick in your hand. If he cannot harm you he will leave a bad smell as he goes by. To be civil to him is like giving treacle to a donkey. If he runs amuck it takes God to hold him. A Jat's laugh would break an ordinary man's ribs. When he learns manners, he blows his nose with a mat, and there is a great run on the garlic. His baby has a plough-tail for a plaything. The Jat stood on his own corn-heap and called out to the King's elephant-drivers, "Hi there, what will you take for those little donkeys?"

The Kunbi or Kurmi. The Kunbi is not so roughly handled as the Jat, but some unpleasant things are said about him. You will as soon grow a reeper on a rock as make him into a true friend. He is as crooked as a sickle, but you can beat him straight. If he gets a sty on his eyelid he is as savage

as a bull. He is so obstinate that he plants thorns across the path. If it rains in the Hathiya asterism (end of September), and there is a bumper crop, he gives his wife gold earrings. You may know her by the basket on her head and the baby on either hip.

The Barber. In the peculiar ways of the artisans and of the castes who are engaged in personal service the makers of proverbs have found abundant material for vituperative sarcasm. Of the village barber, who is also a marriage broker, a surgeon, a chiropodist, and a quack, it is said, "Among men most deceitful is the barber, among birds the crow, among things of the water the tortoise." A sentiment reminding one how on a celebrated occasion Bar'er Tarrypin outwitted Bar'er Rabbit. Barbers, doctors, pleaders, prostitutes—all must have cash down. A barber learns by shaving fools, for which reason you should stick to your barber but change your washerman, since a new Dhobi washes clean. You may hammer a barber on the head with a shoe, but you will not make him hold his tongue. A barber found a purse, and all the world knew it. Of the inquisitive barber the wise say, "Throw a dog a morsel to stop his mouth" which, if applied to the modern representative of pertinacious curiosity, might read, "Choke off a reporter with a scrap of stale news." A barber out of work bleeds the wall or shaves a cat to keep his hand in. A barber's penny, all profit and no risk. A burglary at a barber's: stolen, three pots of combings! If you go back four generations you will find that your uncle was a barber, the suggestion being that the barber is sometimes unduly intimate with the inmates of the zenana.

The goldsmith. Trust not the goldsmith; he is no man's friend, and his word is worthless. If you have never seen a tiger, look at a cat; if you have never seen a thief, look at a Sonar. The goldsmith, the tailor and the weaver are too sharp for the angel of death; God alone knows where to have them. A Sonar will rob his mother and sister; he will filch gold even from his wife's nose-ring; if he cannot steal, his belly will burst with longing. He will ruin your ornament by substituting base metal for the gold you gave him, and will clamour for wages into the bargain. A pair of rogues; the goldsmith and the man who sifts his ashes for scraps.

The Potter. The potter gets off cheaper than the rest; his honesty is not impeached, though his intelligence is held to ridicule, and there is a vein of philosophy in some of the sayings about him. He is always thinking of his pots, and if he falls out with his wife he finds a solace in pulling his donkey's ears. But when the clay is on the wheel the potter may shape it as he will, though the clay rejoins, "Now you trample on me, one day I shall trample on you." Turned on the wheel yet no better for it; praise not the pot till it has been fired; are general proverbs of life to which there are numerous parallels. If you are civil to a potter he will neither respect you nor will he sell you his pots. The frequency of petty thefts in India is illustrated by the saying, "The potter can sleep sound; no one will steal his clay." He lives penuriously, and his own domestic crockery consists of broken pots. He is a stupid fellow—in a deserted village even a potter is a scribe—and his wife is a meddling fool, who is depicted as burning herself, like a Hindu wife, on the carcass of the Dhobi's donkey.²²

²². Dhobi ke gadhe par Kumharin gati hai.

The Blacksmith. A blacksmith's single stroke is worth a goldsmith's hundred; but a Lohar is a bad friend; he will either burn you with fire or stifle you with smoke. His shop is always in an untidy mess; it is like the place where donkeys roll. Sparks are the lot of the blacksmith's legs. Such is his good nature that a monkey begged of him a pair of anklets. But you should not buy his pet manila, even if you can get it for a farthing, for the bird will drive you mad by mimicking the noise of the hammer. "To sell a needle in the Lohar's quarter" is one of the Indian analogues of our "Coals to Newcastle." "Before the smith can make a screw he must learn to make a nail" is a proverbial truism apparently of comparatively modern origin.

The Carpenter. The carpenter thinks of nothing but wood, and his wife walks and talks in tune to the noise of the plane. When out of work he keeps his hand in by planing his friends' buttocks. "The carpenter's face" is cited as a type of unpunctuality, since it is never to be seen at the time when he promised to come. "A whore's oath and a Sutar's chip" are examples of worthlessness. A fool of a Barhai has neither chisel nor adze and wants to be the village carpenter.

The Oil-presser and dealer in oil. The oil-presser is no man's friend; he earns a rupee and calls it eight annas. He sits at ease while his mill goes round, and beguiles his hours of leisure by inventing improper stories, so that when two Telis meet their talk is unfit for publication. His unfortunate bullock is always blindfold, and walks miles and miles without getting any further. Once upon a time the bullock was lost and the Teli is still looking for the peg to which it was tied. On another occasion his bullock took to fighting and the owner was sued before the Kazi for damages. The Kazi's finding ran thus: "What made the beast fight? The oil-cake you fed it on; so give me the ox and pay me the damages into the bargain." His wife saves a little oil by giving short measure to her customers, but "God takes all at once," when the jar breaks and the thick dust sucks up its contents. His daughter, on the other hand, is represented as giving herself airs and wondering what oil-cake can be.

The Tailor. The tailor, the goldsmith and the weaver, these three are too sharp for the angel of death; God alone knows where to have them. The tailor's "this evening" and the shoe-maker's "next morning" never come. However sharp his sight, a Darzi sees nothing, because he cannot take his eyes off his work. The influence of Hindu caste on Muhammadans is illustrated by the saying "A Darzi's son is a Darzi and must sew as long as he lives." A Darzi steals your cloth and makes you pay for sewing it. When a tailor is out of work he sews up his son's mouth. The estimation in which he is held by his neighbours may be gauged by the saying "A snake in a tailor's house; who wants to kill it?"

The Washerman. All the world have their clothes washed, but the Dhobi is always unclean (ceremonially), and to see him the first thing in the morning is sure to bring bad luck. His finery is never his own, but no one has so many changes of linen as a Dhobi. He will not hesitate to use the King's scarf as a loin cloth; at his wedding the clothes of his customers are spread as carpets for the guests; and his son is the dandy of the village on a whistle and bang, that is to say, by wearing other people's clothes which his father washes by giving them a bang on a stone and whistling. As for soap, none is used unless there are enough Dhobis to set up competition. When there is a rob-

bery in the Dhobi's house the neighbours lose their clothes. He tears people's clothes and says it was the wind, but he is careful not to damage his father's things. You should change your Dhobi as you change your linen, for a new Dhobi washes clean. In a Koiri village, the Dhobi is the accountant for he is the only man who can add two and two together. He knows when the village is poor just as the orderly knows when his master has been degraded. The Dhobi's donkey is habitually overworked, and must carry huge bundles of linen while "its life oozes out of its eyes."

The Fisherman. The occupation of fishing ranks rather low as it involves the taking of life, but most Indians are great fish-eaters and one would have expected to find more proverbs dealing with the subject. The few that I have collected seem to suggest that the manners of fishing fold are much the same everywhere. "A fisherman's tongue" corresponds to our "Billingsgate"; a Machhi woman will scold even she is dead; three clouts from an oilwoman are better than three kisses from a fishwife. There is a touch of local colour in the Sind saying "Sometimes the float is uppermost, sometimes the fisherman," a reference to the practice of fishing balanced face downwards on an earthen pot which is liable to break or capsize.

The Weaver. In all parts of India the stupidity of the weaver, especially of the Muhammadan weaver (Jolaha), is the staple subject of proverbial philosophy. His loom being sunk in the ground, he is said to dig a pit and fall into it himself. If he has a pot of grain he thinks himself a Raja. He goes out to cut grass when even the crows are flying home to roost. He finds the hind peg of a plough, and proposes to start farming on the strength of it. If there are eight Jolahas and nine Huqqas, they fight for the odd one. The Jolaha goes to see a ram fight and gets butted himself. Being one of a company of twelve who had safely forded a river, he can only find eleven, as he forgets to count himself, and straightway goes off to bury himself in the belief that, as he is missing, he must be dead. Some Jolahas walking across country come to a field of linseed looking blue in the moonlight; they wonder how deep the water is and hope that all of them can swim. A Jolaha gets into his boat and forgets to weigh the anchor; after rowing all night he finds himself at home and rejoices in the thought that the village has followed him out of pure affection. A crow snatches a piece of bread from a Jolaha's child and flies with it to the roof; the prudent father takes away the ladder before he gives the child any more. A Jolaha hears the Koran being read and bursts into tears; or being asked what passage moves him so, he explains that the wagging beard of the Mulla reminded him of a favourite goat that he had lost. When his dogs bark at a tiger, he proceeds to whip his child. He has no sense of propriety, he will crack indecent jokes with his mother and sister and his wife will pull her father's beard. As a workman he is dilatory and untrustworthy. He will steal a reel of thread when he gets the chance; he has his own standard of time; he lies like a Chamar. And even if you see him brushing the newly woven cloth, you must not believe him when he says that it is ready.

The Tanner and Shoemaker. Below these more or less respectable members of rural society, we find a number of outcaste groups, village menials, or broken tribes some of whom pollute the high-caste man even at a distance, while others are guilty of the crowning enormity of eating beef. Among these the Chamar, tanner, shoemaker, cobbler and cattle-poisoner, is the subject of a number of injurious reflexions. Though he is as wily as a jackal,

he is also so stupid that he sits on his awl and beats himself for stealing it. He laments that he cannot tan his own skin. He knows nothing beyond his last, and the shortest way to deal with him is to beat him with a shoe of his own making, a practical axiom which is expressed in the saying that "old Shoes should be offered to the shoemaker's god." "Stich, stich" is the note of the cobbler's quarter; "stink, stink" of the street where the tanners live. The Chamar's wife goes barefoot, but his daughter, when she has just attained puberty, is as graceful as an ear of millet. The functions of the Chamarin as the Mrs. Gamp of the village are rather inelegantly referred to in the saying "There is no hiding the belly from the midwife." The hides and bones of dead cattle are the perquisite of the Chamar, and in some of the great grazing districts he is credibly suspected of assisting nature by means of a bolus of arsenic, craftily wrapped in a leaf or a petal of the mahua flower, and dropped where the cattle are feeding. A humorous allusion to this practice which is exceedingly difficult to detect, may be traced in the proverb which represents the Chamar as enquiring after the health of the village headman's buffalo. In these later days Chamars are no longer forbidden to drink Ganges water, and this perversion of the old order of things is said to have caused "the righteous to die while the wicked live."

The Dom. The Doms, among whom we find scavengers, vermineaters, executioners, basket-makers, musicians, and professional burglars, probably represent the remnants of a Dravidian tribe crushed out of recognition by the invading Aryans and condemned to menial and degrading occupations. Sir G. Grierson has thrown out the picturesque suggestion that they are the ancestors of the European gipsies, and that Rom or Romany is nothing more than a variant of Dom. In the ironical language of the proverbs the Dom figures as "the lord of death" because he provides the wood for the Hindu funeral pyre. He is ranked with Brahmans and goats as a creature useless in time of need. A common and peculiarly offensive form of abuse is to tell a man that he has eaten of Dom's leavings. A series of proverbs represents him as making friends with members of various castes faring ill or well in the process. Thus the Kanjar steals his dog, and the Gujar loots his house; on the other hand the barber shaves him for nothing, and silly Jolaha makes him a suit of clothes. His traditions associate him with donkeys, and it is said that if these animals could excrete sugar, Doms would no longer be beggars. "A Dom in a palanquin and a Brahman on foot" is a type of society turned upside down. Nevertheless, outcaste as he is, the Dom occupies a place of his own in the fabric of Indian society. At funerals he provides the wood and gets the corpse-clothes as his perquisite; he makes the discordant music that accompanies a marriage procession: and baskets, winnowing-fans, and wicker articles in general are works of his hands.

The Mahar and Dhed. In the west of India Mahars and Dheds hold much the same place as the Dom. In the walled villages of the Maratha country the Mahar is the scavenger, watchman and gate-keeper. His presence pollutes; he is not allowed to live in the village and his miserable shanty is huddled up against the wall outside. But he challenges the stranger who comes to the gate, and for this and other services he is allowed various perquisites, among them that of begging for broken victuals from house to house. He offers old blankets to his god, and his child's playthings are water jar, he pollutes its contents; if you run up against him by accident, you must go off and bathe. If you annoy a Dhed he sweeps up the dust in your face. When

he dies, the world is so much the cleaner. If you go to the Dhed's quarter you find there nothing but a heap of bones.

APPENDIX V

COGNATE PROVISIONS

Cognate provisions relating to evidence in Central Acts arranged chronologically :

1. Bills of Lading Act (9 of 1856)—Sec. 3.
2. The Hindu Widows Remarriage Act (15 of 1856)—Sec. 7.
3. The Societies Registration Act (21 of 1860)—Sec. 19.
4. The Converts Marriage Dissolution Act (21 of 1866)—Sec. 21.
5. The Public Gambling Act (3 of 1867)—Secs. 4, 6, 9.
6. The Press and Registration of Books Act (25 of 1867)—Secs. 7, 8.
7. The Indian Divorce Act (4 of 1869)—Secs. 51, 52.
8. The Coroners Act (4 of 1871)—Sec. 18-A.
9. The Indian Contract Act (9 of 1872)—Secs. 174, 230.
10. The Indian Christian Marriage Act (15 of 1872)—Secs. 61, 80.
11. The Opium Act (1 of 1878)—Sec. 10.
12. The Negotiable Instruments Act (26 of 1881)—Secs. 105 to 107, 118 to 122, 134 to 137.
13. The Land Improvement Loans Act (19 of 1883)—Secs. 8, 9.
14. The Agriculturists' Loans Act (12 of 1884)—Sec. 6.
15. The Telegraphs Act (13 of 1885)—Sec. 5 (2).
16. The Births, Deaths and Marriages Registration Act (6 of 1886)—Secs. 9, 25, 35.
17. The Indian Reserve Forces Act (4 of 1888)—Sec. 6.
18. The Indian Railways Act (9 of 1890)—Secs. 74-D, 142.
19. The Land Acquisition Act (1 of 1894)—Secs. 6, 44.
20. The Code of Criminal Procedure, 1973 (2 of 1974)—Secs. 96 (3), 161, 162, 272-299, 311, 313, 315, 316, 331, 337, 339.
21. The Indian Post Office Act (6 of 1898)—Secs. 14, 15.
22. The Indian Stamp Act (2 of 1899)—Secs. 32, 35, 36, 40, 41, 42, 44, 51.
23. The Code of Civil Procedure (5 of 1908)—Secs. 13, 14; O. 10, Rr. 1-4; O. 11, Rr. 1-23; O. 12, Rr. 1-9; O. 15, Rr. 1-11; O. 16, Rr. 1-21; O. 18, Rr. 1-18.
24. The Indian Registration Act (16 of 1908)—Sec. 49.

25. The Presidency Towns Insolvency Act (3 of 1909)—Sec. 116.
26. The Indian Patents and Designs Act (2 of 1911)—Secs. 71, 71-A.
27. The Co-operative Societies Act (2 of 1912)—Secs. 10, 26.
28. The Indian Lunacy Act (4 of 1912)—Sec. 18.
29. The Destruction of Records Act (5 of 1917).
30. The Workmen's Compensation Act (8 of 1923)—Sec. 18.
31. The Cantonments Act (2 of 1924)—Secs. 289, 290.
32. The Cotton Ginning and Pressing Factories Act (12 of 1925)—Sec. 14.
33. The Indian Succession Act (39 of 1925)—Secs. 273, 275, 381.
34. The Indian Trade Unions Act (16 of 1926)—Sec. 9.
35. The Indian Forest Act (16 of 1927)—Secs. 69, 70.
36. The Dangerous Drugs Act (2 of 1930)—Sec. 32.
37. Indian Partnership Act (9 of 1932)—Sec. 68.
38. The Indian Wireless Telegraphy Act (17 of 1933)—Sec. 6.
39. The Petroleum Act (30 of 1934)—Sec. 19.
40. The Insurance Act (4 of 1938)—Sec. 23.
41. The Commercial Documents Evidence Act (30 of 1939).
42. The Registration of Foreigners Act (16 of 1939)—Sec. 4.
43. The Evidence and Powers of Attorney Act, 1940.
44. The Drugs and Cosmetics Act (23 of 1940)—Secs. 4, 25.
45. The Reciprocity Act (9 of 1943)—Sec. 4.
46. The Industrial Employment (Standing Orders) Act (20 of 1946)—Sec. 12.
47. The Foreigners Act (31 of 1946)—Sec. 9.
48. The Prevention of Corruption Act (2 of 1947)—Secs. 4, 5, 7.
49. The Foreign Exchange Regulation Act (46 of 1973)—Secs. 71, 72.
50. The Trading with the Enemy (Continuance of Emergency Provisions) Act (16 of 1947)—Sec. 5.
51. The Capital Issues (Control) Act (29 of 1947)—Sec. 14.
52. The Diplomatic and Consular Officers (Oaths and Fees) Act (41 of 1948)—Sec. 3.
53. The Banking Regulations Act (10 of 1949)—Secs. 43, 45-F.
54. The Administration of Evacuee Property Act (31 of 1950)—Sec. 49.
55. The Air Force Act (45 of 1950)—Secs. 132, 135, 139.
56. The Army Act (46 of 1950)—Secs. 133, 136, 140.
57. The Representation of the People Act (43 of 1951)—Secs. 90, 93, 95.

58. The Industries (Development and Regulation) Act (65 of 1951) — Sec. 28.
59. The Displaced Persons (Debts Adjustment) Act (70 of 1951) — Sec. 24.
60. The Mines Act (35 of 1952) — Sec. 47.
61. The Salaries and Allowances of Ministers Act (58 of 1952) — Sec. 10.
62. The Salaries and Allowances of Officers of Parliament Act (20 of 1953) — Sec. 10.
63. The Prevention of Food Adulteration Act (37 of 1954) — Sec. 13.
64. The Special Marriage Act (43 of 1954) — Secs. 13, 47.
65. The Essential Commodities Act (10 of 1955) — Secs. 13, 14.
66. The Protection of Civil Rights Act (22 of 1955) — Sec. 12.
67. The Spirituous Preparation (Inter-State Trade and Commerce) Control Act (39 of 1955) — Sec. 11.
68. The Citizenship Act (57 of 1955) — Sec. 13.
69. The Companies Act (1 of 1956) — Secs. 35, 132, 195, 548.
70. The Hindu Succession Act (30 of 1956) — Sec. 21.
71. The Lok Sahayak Sena Act (53 of 1956) — Sec. 10.
72. The Suppression of Immoral Traffic in Women and Girls Act (104 of 1956) — Secs. 4, 6.
73. The Navy Act (62 of 1957) — Sec. 133.
74. The Trade and Merchandise Marks Act (43 of 1958) — Sec. 96.
75. The Prevention of Cruelty to Animals Act (59 of 1960) — Sec. 30.
76. The Customs Act (52 of 1962), Sec. 123.

APPENDIX VI

THE BANKERS' BOOKS EVIDENCE ACT, 1891

(Act No. XVIII of 1891)

An Act to amend the Law of Evidence with respect to Bankers' Books

[1st October, 1891.]

Whereas it is expedient to amend the Law of Evidence with respect to Bankers' Books;

It is hereby enacted as follows :—

1. **Title and extent.** (1) This Act may be called the Bankers' Books Evidence Act, 1891.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definitions. In this Act, unless there is something repugnant in the subject or context,—

(1) "company" means any company as defined in Sec. 3 of the Companies Act, 1956 (1 of 1956), and includes a foreign company within the meaning of Sec. 591 of that Act;

(1-A) "corporation" means any body corporate established by any law for the time being in force in India and includes the Reserve Bank of India, the State Bank of India and any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959);

(2) "bank" and "banker" mean—

(a) any company or corporation carrying on the business of banking,

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided,

(c) any post office savings bank or money order office;

(3) "bankers books" include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank;

(4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken;

(6) "Judge" means a Judge of a High Court;

(7) "trial" means any hearing before the Court at which the evidence is taken; and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

3. Power to extend provisions of Act. The State Government may, from time to time, by notification in the official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account-books, namely, a cash-book, a day-book or journal, and ledger, and may in like manner rescind any such notification.

4. Mode of proof of entries in bankers' books. Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

5. Case in which officer of bank not compellable to produce books. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

6. Inspection of books by order of Court or Judge. (1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and there upon the same shall not be enforced without further order.

7. Costs. (1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs:

APPENDIX VII

THE INDIAN BILLS OF LADING ACT, 1856

(Act IX of 1856)

(EXTRACT)

3. Bill of lading in hands of consignee, etc., conclusive evidence of the shipment as against master etc. Every bill of lading in hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board :

Proviso

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims.

APPENDIX VIII

THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT, 1886

(Act VI of 1886)

(EXTRACTS)

9. Copies of entries to be admissible in evidence. A copy of an entry given under the last foregoing section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer authorised in this behalf by the State Government and shall be admissible in evidence for the purpose of proving the birth, death or marriage to which the entry relates.

25. Searches and copies of entries in register books. (1) Every Registrar of Births and Deaths shall, on payment of the prescribed fees, at all reasonable times, allow searches to be made in the register books kept by him, and give a copy of any entry in the same.

(2) Every copy of an entry in a register book given under this section shall be certified by the Registrar of Births and Deaths and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.

35. Searches of lists prepared by Commissioners and grant of certified copies of entries. (1) Subject to the payment of the prescribed fees, the descriptive list or lists of registers or records, or portions of registers or records delivered by the Commissioners to the Registrar-General of Births, Deaths and Marriages shall be, at all reasonable times, open to inspection by any person applying to inspect it or them, and copies of entries in those registers or records shall be given to all persons applying for them.

(2) A copy of an entry given under this section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer or person authorized in this behalf by the State Government and shall be admissible in evidence for the purpose of proving the birth, baptism, naming, dedication, death, burial or marriage to which the entry relates.

APPENDIX IX

THE INDIAN CHRISTIAN MARRIAGE ACT, 1872

(Act XV of 1872)

(EXTRACTS)

61. Grant of certificate. When, in respect to any marriage solemnized under this part, the conditions prescribed in Section 60 have been fulfilled, the person licensed as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and on the payment of a fee of four annas, grant a certificate of the marriage.

The certificate shall be signed by such licensed person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

80. Certified copy of entry in marriage-register, and to be evidence. Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate required to be kept or delivered under this Act, of any entry of a marriage in such register, or of any such certificate or duplicate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate, or duplicate, or of any entry therein, respectively, or of such copy.

APPENDIX X

THE COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939

(Act No. 30 of 1939)

[26th September, 1939]

An Act to amend the Law of Evidence with respect to certain commercial documents

Whereas it is expedient to amend the Law of Evidence with respect to certain commercial documents; It is hereby enacted as follows :

1. Short title and extent. (1) This Act may be called The Commercial Documents Evidence Act, 1939.

(2) It extends to the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in Part B States.

2. Statement of relevant facts in scheduled documents to be themselves relevant facts. Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) statements of facts in issue or of relevant facts

made in any document included in the Schedule as to matters usually stated in such documents shall be themselves relevant facts within the meaning of that Act.

3. Presumption as to genuineness of documents. For the purposes of the Indian Evidence Act, 1872 (1 of 1872), and notwithstanding anything contained therein, a Court—

- (a) shall presume, within the meaning of that Act in relation to documents included in Part I of the Schedule, and
- (b) may presume, within the meaning of that Act, in relation to documents included in Part II of the Schedule,—

that any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority, was so made and that the statements contained therein are accurate.

4. Definition. In the Schedule, the expression “recognised Chamber of Commerce” means a Chamber of Commerce recognised by the Government of its country as being competent to issue certificates of origin, and includes any other association similarly recognised.

THE SCHEDULE

(See Sections 2 and 3)

PART I

Documents in relation to which the Court “shall presume”

- (1) Lloyd’s Register of Shipping.
- (2) Lloyd’s Daily Shipping Index.
- (3) Lloyd’s Loading List.
- (4) Lloyd’s Weekly Casualty Reports.
- (5) Certificate of delivery of goods to the Manchester Ship Canal Company.
- (6) Official Log Book, Supplementary Official Log Book and Official Wireless Log kept by a British ship.
- (7) Certificate of Registry, Safety Certificate, Safety Radio-Telegraphy Certificate, Exemption Certificate, Certificate of Survey, Declaration of Survey, International Load Line Certificate, Indian Load Line Certificate, Report of Survey of a ship provisionally detained as unsafe, Report of Survey to be served upon the master of a ship declared unsafe upon survey, Docking Certificate, Memorandum issued under Article 56 of the International Convention for the Safety of Life at Sea, 1929.
- (8) Certificates A and B issued under the Indian Merchant Shipping Act, 1923.
- (9) The following documents relating to marine insurance, namely, insurance policy, receipt for premium, certificate of insurance and insurance cover note.

(10) Certificate concerning the loss of country-craft issued by the appropriate authority under Department of Commerce, Mercantile Marine Department Circular No. 2 of 1938.

(11) Protest made before a Notary Public or other duly authorised official by a master of a ship relating to circumstances calculated to affect the liability of the shipowner.

(12) Licence or permit for radio-telegraph apparatus carried in ships or aircraft.

(13) Certificate of registration of an aircraft granted by the Government of the country to which the aircraft belongs.

(14) Certificate of airworthiness of an aircraft granted or validated by, or under the authority of, the Government of the country to which the aircraft belongs.

(15) Licences and certificates of competency of aircraft personnel granted or validated by, or under the authority of, the Government of the country to which the personnel belongs.

(16) Ground Engineer's Licence issued by a competent authority authorised in this behalf by Government.

(17) Consular Certificate in respect of goods shipped or shut out, Consular certificates of origin, and Consular invoice.

(18) Certificate of origin of goods issued (but not merely attested) by a recognised Chamber of Commerce, or by an Indian or British Consular Officer or by an Indian or British Trade Commissioner or Agent.

(19) Receipt for payment of customs duty issued by a Customs authority.

(20) Schedule issued by a Port, Dock, Harbour, Wharfrage or Warehouse authority, or by a Railway Company, showing fees, dues, freights or other charges for the storage, transport or other services in connection with goods.

(21) Tonnage schedule and schedule of fees, commission or other charges for services rendered, issued by a recognised Chamber of Commerce.

(22) The publication known as the Indian Railway Conference Association Coaching and Goods Tariffs.

(23) Copy, certified by the Registrar of Companies, of the memorandum or the articles of association of a company filed under the Indian Companies Act, 1913.

(24) Protest, noting and certifying the dishonour of a bill-of-exchange, made before a Notary Public or other duly authorised official.

PART II

Documents in relation to which the Court "may presume"

(1) Survey Report issued by a competent authority—

- (i) In respect of cargo loaded; or
- (ii) certifying the quantity of coal loaded; or
- (iii) in respect of the security of hatches.

(2) Official Log Book, Supplementary Official Log Book and Official Wireless Log kept by a foreign ship.

(3) Dock certificate, dock chalan, dock receipt or warrant, Port Warehouse certificate or warrant, issued by, or under the authority of, a Port, Dock, Harbour or Wharfage authority.

(4) Certificate issued by a Port, Dock, Harbour, Wharfage or other authority having control of acceptance of goods for shipping, transport or delivery, relating to the date or time of shipment of goods, arrival of goods for acceptance, arrival of vessels or acceptance of delivery of goods, or to the allocation of berthing accommodation to vessels.

(5) Export application issued by a Port authority showing dues paid, weight and measurement and the shutting out of a consignment.

(6) Certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer, or by a recognised Chamber of Commerce.

(7) Reports and publications issued by a Port authority showing the movement of vessels, and certificates issued by such authority relating to such movements.

(8) Certificate of safety for flight signed by a licensed Ground Engineer.

(9) Aircraft Log Book, Journey Log Book and Log Book, maintained by the owner or operator in respect of aircraft.

(10) Passenger List or Manifest of Goods carried in public transport aircraft.

(11) Passenger ticket issued by a steamship company or air transport company.

(12) Air Consignment Note and Baggage Check, issued by an air transport company in respect of goods carried by air, and the counterfoil or duplicate thereof retained by the carrier.

(13) Aircraft Load Sheet.

(14) Storage warrant of a warehouse recognised by a Customs, Excise, Port, Dock, Harbour or Wharfage authority.

(15) Acknowledgment receipt for goods granted by a Port, Dock, Harbour, Wharfage or Warehouse authority or by a Railway or Steamship company.

(16) Customs or Excise pass and Customs or Excise permit or certificate, issued by a Customs or Excise authority.

(17) *Force majeure* certificate issued by a recognised Chamber of Commerce.

(18) Receipt of a Railway or Steamship company granted to a consignor in acknowledgment of goods entrusted to the company for transport.

(19) Receipt granted by the Posts and Telegraphs Department.

(20) Certificate or survey award issued by a recognised Chamber of Commerce relating to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn and other goods.

(21) Copy, certified by the Registrar of Companies, of the Balance Sheet, Profit and Loss Account, and audit report of a company, filed with the said Registrar under the Companies Act, 1956 (Act 1 of 1956) and the rules made thereunder.

APPENDIX XI

THE CORONERS ACT, 1871

(Act IV of 1871)

(EXTRACT)

18-A. Report of Chemical Examiner. Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Act, may be used as evidence in any inquest under this Act and in any subsequent inquiry, trial or other proceeding under the Code of Criminal Procedure, 1898.

APPENDIX XII

THE CODE OF CRIMINAL PROCEDURE, 1973

(Act No. 2 of 1974)

(EXTRACTS)

CHAPTER XXIII

EVIDENCE IN INQUIRIES AND TRIALS

A. Mode of taking and recording evidence

272. Language of Courts. The State Government may determine what shall be, for purposes of this Code, the language of each Court within the State other than the High Court.

273. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Explanation—In this section, “accused” includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

274. Record in summons-cases and inquiries. (1) In all summons-cases tried before a Magistrate, in all inquiries under Secs. 145 to 148 (both inclusive), and in all proceedings under Sec. 446 otherwise than in the course of a trial, the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of his evidence in the language of the Court :

Provided that if the Magistrate is unable to make such memorandum himself, he shall, after recording the reason of his inability, cause such memorandum to be made in writing or from his dictation, in open Court.

(2) Such memorandum shall be signed by the Magistrate and shall form part of the record.

275. Record in warrant-cases. (1) In all warrant-cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Where the Magistrate causes the evidence to be taken down, he shall record a certificate that the evidence could not be taken down by himself for the reasons referred to in sub-section (1).

(3) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

276. Record in trial before Court of Session. (1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

^{28f}(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.]

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

277. Language of record of evidence. In every case where evidence is taken down under Sec. 275 or Sec. 276,—

- (a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;
- (b) if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record;
- (c) where under clause (b) evidence is taken down in a language other than the language of the Court, a true translation thereof in the language of the Court, shall be prepared as soon as practicable,

signed by the Magistrate or presiding Judge, and shall form part of the record :

Provided that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation.

278. Procedure in regard to such evidence when completed. (1) As the evidence of each witness taken under Sec. 275 or Sec. 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

279. Interpretation of evidence to accused or his pleader. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

280. Remarks respecting demeanour of witness. When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

281. Record of examination of accused. (1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

282. Interpreter to be bound to interpret truthfully. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

283. Record in High Court. Every High Court may, by general rule, prescribe the manner in which the evidence of witnesses and the examination of the accused shall be taken down in cases coming before it; and such evidence and examination shall be taken down in accordance with such rule.

B.—Commissions for the examination of witnesses

284. When attendance of witness may be dispensed with and commission issued. (1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter :

Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.

285. Commission to whom to be issued. (1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found.

(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of

such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification, prescribe in this behalf.

286. Execution of commissions. Upon receipt of the commission, the Chief Metropolitan Magistrate or Chief Judicial Magistrate, or such Metropolitan or Judicial Magistrate as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant-cases under this Code.

287. Parties may examine witnesses. (1) The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, Court or officer to whom the commission is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate, Court or officer by pleader, or if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

288. Return of commission. (1) After any commission issued under Sec. 284 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court or Magistrate issuing the commission; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by Sec. 33 of the Indian Evidence Act, 1872 (1 of 1872) may also be received in evidence at any subsequent stage of the case before another Court.

289. Adjournment of proceeding. In every case in which a commission is issued under Sec. 284, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

290. Execution of foreign commissions. (1) The provisions of Sec. 286 and so much of Sec. 287 and Sec. 288 as relate to the execution of a commission and its return shall apply in respect of commissions issued by any of the Courts, Judges or Magistrates hereinafter mentioned as they apply to commissions issued under Sec. 284.

(2) The Courts, Judges and Magistrates referred to in sub-section (1) are—

- (a) any such Court, Judge or Magistrate exercising jurisdiction within an area in India to which this Code does not extend, as the Central Government may, by notification, specify in this behalf;
- (b) any Court, Judge or Magistrate exercising jurisdiction in any such country or place outside India, as the Central Government may, by notification, specify in this behalf and having authority,

under the law in force in that country or place, to issue commissions for the examination of witnesses in relation to criminal matters.

291. Deposition of medical witness. (1) The deposition of a civil surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under this Chapter, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such deponent as to the subject-matter of his deposition.

292. Evidence of officers of the Mint. (1) Any document purporting to be a report under the hand of any such gazetted officer of the Mint or of the India Security Press (including the office of the Controller of Stamps and Stationery) as the Central Government may, by notification, specify in this behalf, upon any matter or thing duly submitted to him for examination and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.

(2) The Court may, if it thinks fit, summon and examine any such officer as to the subject-matter of his report :

Provided that no such officer shall be summoned to produce any records on which the report is based.

(3) Without prejudice to the provisions of Secs. 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872) ; no such officer shall, except with the permission of the Master of the Mint or the India Security Press or the Controller of Stamps and Stationery, as the case may be, be permitted—

- (a) to give any evidence derived from any unpublished official records on which the report is based; or
- (b) to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

293. Reports of certain Government scientific experts. (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely :

- (a) any Chemical Examiner or Assistant Chemical Examiner to Government;
- (b) the Chief Inspector of Explosives;
- (c) the Director of the Finger Print Bureau;
- (d) the Director, Haffkeine Institute, Bombay;
- (e) the Director, ²⁴[Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;
- (f) the Serologist to the Government.

294. No formal proof of certain documents. (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed :

Provided that the Court may, in its discretion, require such signature to be proved.

295. Affidavit in proof of conduct of public servants. When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

296. Evidence of formal character on affidavit. (1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

297. Authorities before whom affidavits may be sworn. (1) Affidavits to be used before any Court under this Code may be sworn or affirmed before—

- ²⁵[(a) any Judge or any Judicial or Executive Magistrate, or]

24. Ins. by Act 45 of 1978, Sec. 21 25. Subs. by *ibid* Sec. 22 (18-12-1978).
(18-12-1978).

(b) any Commissioner of Oaths appointed by a High Court or Court of Session, or

(c) any notary appointed under the Notaries Act, 1952 (53 of 1952).

(2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.

(3) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended.

298. Previous conviction or acquittal how proved. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,—

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered,

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

299. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try ¹[or commit for trial] such person for the offence complained of may, in his absence, examine the witness (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence if the deponent is dead or incapable of giving evidence or beyond the limits of India.

311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in atten-

dance, though not summoned as a witness or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

331. Resumption of inquiry or trial. (1) Whenever an inquiry or a trial is postponed under Section 328 or Section 329, the Magistrate or Court, as the case may be, may at any time after the person concerned has ceased to be of unsound mind resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under Section 330, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

337. Procedure where lunatic prisoner is reported capable of making his defence. If such person is detained under the provisions of sub-section (2) of Section 330, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 332; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

339. Delivery of lunatic to care of relative or friend. (1) Whenever any relative or friend of any person detained under the provisions of Section 330 or Section 335 desires that he shall be delivered to his care and custody, the State Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such State Government, that the person delivered shall—

- (a) he properly taken care of and prevented from doing injury to himself or to any other person;
- (b) he produced for inspection of such officer, and at such times and places, as the State Government may direct;
- (c) in the case of a person detained under sub-section (2) of Section 330, be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence, the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in clause (b) of sub-section (1), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production the Magistrate or Court shall proceed in accordance with provisions of Section 332, and the certificate of the inspecting officer shall be receivable as evidence.

APPENDIX XIII

THE CUSTOMS ACT, 1962

(Act No. LII of 1962)

(EXTRACTS)

123. Burden of proof in certain cases. (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be—

(a) in a case where such seizure is made from the possession of any person,—

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, diamonds, manufacturers of gold or diamonds, watches, and any other class of goods which the Central Government may by notification in the official Gazette specify.

139. Presumption as to documents in certain cases. Where any document—

(i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or

(ii) has been received from any place outside India in the course of investigation of any offence, alleged to have been committed by any person under this Act;

and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall—

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

- (c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document.

APPENDIX XIV

THE DESTRUCTION OF RECORDS ACT, 1917

(Act V of 1917)

An Act to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers.

Whereas it is expedient to consolidate and amend the law providing for the destruction or other disposal of certain documents in the possession or custody of Courts and Revenue and other public officers; It is hereby enacted as follows :—

1. Short title. Extent. This Act may be called THE DESTRUCTION OF RECORDS ACT, 1917. It extends to the whole of India.

2. Definitions. Repealed by A. O. 1937.

3. Power to certain authorities to make rules for disposal of documents. (1) The authorities hereinafter specified may, from time to time, make rules for the disposal, by destruction or otherwise, of such documents as are, in the opinion of the authority making the rules, not of sufficient public value to justify their preservation.

(2) The authorities shall be—

- (a) in the case of documents in the possession or custody of a High Court or of the Courts of civil or criminal jurisdiction subordinate thereto,
- (b) in the case of documents in the possession or custody of Revenue Courts and officers,—the Chief Controlling Revenue-authority, and
- (c) in the case of documents in the possession or custody of any other public officer,—
 - (i) if the documents relate to purposes of a State, the State Government or any officer specially authorized in that behalf by that Government;
 - (ii) in any other case, the Central Government or an officer specially authorized in that behalf by that Government.

(3) Rules made under this section by any High Court or by a Chief Controlling Revenue authority or by an officer specially authorized in that behalf by any State Government shall be subject to the previous approval of the State Government; and rules made by an officer specially authorized in that behalf by the Central Government shall be subject to the previous approval of the Central Government.

4. Validation of former rules for disposal of documents. All rules and orders directing or authorizing the destruction or other disposal of documents in the possession or custody of any public officer, heretofore made by a State Government, or with the approval of the State Government by any authority not empowered to make such rules under the Destruction of Records Act, 1879, shall be deemed to have had the force of law from the date on which they were made, and all such rules and orders now in force shall continue to have the force of law until they are superseded by rules made under this Act.

5. Saving of certain documents. Nothing in this Act shall be deemed to authorize the destruction of any document which, under the provisions of any law for the time being in force, is to be kept and maintained.

6. Repeals. Repealed by the Repealing Act, 1927 (12 of 1927).

THE SCHEDULE—Repeals of Enactments. Repealed by the Repealing Act, 1927 (XII of 1927), Section 2 and Schedule.

APPENDIX XV
THE NEGOTIABLE INSTRUMENTS ACT, 1881
(Act XXVI of 1881)

(EXTRACTS)

CHAPTER X

Of Reasonable Time

105. Reasonable time. In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments; and, in calculating such time, public holidays shall be excluded.

106. Reasonable time for giving notice of dishonour. If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour.

If the said parties carry on business or live in the same place, such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour.

107. Reasonable time for transmitting such notice. A party receiving notice of dishonour, who seeks to enforce his right against a prior party, transmits the notice within a reasonable time if he transmits it within the same time after its receipt as he would have to give notice if he had been the holder.

CHAPTER XIII

Special Rules of Evidence

118. Presumptions as to negotiable instruments. Until the contrary is proved, the following presumptions shall be made:

- (a) **of consideration**—that every negotiable instrument was made or drawn for consideration, and that every such instrument, when

it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

- (b) **as to date**—that every negotiable instrument bearing a date was made or drawn on such date;
- (c) **as to time of acceptance**—that every accepted bill-of-exchange was accepted within a reasonable time after its date and before its maturity;
- (d) **as to time of transfer**—that every transfer of a negotiable instrument was made before its maturity;
- (e) **as to order of indorsement**—that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;
- (f) **as to stamp**—that a lost promissory note, bill-of-exchange or cheque was duly stamped;
- (g) **that holder is a holder in due course**—that the holder of a negotiable instrument is a holder in due course: provided that where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

119. Presumption on proof of protest. In a suit upon an instrument which has been dishonoured, the Court shall, on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

120. Estoppel against denying original validity of instrument. No maker of a promissory note, and no drawer of a bill-of-exchange or cheque, and no acceptor of a bill-of-exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.

121. Estoppel against denying capacity of payee to indorse. No maker of a promissory note and no acceptor of a bill-of-exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same.

122. Estoppel against denying signature or capacity of prior party. No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.

CHAPTER XVI

Of International Law

134. Law governing liability of maker, acceptor or indorser of foreign instrument. In the absence of a contract to the contrary, the liability of the maker or drawer of foreign promissory note, bill-of-exchange or cheque is regulated in all essential matters by the law of the place where

he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable.

Illustration

A bill-of-exchange was drawn by A in California, where the rate of interest is 25 per cent and accepted by B, payable in Washington, where the rate of interest is 6 per cent. The bill is indorsed in India, and is dishonoured. An action on the bill is brought against B in India. He is liable to pay interest at the rate of 6 per cent only; but if A is charged as drawer, A is liable to pay interest at the rate of 25 per cent.

135. Law of place of payment governs dishonour. Where a promissory note, bill-of-exchange or cheque is made payable in a different place from that in which it is made or indorsed, the law of the place where it is made payable determines what constitutes dishonour and what notice of dishonour is sufficient.

Illustration

A bill-of-exchange drawn and indorsed in India, but accepted payable in France, is dishonoured. The indorsee causes it to be protested for such dishonour, and gives notice thereof in accordance with the law of France, though not in accordance with the rules herein contained in respect of bills which are not foreign. The notice is sufficient.

136. Instrument made, etc., out of India, but in accordance with the law of India. If a negotiable instrument is made, drawn, accepted or indorsed outside India, but in accordance with the law of India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country where it was entered into does not invalidate any subsequent acceptance or indorsement made thereon within India.

137. Presumption as to foreign law. The law of any foreign country regarding promissory notes, bills-of-exchange and cheques shall be presumed to be the same as that of India, unless and until the contrary is proved.

APPENDIX XVI

THE OATHS ACT, 1969

(No. 44 of 1969)

[26th December, 1969]

**An Act to consolidate and amend the law relating to judicial
oaths and for certain other purposes**

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows :—

1. Short title and extent. (1) This Act may be called the Oaths Act, 1969.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Saving of certain oaths and affirmations. Nothing in this Act shall apply to proceedings before courts-martial or to oaths, affirmations or declarations prescribed by the Central Government with respect to members of the Armed Forces of the Union.

3. Power to administer oaths. (1) The following courts and persons shall have power to administer, by themselves or, subject to the provisions of sub-section (2) of Sec. 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely:—

- (a) all courts and persons having by law or consent of the parties authority to receive evidence;
- (b) the commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union provided that the oath or affirmation is administered within the limits of the station.

(2) Without prejudice to the powers conferred by sub-section (1) or by or under any other law for the time being in force, any court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf—

- (a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or
- (b) by the State Government, in respect of other affidavits.

4. Oaths or affirmations to be made by witnesses, interpreters and jurors. (1) Oaths or affirmations shall be made by the following persons, namely:—

- (a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;
- (b) interpreters of questions put to, and evidence given by, witnesses; and
- (c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Sec. 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official

interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

5. Affirmation by persons desiring to affirm. A witness, interpreter or juror may, instead of making an oath, make an affirmation.

6. Forms of oaths and affirmations. (1) All oaths and affirmations made under Sec. 4 shall be administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case :

Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation.

(2) All such oaths and affirmations shall, in the case of all courts other than the Supreme Court and the High Courts, be administered by the presiding officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may be.

7. Proceedings and evidence not invalidated by omission of oath or irregularity. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

8. Persons giving evidence bound to state the truth. Every person giving evidence on any subject before any court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.

9. Repeal and saving. (1) The Indian Oaths Act, 1873, is hereby repealed.

(2) Where, in any proceeding pending at the commencement of this Act, the parties have agreed to be bound by any such oath or affirmation as is specified in Sec. 8 of the said Act, then, notwithstanding the repeal of the said Act, the provisions of Secs. 9 to 12 of the said Act shall continue to apply in relation to such agreement as if this Act had not been passed.

THE SCHEDULE

(See Sec. 6)

Forms of Oaths or Affirmations

Form No. 1 (Witnesses) :—

swear in the name of God

I do-----that what I shall state shall be the truth,

solemnly affirm

the whole truth and nothing but the truth.

Form No. 2 (Jurors) :—

swear in the name of God

I do _____ that I will well and truly try and true
solemnly affirm
deliverance make between the State and the prisoner(s) at the bar, whom I
shall have in charge, and a true verdict give according to the evidence.

Form No. 3 (Interpreters) :—

swear in the name of God

I do _____ that I will well and truly interpret and
solemnly affirm
explain all questions put to and evidence given by witnesses and translate cor-
rectly and accurately all documents given to me for translation.

Form No. 4 (Affidavits) :—

swear in the name of God

I do _____ that this is my name and signature (or
solemnly affirm
mark) and that the contents of this my affidavit are true.

APPENDIX XVII**THE INDIAN POST OFFICE ACT, 1898**

-(Act No. VI of 1898)

(EXTRACTS)

14. Post Office marks prima facie evidence of certain facts denoted. every proceeding for the recovery of any postage or sum alleged to be due under this Act in respect of a postal article,—

- (a) the production of the postal article, having thereon the official mark of the Post Office denoting that the article has been refused, or that the addressee is dead or cannot be found, shall be *prima facie* evidence of the fact so denoted, and
- (b) the person from whom the postal article purports to have come, shall, until the contrary is proved, be deemed to be the sender thereof.

15. Official mark to be evidence of amount of postage. The official mark on a postal article denoting that any postage or other sum is due in respect thereof to the Post Office of India or to the Post Office of the United Kingdom or of any British possession or foreign country, shall be *prima facie* evidence that the sum denoted as aforesaid is so due.

APPENDIX XVIII

THE PRESIDENCY-TOWNS INSOLVENCY ACT, 1909

(Act III of 1909)

(EXTRACT)

116. The Gazette to be evidence. (1) A copy of the official Gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice.

(2) A copy of the official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made and of its date.

APPENDIX XIX

THE PRESS AND REGISTRATION OF BOOKS ACT, 1867

(Act No. XXV of 1867)

(EXTRACTS)

7. Office copy of declaration to be prima facie evidence. In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid; attested by the seal of some court empowered by this Act to have the custody of such declaration, or, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor shall be held (unless the contrary to be proved) to be sufficient evidence, as against the person (whose name shall be subscribed to such declaration), or printed on such newspaper, as the case may be that the said person was printer or publisher, or printer and publisher (according as the words of the said declaration may be) of every portion of every newspaper whereof the title shall correspond with the title of the newspaper mentioned in the declaration or the editor of every portion of that issue of the newspaper of which a copy is produced.

8. New declaration by persons who have signed declaration and subsequently ceased to be printers or publishers. If any person has subscribed to any declaration in respect of a newspaper under Sec. 5 and the declaration has been authenticated by a Magistrate under Sec. 6 and subsequently that person ceases to be the printer or publisher of the newspaper mentioned in such declaration, he shall appear before any District, Presidency or Sub-Divisional Magistrate, and make and subscribe in duplicate the following declaration :

"I, A. B., declare that I have ceased to be the printer or publisher or printer and publisher of the newspaper entitled

Authentication and filing. Each original of the latter declaration shall be authenticated by the signature and seal of the Magistrate before whom the said latter declaration shall have been made, and one original of the said latter declaration shall be filed along with each original of the former declaration.

Inspection and supply of copies. The officer-in-charge of each original of the latter declaration shall allow any person applying to inspect that original on payment of a fee of one rupee, and shall give to any person applying a copy of the said latter declaration, attested by the seal of the court having custody of the original, on payment of a fee of two rupees.

Putting copy in evidence. In all trials in which a copy, attested as is aforesaid, of the former declaration, shall have been but in evidence, it shall be lawful to put in evidence a copy, attested as is aforesaid, of the latter declaration and the former declaration shall not be taken to be evidence that the declarant was, at any period subsequent to the date of the latter declaration, printer or publisher of the newspaper therein mentioned.

A copy of the latter declaration attested by the official seal of the Magistrate shall be forwarded to the Press Registrar.

APPENDIX XX

THE REGISTRATION ACT, 1908

(Act XVI of 1908)

(EXTRACT)

49. Effect of non-registration of documents required to be registered. No document required by Sec. 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

- (a) affect any immovable property comprised therein; or
- (b) confer any power to adopt; or
- (c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered :

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877², or as evidence of part-

2. Now see specific Relief Act, 1963.

performance of a contract for the purposes of Sec. 53A of the Transfer of Property Act, 1882 or as evidence of any collateral transaction not required to be effected by registered instrument.

APPENDIX XXI

THE STAMP ACT, 1899

(Act II of 1899)

(EXTRACTS)

32. Certificate by Collector. (1) When an instrument brought to the Collector under Sec. 31 is, in his opinion, one of a description chargeable with duty, and

- (a) the Collector determines that it is already fully stamped, or
- (b) the duty determined by the Collector under Sec. 31, or such a sum as, with the duty already paid in respect of the instrument, is equal to the duty so determined, has been paid,

the Collector shall certify by endorsement on such instrument that the full duty (stating the amount) with which it is chargeable has been paid.

(2) When such instrument is in his opinion, not chargeable with duty, the Collector shall certify in the manner aforesaid that such instrument is not so chargeable.

(3) Any instrument upon which an endorsement has been made under this section, shall be deemed to be duly stamped or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped :

Provided that nothing in this section shall authorise the Collector to endorse—

- (a) any instrument executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;
- (b) any instrument executed or first executed out of India and brought to him after the expiration of three months after it has been first received in India; or
- (c) any instrument chargeable with a duty not exceeding ten naye paise, or any bill-of-exchange or promissory note, when brought to him, after the drawing or execution thereof, on paper not duly stamped.

35. Instruments not duly stamped inadmissible in evidence, etc. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that—

(a) any such instrument not being an instrument chargeable with a duty not exceeding ten naye paise only, or a bill-of-exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act.

36. Admission of instrument where not to be questioned. Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

40. Collector's power to stamp instrument impounded. (1) When the Collector impounds any instrument under Section 33, or receives any instrument sent to him under Section 38, sub-section (2), not being an instrument chargeable with a duty not exceeding ten naye paise only or a bill-of-exchange or promissory note, he shall adopt the following procedure :—

(a) if he is of opinion that such instrument is duly stamped, or is not chargeable with duty, he shall certify by endorsement thereon

that it is duly stamped, or that it is not so chargeable as the case may be;

- (b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees :

Provided that, when such instrument has been impounded only because it has been written in contravention of Section 13 or Section 14 the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

(2) Every certificate under clause (a) of sub-section (1) shall for the purposes of this Act, be conclusive evidence of the matters stated therein.

(3) Where an instrument has been sent to the Collector under Section 38, sub-section (2), the Collector shall, when he has dealt with it as provided by this section, return it to the impounding officer.

41. Instruments unduly stamped by accident. If any instrument chargeable with duty and not duly stamped, not being an instrument chargeable with a duty not exceeding ten naye paise only or a bill-of-exchange or promissory note, is produced by any person of his own motion before the Collector within one year from the date of its execution or first execution, and such person brings to the notice of the Collector the fact that such instrument is not duly stamped and offers to pay to the Collector the amount of the proper duty, or the amount required to make up the same, and the Collector is satisfied that the omission to duly stamp such instrument has been occasioned by accident, mistake or urgent necessity, he may, instead of proceeding under Sections 33 and 40, receive such amount and proceed as next hereinafter prescribed.

42. Endorsement of instruments on which duty has been paid under Section 35, 40 or 41. (1) When the duty and penalty (if any), leviable in respect of any instrument have been paid under Section 35, Section 40 or Section 41, the person admitting such instrument in evidence or the Collector as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct :

Provided that—

- (a) no instrument which has been admitted in evidence upon payment of duty and a penalty under Section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate;
- (b) nothing in this section shall affect the Code of Civil Procedure, Section 144, clause (3).

43. Prosecution for offence against Stamp law. The taking of proceeding or the payment of a penalty under this Chapter in respect of any instrument shall not bar the prosecution of any person who appears to have committed an offence against the Stamp law in respect of such instrument :

Provided that no such prosecution shall be instituted in the case of any instrument in respect of which such a penalty has been paid, unless it appears to the Collector that the offence was committed with an intention of evading payment of the proper duty.

44. Persons paying duty or penalty may recover same in certain cases. (1) When any duty or penalty has been paid under Section 35, Section 37, Section 40 or Section 41, by any person in respect of an instrument, and, by agreement or under the provisions of Section 29 or any other enactment in force at the time such instrument was executed, some other person was bound to bear the expense of providing the proper stamp for such instrument, the first-mentioned person shall be entitled to recover from such other persons the amount of the duty or penalty so paid :

For the purpose of such recovery any certificate granted in respect of such instrument under this Act shall be conclusive evidence of the matters therein certified.

61. Revision of certain decisions of Courts regarding the sufficiency of stamps. (1) When any Court in the exercise of its civil or revenue jurisdiction or any Criminal Court in any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898), makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under Section 35, the Court to which appeals lie from, or references are made by, such first-mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration.

(2) If such Court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under Section 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under sub-section (2) the Court recording the same shall send a copy thereof to the Collector, and where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under Section 42, or in Section 43, prosecute any person for any offence against the Stamp law which the Collector considers him to have omitted in respect of such instrument :

Provided that—

- (a) no such prosecution shall be instituted where the amount (including duty and penalty) which according to the determination of such Court was payable in respect of the instrument under Section 35, is paid to the Collector unless he thinks that the offence was committed with an intention of evading payment of the proper duty;
- (b) except for the purposes of such prosecution, no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate granted under Section 42.

APPENDIX XXII

THE INDIAN TELEGRAPH ACT, 1885

(Act XIII of 1885)

(EXTRACT)

5. Power to Government to take possession of licensed telegraphs and to order interception of messages. (1) On the occurrence of any public emergency or in the interest of the public safety, the Central Government or a State Government, or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do, take temporary possession (for so long as the public emergency exists or the interest of the public safety requires the taking of such action) of any telegraph established, maintained or worked by any person licensed under this Act.

(2) On the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty, and integrity of India, the security of the State,

friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order :

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

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